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	168 I C 740	321	...	SB	39 P L R 666		170 I O 456
	38 Cr L J 581	322	...	419	39 P L R 712	490	...
239	39 P L R 511	323	...		173 I O 57	492	...
	172 I C 392	324	...	420	39 P L R 670	493	...
241	...	328	39 P L R 79		ILR 1937 L 395	494	...
242	39 P L R 405		168 I C 944		39 P L R 820	495	...
	172 I O 402	329	39 P L R 3		172 I O 341	496	39 P L R 237
243	38 P L R 105		ILR 1937 L 220	425	39 P L R 707		170 I O 224
	170 I C 81		170 I C 978		ILR 1937 L 629	497	ILR 1937 L 69
	38 Cr L J 843	332	...	428	39 P L R 656	SB	170 I O 375
246	38 P L R 975	335	...	430	39 P L R 651		39 P L R 733
	168 I C 966	338	168 I C 549		173 I O 927		38 Cr L J 883
	38 Cr L J 671	FB	ILR 1937 L 306	432	39 P L R 213	500	39 P L R 729
247	17 Lah 395		5 I T R 279		170 I C 849	504	ILR 1937 L 143
	38 P L R 842		39 P L R 998	433	ILR 1937 L 486		170 I O 271
	170 I C 418	345	39 P L R 104		39 P L R 839		39 P L R 762
249	164 I O 664		171 I C 421	435	4 I T R 297	506	39 P L R 743
	39 P L R 510	346	...	437	...	507	39 P L R 21
250	39 P L R 146	347	...	439	ILR 1937 L 238		ILR 1937 L 171
	171 I O 808	349	...		170 I O 266		170 I O 245
252	39 P L R 480	350	...		39 P L R 897	513	170 I O 439
	172 I C 336	352	38 P L R 431	441	...	SB	ILR 1937 L 445
253	39 P L R 471		168 I C 588	442	39 P L R 230		38 Cr L J 898
	172 I O 510	353	39 P L R 591		172 I O 313		39 P L R 782
254	39 P L R 466		173 I C 277	444	39 P L R 107	525	39 P L R 780
	ILR 1937 L 492	360	39 P L R 568		170 I C 534		172 I O 1002
	172 I O 250		173 I O 198	445	5 I T R 44	527	ILR 1937 L 294
255	...	367	39 P L R 100	446	ILR 1937 L 721		39 P L R 750
257	...		169 I C 944		172 I O 418		172 I O 11
258	...	368	39 P L R 583		40 P L R 206	529	39 P L R 802
259	ILR 1937 L 580		173 I C 800	448	170 I O 463		171 I O 970
	39 P L R 953	369	39 P L R 585	449	...	537	39 P L R 29
	173 I C 175		173 I O 357	451	39 P L R 349		ILR 1937 L 209
263	...	370	39 P L R 602	FB	169 I O 909		171 I O 189
266	...	380	39 P L R 720		ILR 1937 L 594	542	39 P L R 767
268	...		173 I O 365	454	38 P L R 1154	543	39 P L R 746
270	...	382	39 P L R 678		170 I O 422		171 I C 961
272	...		ILR 1937 L 562	455	...	545	39 P L R 233
273	...		173 I C 361	458	39 P L R 137		ILR 1937 L 845
276	...	383	39 P L R 692		170 I O 539		171 I O 730
277	...		173 I C 389		38 Cr L J 941		169 I O 649
280	...	386	39 P L R 726	459	...	547	38 Cr L J 793
284	...		173 I C 220	463	39 P L R 278		39 P L R 799
285	...	387	39 P L R 714		ILR 1937 L 62	549	39 P L R 13
286	...		173 I C 379		170 I O 303	551	38 Cr L J 1079
287	...	389	39 P L R 723		33 Cr L J 1061		171 I O 368
288	...		173 I O 444	464	...		ILR 1937 L 276
289	...	392	39 P L R 199	465	ILR 1937 L 162	552	39 P L R 749
290	...		171 I O 764		39 P L R 904		172 I O 37
292	...	393	39 P L R 718		171 I O 91		39 P L R 738
295	...		173 I O 218	468	...	558	39 P L R 243
297	...	395	39 P L R 556	471	39 P L R 152	560	170 I O 388
298	...	397	39 P L R 563		171 I O 856		172 I O 351
300	168 I C 773		5 I T R 65	475	39 P L R 290	561	39 Cr L J 119
	38 Cr L J 611		173 I O 192		170 I O 253		ILR 1937 L 208
303	...	399	170 I O 5		38 Cr L J 869	562	168 I O 923
304	...		ILR 1937 L 481	477	...		38 Cr L J 537
305	5 I T R 62		38 Cr L J 879	480	...		40 P L R 44
306	...		39 P L R 834	481	39 P L R 129		39 P L R 315
308	...		39 P L R 677		170 I O 592	563	...
309	5 I T R 329	401	39 P L R 627	482	ILR 1937 L 65	564	...
	...	402	39 P L R 680	SB	169 I O 1008	565	...
310	...	404	173 I O 185		38 Cr L J 841	566	...
311	...						

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568	...			639	173	IO	214	702	38	Cr L J	1026	793	39	Cr L J	141
570	39	PLR	208	640	39	PLR	252		171	IO	16	794	40	PLR	103
572	ILR 1937 L	380			172	IO	966	703	39	PLR	836	795	...		
	39	PLR	845	641	39	PLR	276	704	ILR 1937 L	242	797	39	PLR	640	
	172	IO	567		172	IO	963		171	IO	109		ILR 1937 L	426	
577	ILR 1937 L	413		642	...				39	PLR	920	798	40	PLR	35
	39	PLR	817	644	39	PLR	293	705	169	IO	593	800	40	PLR	134
	171	IO	963		173	IO	165		39	PLR	722	801	39	PLR	1025
578	ILR 1937 L	618		649	39	PLR	117	706	169	IO	613	802	39	PLR	1011
580	...			652	39	PLR	78		39	PLR	690		172	IO	373
581	ILR 1937 L	693			171	IO	791	708	39	PLR	496		39	Cr L J	122
	40	PLR	166	653	39	PLR	559		172	IO	743	804	169	IO	541
589	ILR 1937 L	149			172	IO	218	709	169	IO	640		40	PLR	139
	39	PLR	907	656	168	IO	638		39	PLR	686	805	40	PLR	110
	171	IO	831		39	PLR	482	710	39	PLR	912	806	...		
592	...			657	39	PLR	545	712	ILR 1937 L	268	811	...			
593	39	PLR	327		ILR 1937 L	778			39	PLR	877	812	40	PLR	52
	171	IO	351	658	39	PLR	872		172	IO	803	814	39	PLR	616
	38	Cr L J	1073	660	39	PLR	355	714	39	PLR	504		5	ITR	502
596	168	IO	385		172	IO	319	715	169	IO	535	816	40	PLR	77
597	39	PLR	555	662	39	PLR	206	716	39	PLR	637	819	39	PLR	660
	169	IO	434		172	IO	7		172	IO	407		172	IO	503
	38	Cr L J	765	664	39	PLR	261	717	39	PLR	179	820	39	PLR	622
598	168	IO	730		172	IO	246		171	IO	950		172	IO	455
	39	PLR	508	665	39	PLR	899	719	39	PLR	639	824	170	IO	77
599	39	PLR	370	668	39	PLR	914		172	IO	736		39	PLR	771
	ILR 1937 L	732		669	39	PLR	279	720	39	PLR	581	825	170	IO	42
601	39	PLR	407	671	39	PLR	887		173	IO	33		39	PLR	753
602	ILR 1937 L	255		673	168	IO	483	721	5	ITR	464	826	169	IO	947
	39	PLR	951		39	PLR	460		39	PLR	1023	827	169	IO	973
	172	IO	259	676	39	PLR	484		ILR 1938 L	10	828		...		
607	168	IO	458		171	IO	279	733	39	PLR	858	830	ILR 1937 L	325	
	39	PLR	457		38	Cr L J	1056	736	169	IO	961		5	ITR	137
608	39	PLR	201	677	39	PLR	193		39	PLR	923		39	PLR	934
	172	IO	438		172	IO	675	738	39	PLR	649		172	IO	821
609	...			680	39	PLR	338	740	39	PLR	854	837	39	PLR	619
611	168	IO	389	682	39	PLR	402	742	39	PLR	926		172	IO	449
612	168	IO	371		171	IO	336	746	39	PLR	453	839	40	PLR	46
614	39	PLR	506		38	Cr L J	1072		173	IO	105	841	39	PLR	601
	172	IO	1007	683	39	PLR	566	748	169	IO	922		172	IO	578
615	...				172	IO	158		39	PLR	915	842	40	PLR	55
617	168	IO	607	684	39	PLR	357	751	39	PLR	173	843	ILR 1937 L	433	
	38	Cr L J	576		171	IO	15	752	39	PLR	344		39	PLR	852
	39	PLR	488		38	Cr L J	1048	753	39	PLR	989		172	IO	460
618	39	PLR	292	685	39	PLR	481	755	...			844	ILR 1937 L	433	
619	ILR 1937 L	111			173	IO	488	756	169	IO	966	847	39	PLR	842
	171	IO	284	686	168	IO	991		39	PLR	974		172	IO	200
	38	Cr L J	1052		39	PLR	536	757	...			847	169	IO	123
620	ILR 1937 L	108		688	39	PLR	389	758	39	PLR	972	849	39	PLR	485
	171	IO	377		172	IO	769	759	169	IO	927	851	...		
	38	Cr L J	1082	689	39	PLR	394	760	40	PLR	131	859	...		
624	39	PLR	238		171	IO	954	761	39	PLR	992	861	170	IO	33
	171	IO	333	691	39	PLR	34	764	39	PLR	986		39	PLR	756
	38	Cr L J	1070		171	IO	812	766	...			862	...		
626	...			692	39	PLR	479	767	39	PLR	995	863	...		
629	168	IO	682		171	IO	314	769	...			865	ILR 1937 L	234	
	39	PLR	495		38	Cr L J	1057	771	40	PLR	93		169	IO	608
631	39	PLR	182	693	169	IO	414	772	40	PLR	88		39	PLR	921
	172	IO	388		39	PLR	882	777	...			867	39	PLR	812
632	ILR 1937 L	231		694	ILR 1937 L	196	778		39	PLR	102		172	IO	942
	38	Cr L J	1077		39	PLR	884		ILR 1937 L	420	869		170	IO	636
	171	IO	353		171	IO	837	780	...			871	39	PLR	642
633	39	PLR	197	696	168	IO	973	781	...			872	ILR 1937 L	496	
	168	IO	692		39	PLR	538	782	40	PLR	8		39	PLR	829
634	39	PLR	204	698	39	PLR	831	784	...			874	170	IO	821
	172	IO	481	700	39	PLR	1	785	...			876	5	ITR	459
635	...				ILR 1937 L	227	786		40	PLR	82	873	5	ITR	345
636	39	PLR	577		171	IO	342	790	...				ILR 1937 L	789	
637	169	IO	430		38	Cr L J	1066	791	...			880	5	ITR	511
638	39	PLR	189	701	39	PLR	579	792	39	PLR	1008	884	5	ITR	490
	172	IO	487		171	IO	959	793	39	PLR	1013	890	39	PLR	695
639	39	PLR	14	702	39	PLR	459		172	IO	405	892	39	PLR	765

A I R 1937 Lahore = Other Journals—(Concl'd.)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	A I R	Other Journals
894	39 P L R 769	911	...	919	...	936	170 I O 911
895	171 I O 31	912	...	920	...	937	ILR 1937 L 537
897	5 I T R 548	913	171 I O	82 924	...	938	...
900	...	915	5 I T R 591	926	...	939	170 I O 596
903	171 I C 205	916	...	930	171 I O 114	940	...
905	5 I T R 569	917	171 I C	97 931	ILR 1937 L 649	942	...
	ILR 1938 L 47	918	171 I O	100 934	...		

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I L R 1937 Lahore = All India Reporter

ILR	A I R	ILR	A I R	ILR	A I R	ILR	A I R	ILR	A I R
1	1937 L 38	136	1937 L 180	255	1937 L 602	438	1937 L 844	637	1937 L 937
11	" " 41	143	" " 504	268	" " 712	445	" " 513	642	1938 " 83
31	1936 " 917	149	" " 589	276	" " 552	481	" " 399	649	1937 " 931
42	" " 983	159	" " 110	291	" " 52	486	" " 433	658	1938 " 200
48	" " 845	162	" " 465	294	" " 527	492	" " 254	671	" " 117
54	" " 1010	171	" " 507	299	" " 85	496	" " 872	683	1937 " 581
59	1937 " 34	189	" " 172	303	" " 101	502	" PC 163	706	1938 " 44
62	" " 463	196	" " 694	306	" " 338	517	1935 L 787	721	1937 " 446
65	" " 482	202	" " 97	325	" " 830	525	1936 " 652	728	1938 " 18
69	" " 497	206	" " 562	345	" " 545	538	" " 899	732	1937 " 599
80	1936 " 1022	209	" " 537	371	" PC 179	555	" " 981	740	1938 " 292
87	1937 " 79	220	" " 929	380	" L 572	562	1937 " 882	746	" " 35
92	1936 " 901	227	" " 700	395	" " 420	567	1936 " 972	756	" " 49
100	" " 998	231	" " 632	413	" " 577	580	1937 " 259	769	" " 1
106	1937 " 620	234	" " 865	415	" " 178	594	" " 451	778	1937 " 657
111	" " 619	238	" " 439	420	" " 778	618	" " 578	783	1938 " 86
114	" " 411	242	" " 704	426	" " 797	623	1938 " 99	789	1937 " 878
125	" " 148	245	" PC 124	433	" " 843	629	1937 " 425	789	1937 " 878

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PLR	A I R	PLR	A I R	PLR	A I R	PLR	A I R	PLR	A I R
1	1937 L 700	129	1937 L 481	213	1937 L 432	834	1937 PC 119	439	1936 L 939
8	" " 829	130	" " 23	214	" " 2	838	" L 680	443	" " 935
6	1936 " 842	135	" " 33	217	" PC 46	842	" " 67	444	1937 " 217
8	" " 843	136	" " 61	222	" L 9	844	" " 752	448	" " 196
13	1937 " 551	137	" " 458	226	" " 104	845	" " 73	453	" " 746
14	" " 639	138	" " 58	228	" " 90	849	" " 451	457	" " 607
16	" " 148	139	" " 63	230	" " 442	853	" " 70	459	" " 702
21	" " 507	141	" " 19	233	" " 545	855	" " 660	460	" " 673
29	" " 537	143	" " 155	237	" " 496	857	" " 684	466	" " 254
34	" " 691	146	" " 250	238	" " 624	859	1936 " 923	467	1936 " 936
35	1936 " 721	148	" " 223	243	" " 560	864	1937 " 72	471	1937 " 253
48	" PC 253	152	" " 471	245	" PC 50	865	1936 " 850	472	" PC 163
50	" L 876	158	" " 151	250	" L 28	867	" " 511	479	" L 692
52	" " 887	163	" " 59	252	" " 640	868	" " 942	480	" " 252
56	" " 730	165	" " 6	253	" " 135	870	1937 " 599	481	" " 685
58	" " 913	168	" " 164	261	" " 664	877	" " 81	482	" " 656
60a	1937 " 33	171	" " 32	262	" " 176	878	" " 78	484	" " 676
62	1936 " 382	173	" " 751	272	" " 172	880	" PC 133	485	" " 849
66	1937 " 320	177	" " 54	276	" " 641	889	" L 688	488	" " 617
68	1936 " 524	179	" " 717	278	" " 463	891	" " 408	495	" " 629
76	" " 943	181	" " 53	279	" " 669	894	" " 689	496	" " 708
78	1937 " 652	182	" " 631	284	" " 174	896	1936 " 1016	504	" " 714
79	" " 328	184	" " 26	287	" " 146	400	1937 " 488	506	" " 614
80	" " 178	188	" " 60	290	" " 475	402	" " 682	508	" " 598
83	1936 " 946	189	" " 638	292	" " 618	404	" " 119	510	" " 249
100	1937 " 367	190	" " 34	293	" " 644	405	" " 242	511	" " 239
102	" " 778	193	" " 677	299	1936 " 1021	407	" " 601	514	" " 226
104	" " 345	197	" " 633	301	1937 " 180	408	" " 193	528	" Pesh 41
105	1936 " 859	199	" " 392	305	" " 93	411	" " 201	529	1936 L 652
107	1937 " 444	201	" " 608	306	" " 169	415	1938 " 93	536	1937 " 686
109	" " 52	202	" " 21	314	" " 96	418	1937 " 200	538	" " 696
110	" " 1	204	" " 634	315	" " 563	419	" " 208	540	" PC 201
112	" " 38	205	" " 25	317	" " 186	423	" " 206	545	" L 657
117	" " 649	206	" " 662	327	" " 593	426	" PC 179	548	" PC 223
121	" " 182	208	" " 570	330	" " 58	429	" " 101	548	" PC 223
127	" " 485	210	" " 29	331	" " 65	431	" L 211	555	" L 597

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556	1987 L 895	663a	1987 L 409	756	1987 L 861	854	1937 L 740	930	1988 L 135
559	" " 653	664	1987 " 94	758	" " 825	858	" " 733	931	1987 " 998
563	" " 397	666	1987 " 417	760	" " 527	863	" " 101	934	1987 " 890
566	" " 683	668	" " 410	762	" " 504	865	" PC 124	944	" " 110
568	" " 360	670	" " 420	765	" " 892	868	" L 85	947	1988 " 113
577	" " 636	677	" " 401	767	" " 542	870	1938 " 16	948	" " 196
579	" " 701	678	" " 382	769	" " 894	872	1937 " 658	951	1937 " 602
581	" " 720	680	" " 404	771	" " 824	875	1938 " 208	958	" " 259
583	" " 368	686	" " 709	775	1938 " 122	877	1937 " 712	964	1936 " 991
585	" " 369	690	" " 706	777	" " 96	881	1938 " 64	967	1938 " 123
591	" " 353	692	" " 383	778	" " 30	882	1937 " 693	972	1937 " 758
601	" " 841	695	" " 890	780	1937 " 525	884	" " 694	974b	" " 756
602	" " 370	698	" PC 233	782	" " 513	887	" " 671	976	1936 " 972
616	" " 814	707	" L 425	799	" " 549	889	" " 97	982	1935 " 787
619	" " 837	710	" " 416	802	" " 529	891	1938 " 14	986	1937 " 764
622	" " 820	712	" " 419	812	" " 867	894	1937 " 482	989	" " 759
627	" " 402	714	" " 387	815	1938 " 101	896	1938 " 48	992	" " 761
637	" " 716	718	" " 398	817	1937 " 577	897b	1937 " 439	995	" " 767
639	" " 719	720	" " 380	820	" " 420	899	" " 665	998	" " 338
640	" " 797	722	" " 705	829	" " 872	904	" " 465	1007	1938 " 71
642	" " 871	723	" " 889	831	" " 698	907	" " 589	1008	1937 " 792
648	" " 411	726	" " 886	834	" " 399	912	" " 710	1010	1938 " 294
649	" " 738	729	" " 500	836	" " 703	914	" " 668	1011	1937 " 802
651	" " 430	733	" " 497	838	1938 " 121	915	" " 748	1013	" " 793
654	1938 " 95	738	" " 558	839	1937 " 433	920	" " 704	1025	" " 801
655	" " 128	743	" " 506	842	" " 844	921	" " 865	1027	1938 " 138
656	1937 " 428	746	" " 543	845	" " 572	923	" " 736	1028	1937 " 721
659	1938 " 116	749	" " 552	852	" " 843	926	" " 742	1046	1938 " 295

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1	1936 C 688	88	1936 S 189	155	1937 B 1	226	1936 R 473	304	1937 B 52
2	" P 626	90	" P 508	165	" O 201	227	" A 745	306	" S 21
4	" C 678	93	" S 187	168	1936 S 188	230	" N 237	307	1936 N 192
5	" M 835	94	1937 P 160	169	1937 O 425	233	1937 N 89	312	1937 A 115
9	" B 379	97	" " 176	170	1936 N 228	237	" " 17	316	" S 4
15	" N 220	100a	1936 P 512	173	" C 692	242	1936 L 1012	318	" A 75
16	" B 453	100b	" N 243	174a	" N 242	243	" C 793	320	" S 2
19	" L 882	102	" P 581	174b	" O 451	246	" L 859	321	" R 2
22	" P 501	103	" R 526	175	" N 143	248	1937 B 85	323	" M 209
24	" L 914	105	1937 O 79	176	" C 675	250	" " 55	324	" S 1
26	" P 607	106	1936 N 97	180a	1937 L 131	251	" N 17	327	" B 60
27	" L 855	111	" A 830	180b	1936 C 450	257	" M 181	329	" O 283
29	" P 639	113	" C 674	181	" L 827	258	" N 57	330	" N 50
30	" L 911	114	" S 238	182	" C 414	260	" M 179	333	" Pesh 7
33	" R 485	115	" L 859	183	" R 474	262	1936 N 266	334	" N 72
35	" P 579	117	" S 243	186	" L 851	263	1937 M 208	335	" Pesh 6
37	" B 376	118	" C 578	188	1937 O 273	264	" P 8	336	" M 14
40	" A 753	119	" S 235	189	1936 N 241	265	1937 M 222	338	" L 98
45	" M 715	120	1937 M 130	191	1937 O 269	266	" P 14	339	" C 39
46	" A 759	121	1936 S 240	192	1936 P 636	267	" B 55	344	" " 64
48	" R 471	123	" L 1015	193	1937 A 14	271	" P 84	347	" Pesh 10
49	" " 468	124	" S 236	195	1936 C 469	272	" B 46	349	" P 112
52	" " 477	125	1937 M 167	196	1937 A 47	274	" R 29	350	" S 23
53	" A 742	127	1936 S 221	197	1936 O 658	277	1936 A 865	354a	" N 67
54	" L 717	128	" L 1011	199	1937 M 191	278	1937 R 26	354b	" L 80
55	" A 762	129	1937 P 191	200	" A 12	279	" " 10	355	" N 33
56	" O 520	133a	1936 L 919	201	1936 C 693	281	" PC 24	358	" R 42
57	" A 788	133b	" S 237	202	1937 A 13	284	" R 24	361	" A 127
68	" O 429	136	1937 P 146	203	1936 C 477	286	" O 259	363	" S 26
69	" A 761	137	1936 A 850	205	" A 833	289	" P 6	366	" R 4
71	" " 758	139	" P 622	209	" C 440	291a	" S 31	368	" A 117
72	" P 531	142	" A 851	210	1937 P 4	291b	" P 3	369	" S 42
73	" L 917	143	" C 488	212	1936 C 527	292a	" S 3	371	1936 N 240
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77	" P 499	145	1937 B 28	215	1936 C 372	295	" R 7	375	1936 N 271
79	" O 559	147	" O 207	216	1937 P 211	296	" A 50	376	1937 O 277
81	1937 M 17	149	" B 14	219	1936 C 373	299	" R 8	379	" S 32
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384	" N 181	535	" B 165	688	" C 256	843	" L 243	980	" R 232
387	" Pesh 20	537	" M 448	689	" N 114	846	" P 303	982	" P 601
388	1936 N 265	538	" B 150	690	" M 313	850a	" C 312	983	" R 206
389	" L 913	540	" P 226	691	" C 49	850b	" B 260	985	" B 396
390	" N 132	542	" N 188	694	" N 102	852	" C 433	986	" C 460
392	1937 P 122	544	" M 534	695	" M 341	864	" M 487	987	" N 257
394	" A 189	545	1936 C 753	696	" C 250	867	" L 108	989	" R 250
395	" N 93	561	1937 A 305	697	" N 147	868	" C 432	990	" C 394
396	" Pesh 30	568	" Pesh 33	699	" M 356	869	" L 475	992	" L 217
397	" R 33	571	" B 152	700	" C 42	870	" C 389	995	" S 221
399	1936 Pesh 211	572a	" P 275	702	" N 251	871	" M 716	999	" R 301
401	1937 A 182	572b	" B 148	703	" M 654	872	" R 275	1000	" M 696
407	" P 406	573	" PO 179	705	" R 116	873	" S 116	1002	" E 193
408	1936 C 801	576	" L 617	706	" C 84	875	" R 231	1007	" P 497
409	1937 P 347	577	" C 214	709	" R 120	876	" C 413	1010	" R 244
410	" A 167	581a	" M 480	710	" C 284	878	" R 286	1011	" P 467
411	" P 138	581b	" L 238	711	" B 146	879	" L 399	1013	" R 310
412	" " 124	582	" M 311	714	" B 191	882	" R 272	1014	" S 204
415	1936 PO 253	583	" L 208	715	" R 118	883	" L 497	1015	" R 318
416a	1937 P 352	587	" M 273	717	1938 N 133	887	" R 280	1018	" C 269
416b	" A 171	588a	" N 169	718	1937 R 192	890	" " 267	1022	" R 121
420	" L 133	588b	" M 286	719	" N 103	892	" M 494	1026	" L 702
423	1936 N 245	589	" N 110	720	" L 215	893	" L 486	1027	" M 618
424	1937 O 236	594	" M 490	722	" R 164	895	" R 245	1040	" R 189
427	" Pesh 12	596	" S 88	723	" S 129	897	" " 273	1042	" Pesh 52
428	" L 195	602a	" M 547	741	" Pesh 71	898	" L 513	1047	" B 385
429	" Pesh 22	602b	" P 257	742	" S 81	910a	" R 239	1048	" L 684
430	" L 196	606	" B 153	745	" O 80	910b	" A 497	1049	" E 399
432a	" " 132	608	" P 276	748	" Pesh 67	913	" R 246	1051	" R 254
432b	" R 54	610	" Pesh 51	750a	" O 22	915	" C 406	1052	" L 619
433	" N 123	611	" L 300	750b	" P 242	916	1936 P 337	1053	" E 388
435	" L 160	614	" Pesh 45	753	" M 321	918	1937 R 248	1054	" P 600
437	" N 119	615	" R 62	759	" R 132	919	" P 440	1056	" L 676
438	" L 155	619	" M 492	760	" M 272	923	" R 284	1057	" " 692
441	" P 137	620	" " 535	762	" L 23	924	" C 367	1058	" N 285
447	" N 70	621	" A 353	764	" R 117	925	" P 433	1061	" L 463
449	1936 O 788	622	" C 218	765a	" L 597	927	1936 R 90	1062	" O 524
454	1937 P 144	625	" " 233	765b	" R 194	931	1937 C 463	1066	" L 700
455	1936 N 263	637	" L 562	767	" C 266	934	" A 496	1067	" O 809
457	1937 M 301	638	" C 156	769	" B 186	935	" O 462	1070	" L 624
462	" P 84	639	" N 213	774	" R 218	936	1936 N 249	1071	" C 513
464	" M 291	641	" R 100	775	" N 138	938	1937 O 457	1072	" L 682
465	" A 195	642	" N 220	776	" R 201	941	" L 458	1073	" " 593
470	" P 110	646	" B 67	777	" P 369	942	" B 305	1075	" O 540
472	" L 127	648	" N 254	782	" R 205	945	" R 312	1077	" L 532
474	1936 " 850	651	" S 58	783	" S 125	947	" O 444	1078	" O 520
476	1937 P 139	654	" B 160	784	" O 54	948	" R 264	1079	" L 551
277	" Pesh 23	657	" P 246	785	" R 209	950	" M 578	1080	" A 681
482	1936 N 250	658	" B 80	790	" P 317	951	" S 209	1082	" L 620
483	1937 R 80	659	" A 373	793	" L 547	952	" R 263	1086	" A 677
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500	" S 65	665	" S 100	800	" " 421	961	" S 203	1093	" N 387
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511	" A 228	669	" A 361	808	" S 162	966	" O 458	1099	" P 559
512	" S 68	670	" R 183	818	" O 99	968	" S 212	1100	" L 85
521	" A 240	671	" L 246	838	" Pesh 73	972	" A 466	1101	" S 254
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47	" A 819	206	" P 636	339	" M 110	492	" C 388	657	1936 C 269
48	" R 510	208	" M 941	341	" O 269	495	" L 657	662	1937 O 217
53	" A 830	209	" P 634	342	" P 11	497	" R 466	664	1938 P 103
55	" O 714	210	1937 O 129	343	" L 131	499	1937 P 22	665	1937 M 179
56	" A 803	211	1936 A 879	344	" M 191	501	1936 L 359	667	" O 259
59	1937 M 100	212	" C 480	345	" P 4	503	1937 P 20	670	1936 M 990
61	1936 A 837	214	" L 761	347	1936 S 229	504	1936 R 407	671	1938 P 106
63	" L 645	215	1937 O 193	352	1937 P 211	509	" C 573	673	1937 O 252
66	1937 M 9	216	1936 P 631	354	1936 A 811	512	1937 R 1	675	1936 Pesh 202
68	1936 R 525	219	1937 O 207	360	" M 980	513	" PC 27	677	" S 213
69	" M 955	220	1936 Pesh 204	363	1937 A 47	516	" " 31	681	1937 N 57
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71	" L 1015	224	1937 O 126	369	1937 A 14	528	" S 3	686	" N 171
72	1937 M 289	225	1936 A 875	371	1936 C 658	529	1936 C 653	689	1937 P 531
73	1936 O 698	228a	1937 O 177	372	" Pesh 206	533	1937 A 23	690	1936 N 266
75	" M 951	228b	1936 A 856	373a	1937 A 13	535a	1936 M 916	692	1937 P 8
77	1937 " 167	229	" " 868	373b	1936 L 827	535b	" C 493	693	1936 L 641
80a	1936 L 1011	230	" Pesh 208	374	" C 571	538	1937 P 54	695	1937 P 1
80b	1937 M 13	231	" A 857	376	1937 A 12	540	" A 9	698	1936 L 742
82	1936 C 702	232	1937 O 47	377	1936 L 749	541	1936 S 205	699	1937 P 14
83a	" L 909	237	1936 L 237	378	1937 M 131	543	" C 470	701	" R 24
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86	" P 611	247	" R 514	382	" C 412	550	" M 913	705	" O 286
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91	1937 P 191	254	" Pesh 200	385	" M 551	552	1937 C 178	709	" N 192
95	" O 178	256	" M 973	386	" L 687	553	1936 L 591	714	1937 O 270
98	1936 A 826	259	1937 O 201	388	" C 547	555	1937 P 40	716	1936 L 650
102	" L 769	262	1936 P 600	391	" L 696	558	1936 R 478	718	1937 O 409
103	" C 485	263	1937 B 28	393	1937 O 220	562	1937 B 10	719	1936 L 551
106	" A 820	266	" L 265	397	1936 L 675	563	1936 N 283	723	" " 816
111	" L 470	267	1936 R 497	400	1937 O 262	565	1937 B 26	726	1937 P 34
112	" M 966	268	" S 244	402	1936 O 477	567	1936 O 302	727	" M 153
113	1937 O 189	270	1937 B 14	404	1937 O 275	569	1937 B 31	729	" P 21
115	1936 L 684	271	1936 N 143	406	1936 L 700	573	1936 M 989	730	1936 M 960
116	" R 498	272	" S 186	408a	" C 282	574	1937 B 35	731	1937 B 46
118	" L 958	273	" R 491	408b	" L 202	575	1936 L 564	734	1936 C 300
120	1937 O 83	276	" A 855	412	" C 440	577	1937 R 29	736	1937 B 52
123	" P 165	277	1937 B 11	413	" R 464	580	1936 L 1012	738	" P 6
127	1936 C 706	280a	1936 A 869	415	" C 421	581	" Pesh 216	740	1936 C 331
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129	" P 622	283	" A 832	421	" L 558	594	" P 58	743	1937 P 25
133	" S 246	284	1937 O 222	423	1937 A 1	598	" B 55	745	1936 L 739
134	" R 495	286	1936 C 451	426	1936 C 372	599	" P 44	747	" C 489
136	1937 P 146	287	" A 880	427	" M 789	603	1936 L 555	748	" L 679
137	" O 206	288	1937 O 266	430	" A 833	605	1937 R 10	750a	" M 939
138	1936 B 418	289	1936 Pesh 232	434	" M 780	607	1936 L 741	750b	" C 323
143	" L 766	290b	" O 450	436	1937 A 42	608	" C 650	751	" L 756
144	" O 695	291	1937 O 273	438a	1936 S 212	611	1937 A 18	753	" " 652
147	" L 405	292	1936 L 785	438b	" L 649	612	1936 C 809	757	" C 432
148	" R 501	294	1937 B 24	439	1937 A 25	615a	1937 A 19	759	1937 PC 10
150	" L 548	295	" O 113	443	1936 C 442	615b	" M 81	763	1936 A 865
152	" O 170	297	1936 C 414	445	1937 PC 36	619	" A 39	764	" C 481
153	1937 M 146	298	" S 188	448	1936 C 331	622	" S 31	766	1937 A 16
154	1936 B 886	299	" O 135	451	1937 P 9	623b	" M 181	769	1936 M 797
157	" L 394	302	" L 746	452	1936 C 129	624	" A 23	771	1937 B 43
163	" C 680	303	" N 237	454	1938 P 110	625	1936 O 793	774	" O 291
169	1937 M 103	305	" P 602	455	1936 A 745	628	1937 B 48	777	" M 21
172	1936 B 459	308a	1937 PC 35	457	" O 373	631	" A 46	779	" O 284
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178a	" Pesh 213	310	" N 89	459b	1937 O 267	635	" P 17	787	1937 R 14
178b	" O 723	312	" P 13	460	1936 O 456	639	" M 222	788	1936 C 313
182	" A 858	313	" M 40	463	1937 P 63	640	" S 21	790	1937 PC 21
188	1937 M 86	317	1936 P 595	464	1936 C 386	641	1936 C 343	793	1936 " 253
190	1936 L 851	321	" S 209	467	" L 771	643	1937 S 4	794	1937 P 49
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812	1937 A 10	853	1937 O 224	900	1936 O 382	942	" C 472	980	1937 O 239
814	1936 C 390	855	1936 C 409	903	1937 A 29	946	1937 P 39	982	1936 L 187
815	" " 402	858	1937 O 247	906	" S 18	947	" S 7	983	1937 O 280
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818	1937 A 50	870	" P 31	912	" L 599	950a	" P 43	987b	1935 L 985
821	1936 C 289	872	" Pesh 7	915	1937 A 76	950b	1936 N 163	992	1937 O 290
823	1937 A 57	873	" P 50	917	" M 209	953	1937 P 55	993	1936 O 780
827	1936 C 476	876	" Pesh 10	919	" A 101	954	1936 C 815	994	1937 R 4
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831	1937 S 2	882	" L 17	924	1937 O 430	956a	" L 33	997	" L 88
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833	1937 PC 8	884	" A 54	926	" N 72	957	1936 C 162	1003	1937 L 98
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11	" O 277	130	1937 " 18	254	1936 " 707	352	1937 P 347	479a	" Pesh 193
13	" M 97	134	" P 316	258	1937 M 150	353	1936 N 240	479b	1937 R 61
15	1936 L 1020	135	1936 L 809	259	" C 47	354	" L 942	481	" P 331
17	1937 P 117	141	1937 P 27	260	1936 N 246	355	1937 S 36	482	1936 O 576
21	" A 144	145	" S 8	263	" C 627	356	1936 M 636	486	1937 P 122
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34	1937 O 233	157	" M 655	274	1937 O 322	368	1937 S 28	496	" P 85
37	" A 99	158	1937 Pesh 17	275b	" " 428	371	" A 124	497	1936 L 877
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46	" A 55	167	" O 812	280	1937 O 272	379	1937 S 32	502	1937 N 80
47	" P 98	168	1937 A 96	281	1936 C 581	380	" B 65	503a	1937 M 253
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52	" O 420	171	" A 141	284	1937 " 80	395	" R 33	505a	1937 N 82
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59	1936 A 874	175	" Pesh 20	286	" M 605	401	" O 298	511	1937 P 406
61	1937 N 50	176	" M 152	291	1937 L 111	403	1936 N 265	513	" M 259
63	" P 104	179	" A 129	292	" R 37	405	1937 A 82	515	" A 171
65	1936 L 705	190	" N 13	293	" O 288	418	1936 M 940	520a	1936 L 1000
66	1937 P 53	191	" Pesh 30	294	1936 C 803	414	1937 O 263	520b	1937 M 192
67	" M 95	192	" C 58	295	1937 O 295	417	1936 S 191	521	1936 N 245
69	1936 R 482	193	1936 S 160	297	1936 L 878	424	1937 O 254	522	1937 A 189
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79	" O 431	202	" C 814	304	" C 346	433	" A 90	526	" L 883
80	" R 12	203	" B 456	305	1937 A 80	439	" M 308	527	1937 A 188
82	1936 M 958	206	" C 770	307	1936 L 271	441	1936 C 127	529	1936 E 423
84	1937 R 31	208	1937 B 81	308	1937 A 158	443	" L 913	547	1937 O 248
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579	" O 236	668	" P 138	746	" L 133	837	1936 L 885	910	1936 L 891
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586	" O 246	681	1936 L 982	759	1936 L 514	851	1937 A 197	919	1937 O 300
588	1936 L 990	683	1937 A 176	764	1937 B 144	852	" P 84	920	" R 74
589	1937 R 54	689	" C 81	765	" P 185	853	" A 207	922	" O 338
590	1936 L 825	692a	" P 93	771	1936 C 788	854	" M 291	924	" Pesh 21
592	" N 278	692b	1936 M 953	775	" L 836	856	1936 L 585	925	" O 361
594	" M 598	693	" L 453	781	1937 P 189	858	1937 Pesh 8	927	" A 261
596	" C 582	698	1937 Pesh 5	783	" A 44	860	1936 N 250	929	" S 51
599	1937 R 51	700	" N 39	784	" " 194	861	1937 L 127	934	" P 155
600	" C 7	701	1936 L 291	785	" PC 121	864	" M 300	935	" A 228
602	" Pesh 12	703	" N 268	786	" " 124	865	" P 180	936	" L 172
604a	" N 125	704	" L 1005	790	" " 119	867	1936 L 998	938	" P 477
604b	1936 C 553	706	" M 937	793	" " 133	870	1937 O 226	940	" A 226
613	1937 P 92	707	1937 R 47	798	" P 481	873	" S 56	941	" P 495
615	1936 C 593	710	1936 L 991	802	" A 195	874	" P 453	943	" S 61
646	1937 P 124	713	" C 556	804	" B 142	875	" M 332	947	" B 98
648	1937 A 119	720	" L 1002	805	" R 71	878	1936 N 288	950	" R 55
651	1936 L 864	723	1937 L 195	807	" N 41	879	1937 Pesh 3	951	1936 L 418
652	1937 P 348	725	" " 148	809	" R 39	881	" P 131	952	1937 O 301
653	" A 165	728	" O 256	812	" S 13	884	" PC 127	973	" B 135
655	" Pesh 22	729	" N 119	816	" B 113	890	" P 178	980	1936 M 752
656	" P 137	730	1936 L 865	817	" P 479	892	" R 80	1003	" N 285
657	" A 161	735	1937 R 79	819	" M 182	894	" P 110	1006	1937 M 350
662	1936 L 819	736	" P 127	828	" O 229	895	" " 139		

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1	1937 PC 152	113	1937 P 149	209	1937 R 102	332	1937 P 226	413	1936 M 936
6	" " 148	115	" " 183	212	" N 60	335	1936 M 967	415	1937 N 63
10	" " 93	117	" PC 82	213	1936 L 794	337	1937 " 310	416	1936 C 537
13	" M 316	124	" P 151	215	1937 N 62	338	1936 N 295	418	1937 PC 174
17	" A 240	128	" PC 99	216	1936 L 504	340	1937 M 266	423	" " 181
20	" B 104	129	" P 78	219	1937 B 150	341	" P 195	427	" " 163
24	" M 254	132	" A 246	221	" N 59	342	1936 N 292	432	" " 179
29	1936 N 252	137	1936 C 721	222	" S 50	343	" L 887	434	" A 305
32	1937 A 528	140	1937 P 134	223	1936 M 843	346	1937 P 239	442	" M 375
38	" " 219	142	" A 235	224	" C 550	349	" N 51	446	1936 L 747
40	" O 321	145	" PC 143	230	" Pesh 217	350	" L 118	449	1937 B 167
41	" Pesh 28	148	" A 232	244	" C 703	351	" N 84	450	" N 188
44	" S 65	151	1936 N 259	247	1937 M 26	352	1936 C 588	452	" L 49
47	" O 344	152	1937 A 260	249	1936 C 529	357	1937 B 109	455	" M 219
49	1936 L 301	154	" O 355	259	1937 O 386	359	" A 559	458	" L 607
52	" N 269	156	" A 255	263	" O 341	361	" O 323	459	" M 11
53	1937 O 349	158	" N 15	265	1936 N 218	364	" P 245	460	1936 O 641
55	" S 84	159	" A 526	268	1937 O 327	366	1936 C 543	462	1937 M 91
56	" PC 91	160	" M 393	270	1936 C 452	369	1937 Pesh 35	463	1936 N 257
58	" O 331	164	1936 C 534	272	1937 R 89	371	" L 612	464	" M 650
64	" PC 95	166	1937 R 45	281	" P 88	373	" Pesh 38	465	1937 O 330
67	" " 108	168	" M 515	285	1936 L 443	375	1936 C 454	466	" L 115
73	" B 121	173	" PC 139	289	" C 540	377	1937 Pesh 42	467	" O 385
76	" S 85	177	" O 320	291	1937 M 448	379	1936 L 804	469	" N 169
77	" B 162	178	" A 192	292	1936 L 861	384	1937 Pesh 41	470	" O 358
80	" M 163	180	" O 359	294	" M 887	385	" L 596	471	" S 93
82	1936 L 972	181	1936 L 897	302	1937 O 370	389	" " 611	472	" O 394
87	1937 M 32	185	1937 O 377	306	" M 114	390	" Pesh 39	475	1936 N 277
89	" S 58	187	" A 257	309	" O 328	391	1936 O 521	476	1937 M 151
98	" M 122	190	" N 172	310	1936 C 465	394	1937 Pesh 33	477	" R 82
100	1936 N 291	191	" A 449	314	1937 O 337	396	1936 L 936	478	1936 M 945
101	1937 M 126	193	" R 83	315	" M 12	399	1937 A 628	479	1937 B 152
102	1936 C 802	198	" A 527	316	" PC 89	402	1936 M 985	480	" M 211
103	1937 M 134	199	" B 165	318	" O 312	405	" C 539	481	" " 287
105	1936 L 879	201	" O 304	326	" P 105	407	1937 R 81	483	" L 678
109	1937 P 86	203	1936 C 304	328	1936 L 963	408	" M 29	487	" C 585
110	" M 214	207	1937 O 367	330	1937 S 11	410	" C 23		

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IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
492	1937 M 155	620	1937 PC 146	714	1937 N 94	827	1937 S 58	925	1937 O 401
494	" PC 78	622	1936 L 733	716	" M 326	890	" R 69	926	" M 315
498	1936 M 831	625	1937 O 379	716	" C 233	832	" Pesh 45	927	" O 387
502	1937 P 237	627	" P 260	717	" M 178	833	" A 353	929	1936 L 540
504	" B 148	628	" L 237	718	" B 153	840	" P 276	932	1937 O 397
505	" M 264	629	" B 101	720	" M 311	842	" M 158	933	1936 M 794
506	1936 L 753	632	" R 62	723	" " 490	843	1936 L 273	936	1937 A 333
509	1937 P 196	637	1936 C 700	725	" O 406	846	1937 B 158	937	" M 101
511	" M 534	638	1937 L 656	729	" M 286	848	" M 535	938	" Pesh 43
512	" P 280	639	" O 189	730	" L 598	849	1936 O 786	939	" A 271
520	" A 3 3	642	" A 282	731	" M 345	851	1937 Pesh 47	941	1936 M 978
524	" P 252	643	" S 44	733	" O 402	853	" R 105	943	1937 A 347
525	1935 C 481	646	" C 10	736	" M 273	860	" S 47	944	" L 328
528	1937 M 22	650	" A 293	738	1937 C 156	863	" R 99	945	" M 159
530	" A 562	652	" B 145	740	" L 238	864	" M 548	947	" A 295
532	" PC 168	655	" A 297	741	" N 110	865	" B 50	948	" L 11
538	" C 86	657	1936 O 753	745	" L 208	866	" Pesh 49	951	" A 361
541	" A 197	673	1937 A 285	753	1936 M 721	867	" M 492	952	1936 L 258
548	" P 275	674	" M 169	765	1937 PC 185	868	" L 164	955	1937 A 344
549	" L 338	676	" A 280	769	" " 189	870	" B 96	956	" B 160
555	" M 401	678	" C 86	773	" L 300	872	1936 M 844	958	" A 373
557	1936 L 989	680	" A 350	777	" S 86	875	1937 Pesh 48	959	1936 O 590
561	1937 M 385	681	" M 265	782	" M 547	878	" " 50	962	1937 N 220
568	1936 C 715	682	" L 629	783	" Pesh 51	879	" N 213	966	" L 246
573	1937 N 158	683	" A 317	784	" S 92	881	" PC 201	967	" R 76
576	" B 180	686	1936 M 956	785	" O 398	884	" " 223	970	" N 140
577	" " 124	688	1937 L 352	786	" P 293	890	" " 209	972	" C 45
588	1936 M 528	699	" A 298	795	" " 257	895	" N 31	973	" L 696
591	" L 627	691	" M 227	799	" O 391	896	" L 236	975	" R 183
593	1937 O 373	692	" L 633	801	" S 94	897	1936 " 976	976	" N 254
596	1936 N 276	694	" A 348	803	" O 341	899	1937 M 136	979	" P 246
597	1937 P 235	696	" " 346	806	1936 C 483	902	1936 O 889	981	" O 389
599	" B 181	698	" C 218	809	1937 Pesh 44	905	" L 989	983	" A 276
600	" O 351	699	" M 261	810	" B 173	907	" M 910	986	" P 526
601	" N 170	702	" R 101	814	1936 N 293	910	1937 R 98	988	" A 273
603	" O 347	703	" M 480	815	1937 R 72	911	1936 L 149	991	" L 586
605	" P 247	704	" Pesh 46	817	" B 155	913	" M 479	992	" S 98
607	" L 617	705	" B 177	819	1936 L 561	919	1937 O 400	993	1938 PC 40
608	" P 220	708	" C 214	820	1937 S 95	921	" N 38	1001	1937 A 284
610	" PC 157	712	" N 12	821	" B 169	922	" O 405	1003	" N 161
616	" " 114	713	" R 100	825	" R 67	924	" M 285	1005	1936 M 252
								1008	1937 R 164

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1	1937 PC 233	66	1937 P 302	125	1937 A 300	239	1937 A 365	303	1937 C 54
7	" " 239	71	" M 637	128	" C 140	242	" L 145	304	" P 147
8	" " 228	72	" P 278	135	" A 363	244	" M 293	306	" O 266
12	" M 124	74	1938 N 133	137	" PC 198	245	" R 192	309	" P 260
14	" Pesh 57	75	1937 P 261	145	" A 828	246	" A 362	311	" N 151
15	" A 320	76	" O 250	149	" N 106	247	" M 213	312	" P 242
17	" " 321	78	" P 311	151	" A 238	248	" S 153	315	" Pesh 64
23	" N 54	80	" M 313	153	" B 182	250	" R 132	316	" E 208
26	" M 140	81	" B 202	157	1936 L 946	251	" O 60	318	" M 228
31	" A 396	87	" O 84	171	1937 " 215	255	1936 L 873	319	" Pesh 65
32	1936 L 923	89	1936 L 822	174	" M 161	256	1937 O 22	321	1936 L 853
33	1937 N 114	92	1937 S 118	176	1936 L 1007	257	" Pesh 71	325	1937 M 436
34	" C 256	95	" N 68	177	1937 C 297	258	" R 133	327	" B 193
35	" S 99	96	" " 103	181	" A 389	259	" L 120	330	" M 559
36	" N 102	97	" M 356	186	" " 243	260	" N 150	331	" O 180
38	" P 224	99	" N 98	189	" M 51	261	" M 1	340	" M 38
40	" S 100	100	" M 341	217	" A 394	269	" A 334	343	" " 212
41	" B 191	101	" C 234	218	" R 118	272	" L 130	344	" R 194
42	" N 251	102	" M 654	220	" A 303	274	" S 129	345	" M 234
44	" Pesh 67	104	1936 B 356	221	" R 146	292	" M 434	346	" " 339
45	" R 116	110	1937 N 217	224	" A 399	293	" R 117	348	" M 495
47	" N 147	112	" S 81	225	" " 397	294	" N 120	350	" P 314
48	" P 263	115	" A 287	227	" " 395	295	" R 151	352	1936 M 895
50	" C 49	117	" N 65	228	1936 L 1016	298	" N 152	354	1937 P 289
63	" R 120	119	" A 290	231	1937 A 345	300	1936 M 954	358	" M 348
64	" C 42	123	" L 847	232	" B 217	301	1937 B 211		

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359	1937 P 349	486	1937 O 277	629	1937 A 418	741	1937 P 232	879	1937 L 63
362	1936 M 876	489	" P 917	631	" S 113	744	" A 377	880	" R 203
364	1937 P 360	491	" R 214	635	" " 103	756	" P 374	881	" PC 244
365	" B 196	495	" P 369	639	" A 422	761	" A 453	887	" N 243
368	" L 151	500	" A 432	640	" L 709	764	" R 128	890	" R 185
372	" M 321	503	1938 N 77	641	" M 431	767	" A 843	894	" N 108
376	" B 214	504	1937 A 230	643	" L 61	769	" PC 276	896	" " 100
379	1936 M 969	508	" " 374	644	" R 134	771	" C 355	897	" P 414
381	1937 B 198	512	" O 308	647	" L 60	776	" L 78	899	" O 433
385	" A 351	513	" N 165	648	" N 135	778	" PC 271	901	" P 330
386	1936 M 946	516	" M 565	649	" L 547	780	" A 439	902	" PC 292
388	1937 A 289	519	" O 229	651	" B 242	783	" M 694	906	" P 546
389	" R 198	522	" M 368	652	1936 C 326	785	" O 410	909	" L 451
390	" A 264	524	" N 107	653	1937 M 367	794	" " 414	912	" O 424
394	" Pesh 79	525	" M 344	654	" L 417	795	" A 442	913	" " 88
395	" A 368	526	" B 186	656	" " 52	799	" " 417	918	" S 101
396	" P 358	532	" M 270	657	" PC 260	801	" P 382	920	" A 444
398	" R 199	533	" A 370	658	" " 261	802	" A 400	922	" L 748
399	" P 351	535	" L 715	664	1936 Pesh 160	803	1936 Pesh 307	926	" Pesh 61
400	" M 424	536	" PC 205	666	1937 A 428	805	1937 P 307	927	" L 759
404	" O 416	541	" L 804	668	" R 161	809	" L 2	929	" " 1
407	" M 569	542	" E 226	671	" M 584	811	" O 14	930	" C 359
410	" L 141	547	" PC 256	673	" " 582	813	" P 325	932	" L 25
413	" R 150	551	" " 242	675	" N 330	816	" N 91	933	" R 219
414	" L 693	556	" " 251	679	" M 501	818	" " 146	934	" E 238
415	" R 201	561	" S 154	681	" Pesh 73	819	" M 591	938	" L 68
416	" L 157	562	" PC 214	683	" N 197	822	" P 328	939	" R 202
420	" M 349	570	" A 401	685	" S 126	823	" M 476	940	" L 26
423	" S 151	575	" M 284	687	" L 28	830	" L 32	942	" Pesh 62
424	" E 225	577	" A 108	688	" M 528	832	" N 101	943	" S 173
425	" R 218	581	" P 337	689	" Pesh 1	833	" A 438	944	" L 367
426	" L 23	586	" A 268	690	" O 26	834	" N 116	945	" R 148
428	" R 205	588	" S 97	692	" M 364	836	" A 424	947	" L 826
429	" N 138	590a	" N 253	693	" R 138	840	" C 1	954	" N 85
430	" L 637	590b	" C 369	694	" M 472	843	" A 451	957	" M 576
431	" S 125	593	" L 705	697	" L 58	845	" L 53	958	" Pesh 58
432	" R 193	594	" R 113	698	" M 604	846	" N 127	961	" L 736
434	" L 597	597	" M 523	699	" L 84	847	" L 19	962	" A 429
435	" M 223	602	" C 31	700	" O 27	849	" " 54	964	" P 408
439	" E 231	607	" M 406	704	" M 605	850	" C 352	966	" L 756
445	" Pesh 80	608	" L 865	705	" R 209	853	" N 88	967	" R 126
446	1936 M 898	609	" A 251	711	" M 427	854	" L 21	969	" A 817
449	1937 N 9	613	" L 706	713	" C 55	855	" N 134	971	" P 388
452	" M 272	614	" N 126	715	" M 533	856	" R 165	973	" L 827
454	" O 301	616	" A 860	716	" S 162	860	" M 579	974	" N 92
456	1936 M 733	617	" R 170	726	" C 127	862	1936 C 490	976	" P 262
477	1937 R 195	623	" S 110	729	" P 341	865	1937 M 656	977	" C 99
478	" N 269	624	" A 369	732	" L 9	870	" L 29	997	" A 446
479	" E 156	626	" " 423	735	" M 647	872	" P 321	1000	" P 387
480	" O 283	627a	" " 421	736	" P 324	875	" M 325	1004	" A 478
481	" M 545	627b	" M 640	737	" M 562	876	" L 6	1004	" A 478
483	" P 113	628	" A 372	739	" O 16	877	" P 386	1008	" L 482

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1	1937 B 275	34	1937 N 163	74	1937 P 363	115	1937 N 69	152	1937 O 427
5	" L 399	37	" M 549	77	" L 824	116	" S 155	153	" B 260
7	1936 M 865	39	" R 320	78	" N 202	118	" N 97	155	" O 426
9	1937 S 159	42	" L 825	81	" L 243	119	" A 465	157	" M 484
11	" M 409	43	" R 334	84	" P 229	120	" N 104	159	" N 216
12	1937 S 161	45	" N 200	86	" M 509	121	" A 472	161	" " 171
13	" R 246	46	" S 112	90	" P 413	126	" N 99	162	" B 266
15	" M 531	48	" N 136	91	" R 257	127	" R 258	170	" N 235
17	" A 500	49	" M 241	93	" N 105	130	" P 410	172	" B 244
18	1936 M 628	61	" P 335	94	" P 367	133	" N 168	187	" P 333
25	1937 L 108	53	" Pesh 74	95	" R 227	134	" P 345	189	" S 121
26	" O 413	54	" P 409	99	" P 253	136	" Pesh 76	192	" N 121
28	" A 474	55	" M 433	102	" S 174	139	" P 380	193	" M 487
29	" C 432	66	" P 319	105	" R 124	142	" M 382	195	" Pesh 63
30	" A 533	68	" L 220	107	" M 538	146	" P 384	195	" Pesh 63
33	" L 861	71	" N 189	113	" A 476	147	" B 262	198	" M 551

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200	1937 R 883	351	1937 P 348	505	1937 O 452	651	1937 O 476	848	1937 A 578
201	" C 493	353	" " 609	507	" A 513	656	1938 O 48	845	" M 195
213	" N 304	355	" R 245	508	" O 446	657	1937 A 481	849	" L 482
214	" O 129	357	" P 455	510	1936 M 819	676	" S 203	850	" B 882
224a	" " 312	360	" S 116	515	1937 O 434	677	" P 444	851	" M 727
224b	" L 496	362	" P 495	516	" R 312	685	1936 O 751	854	" R 232
225	" S 181	367	" C 367	518	" O 449	686	1937 L 869	856	1936 M 70
234	" M 127	368	" R 248	519	" O 463	688	1936 O 752	867	1937 B 864
236	" R 275	369	1936 M 808	523	" O 443	689	1937 R 263	868	" N 257
237	" O 889	373	1937 O 363	524	" M 357	690	1936 O 727	870	" R 206
238	" R 231	375	" L 497	527	1936 N 140	706	1937 A 515	872	" M 193
239	" N 137	379	1936 M 804	530	1937 O 454	717	" B 326	874	" A 466
240	" R 292	383	1937 N 193	532	" R 226	724	" N 45	877	" B 865
241	" N 209	385	" P 422	533	" O 453	730	1936 O 744	883	" M 504
242	" M 520	388	" L 560	534	" L 444	737	1937 PO 301	887	" O 487
245	" L 507	390	" M 494	535	" A 435	742	" O 369	888	" O 163
251	" O 408	393	" B 279	538	" O 462	743	" A 502	891	" S 193
253	" L 475	418	" L 247	539	" L 458	746	" S 218	895	" L 939
254	" R 286	420	" R 284	540	" O 450	749	1936 M 871	897	" B 358
255	" M 716	422	" L 454	541	" L 485	753	1937 R 253	903	" O 460
257	" R 280	423	" PO 274	543	" N 890	754	" P 458	904	" O 471
259	" O 455	424	" L 484	545	" PC 279	757	" B 836	905	" N 259
262	" S 147	425	" PO 265	554	" N 74	758	" O 241	909	" R 250
266	" L 439	431	" L 486	559	" A 407	760	" P 417	910	" O 276
267	" O 467	434	" R 287	563	" PO 288	762	1936 M 901	911	" L 936
268	1936 M 673	439	" L 513	567	" A 598	766	1937 R 274	912	" O 879
270	1937 R 272	451	" P 428	573	" M 529	767	" O 236	914	" M 458
271	" L 504	453	" A 497	575	" B 357	769	" A 529	917	" O 461
273	" R 267	455	" L 488	577	" A 456	772	" Pesh 52	919	" M 641
274	1936 O 646	458	1936 P 337	586	" L 411	777	" P 488	920	" O 894
278	1937 R 273	459	1937 A 411	592	" " 481	780	" L 217	922	" S 221
279	" M 571	463	" L 448	593	" P 430	783	" P 475	926	" O 446
284	" N 242	464	" P 440	595	" O 473	784	" " 501	932	" M 554
285	" R 239	469	1936 L 31	601	" N 177	785	" P 497	934	" A 610
286	1936 M 498	471	1937 R 276	603	" R 337	788	" O 488	942	" R 189
288	" " 948	475	" P 454	605	" S 239	790	" N 139	944	" A 512
290	1937 O 67	476	" O 444	607	1936 L 750	791	" S 198	946	" R 824
303	" L 463	477	" A 415	608	1937 S 209	794	" O 498	955	" P 476
304	1936 M 930	479	" O 445	609	" " 208	797	" P 524	956	" O 481
309	1937 O 257	480	" P 432	611	" C 473	798	" N 215	959	" P 514
310	" S 157	481	" M 578	615	" A 500	800	" P 525	960	" B 341
312	1936 M 574	483	" A 505	621	" S 226	801	" B 307	975	" A 470
314	1937 S 179	484	" P 425	624	" A 337	818	" R 317	977	" O 468
316	" P 391	487	" S 171	629	" O 465	819	" M 563	978	" L 829
324	" PO 299	489	" M 557	631	" B 305	821	" L 874	981	" M 165
329	" " 296	490	" O 436	634	1936 O 203	822	" R 268	982	" O 502
332	" " 306	493	" S 108	636	1937 O 448	824	" A 547	988	" A 535
335	" " 310	495	" O 456	638	1936 N 249	827	" S 212	994	1938 L 6
339	" P 433	496	" A 496	643	1937 O 460	833	" A 605	997	1937 P 467
341	" O 457	497	" O 463	645	" R 264	838	" O 458	999	" B 337
344	" M 481	499	" C 406	647	" B 334	840	" M 148	1004	1936 N 290
347	" O 418	502	1936 R 90	649	" M 92	841	" R 311	1005	1937 P 353

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7	" M 699	45	" P 516	81	" O 490	119	" O 199	181	" O 510
12	" N 212	46	" O 469	82	" L 913	124	" P 523	183	" O 269
13	" Pesh 89	49	" B 374	84	" O 505	125	" R 121	187	" O 521
14	" R 249	56	" O 478	85	" R 318	127	" S 177	189	" L 537
15	" L 684	59	" O 150	89	" O 503	129	" R 139	193	" O 243
16	" " 702	61	" S 204	91	" L 465	132	" S 206	196	" A 567
17	" O 252	62	" R 301	93	" M 696	133	" M 685	198	" O 211
21	" M 411	63	" O 492	95	1938 O 14	143	" P 500	201	" S 201
29	" A 566	65	" P 486	97	1937 L 917	145	" M 200	202	" M 267
30	" M 596	71	" R 310	99	" P 522	153	" A 588	203	" A 561
31	" L 895	72	" M 340	100	" L 918	163	" O 292	205	" L 903
33	" O 484	73	" P 493	101	" M 610	168	" R 220	207	" O 96
36	" A 552	75	" A 556	109	" L 704	172	" O 507	207	" O 96
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220	"	" 589	394	"	A 618	553	"	A 627	691	"	P 588	860	"	N 230
222	1938	O 12	395	1938	L 8	559	"	M 461	692	"	B 432	864	"	L 104
224	1937	A 580	398	1937	A 582	570	"	L 67	694	"	M 634	866	"	" 70
226	"	O 207	401	"	R 234	571	"	A 669	697	"	A 701	867	"	O 280
228	"	M 594	404	"	A 638	572	"	M 402	700	"	P 528	870	"	M 703
231	"	N 236	406	"	PO 326	573	"	A 693	702	"	R 142	876	"	R 175
232	"	P 517	409	"	A 635	574	"	R 396	706	"	P 593	881	"	P 572
233	"	O 493	411	"	E 397	575	"	S 225	703	"	S 242	887	1933	O 44
237	"	O 159	412	1938	L 41	577	"	A 665	709	"	A 728	889	1937	M 449
241	"	S 237	415	1937	A 636	581	"	M 511	711	"	P 598	894	"	P 603
242	1938	N 127	416	"	B 387	584	"	A 650	712	"	O 191	897	"	R 385
245	1937	M 618	418	"	L 100	586	"	R 343	715	"	P 563	899	"	B 454
258	"	S 233	419	"	A 634	587	"	A 705	718	"	R 225	900	"	S 248
259	"	M 407	420	"	S 241	589	"	P 691	720	"	P 594	903	"	A 599
262	"	N 285	421	"	L 345	590	"	L 88	724	"	M 219	905	"	M 809
265	1938	L 39	422	"	A 640	591	"	P 560	728	"	P 584	908	"	O 221
267	1937	Pesh 94	425	"	P 541	593	"	" 557	730	"	L 545	909	"	N 160
268	"	O 513	426	"	R 372	594	"	A 686	732	"	P 567	910	"	A 696
269	"	" 909	432	1933	O 7	596	1938	O 18	733	"	N 156	912	"	R 391
271	"	N 129	433	1937	L 95	597	1937	O 314	736	"	A 676	913	"	" 204
274	"	B 388	434	1938	O 10	602	1938	O 42	737	"	S 251	914	"	M 794
276	"	M 314	435	1937	O 259	604	1937	P 559	740	"	N 225	915	"	A 735
277	"	B 399	437	1938	O 16	605	1938	O 24	742	"	B 447	920	"	O 509
278	"	N 241	438	1937	P 469	606	1937	S 272	743	"	A 646	921	"	R 393
279	"	L 676	444	"	M 882	607	"	P 530	747	"	O 194	923	"	A 689
280	"	O 158	457	"	P 519	609	"	M 556	752	"	R 240	925	"	M 580
281	"	O 523	459	"	O 512	609	1938	O 8	757	"	L 65	926	"	L 112
282	"	E 385	460	"	N 87	610	1937	L 87	759	"	N 149	927	1938	O 33
284	"	L 619	461	"	P 399	612	"	N 196	760	"	M 353	930	1937	O 303
285	"	R 254	463	1938	O 20	613	"	P 578	763	"	N 173	931	1933	M 192
286	"	O 513	470	1937	B 410	616	"	L 84	764	"	L 392	932	1937	L 118
291	"	R 302	477	"	S 229	617	1938	O 11	765	"	A 632	933	"	P 620
296	"	O 517	478	"	L 72	619	1937	R 346	769	"	E 423	934	"	A 664
302	"	Pesh 90	481	1938	O 26	620	"	N 387	777	"	M 446	935	"	N 175
304	"	E 392	487	1937	PO 314	621	"	O 528	779	"	Pesh 96	937	"	A 642
306	"	P 506	492	"	O 169	622	"	R 137	781	"	N 198	940	"	M 606
314	"	L 692	495	"	M 444	623	"	B 446	782	"	A 652	941	"	L 101
315	"	S 236	496	"	N 179	625	"	S 247	783	"	N 184	943	1938	M 173
317	"	P 418	498	1938	L 107	626	"	O 167	785	"	O 245	944	1937	O 578
320	"	O 540	502	1937	N 210	629	"	L 85	789	"	A 653	945	"	P 616
322	"	A 569	503	"	R 345	630	"	S 217	791	"	L 652	948	"	N 250
331	"	E 395	504	1938	O 17	631	"	R 262	792	"	A 655	950	"	L 717
333	"	L 624	506	1937	L 81	632	"	O 148	794	"	R 270	951	"	M 711
335	"	O 520	507	"	O 201	634	"	M 398	795	"	A 688	953	"	P 605
336	"	L 682	509	"	L 94	636	"	R 157	797	"	N 154	954	"	L 689
337	"	O 524	510	"	O 219	640	"	N 379	798	"	M 888	956	"	N 201
341	"	E 384	512	"	S 207	642	"	M 478	799	"	A 641	957	"	M 429
342	"	L 700	513	"	O 122	643	"	R 180	800	"	R 370	958	"	L 110
344	"	S 230	515	"	S 219	646	"	M 342	802	"	A 724	959	"	" 701
346	"	Pesh 92	517	"	O 177	648	"	S 243	806	"	R 367	961	"	" 543
349	"	B 389	518	"	M 379	649	"	L 73	808	"	L 250	962	"	M 822
351	"	L 593	520	"	A 645	652	"	C 172	810	"	Pesh 97	963	"	L 577
353	"	" 632	522	"	O 203	654	"	N 186	812	"	L 691	964	"	P 619
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356	"	R 154	527	"	R 197	657	"	P 582	815	"	O 289	970	"	L 529
359	"	A 550	528	"	A 657	658	"	N 211	818	"	P 554	978	"	N 262
361	1939	L 223	529	"	R 347	660	"	B 417	821	"	M 419	980	"	M 421
363	1937	A 585	532	"	A 632	665	"	P 562	822	"	O 273	984	"	P 599
365	"	O 174	533	"	M 503	666	"	R 237	825	"	A 711	987	1938	O 37
367	"	A 581	534	"	A 677	668	"	P 542	828	"	P 568	990	1937	M 456
368	"	L 551	536	"	B 401	672	"	S 254	831	"	L 589	992	"	L 96
369	"	M 651	545	"	A 674	678	"	M 370	834	"	O 237	993	"	S 303
371	"	N 80	546	"	L 93	683	"	L 90	837	"	L 694	994	"	A 714
375	"	S 234	547	"	A 708	684	"	M 403	839	"	A 694	1004	"	B 481
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4	1937 P 615	170	" B 457	335	1937 L 252	498	" M 975	672	" R 351		
5	1938 PC 7	171	" P 652	337	" A 731	499	" Pesh 101	675	" L 677		
7	1937 L 662	173	" L 106	341	" L 420	501	" M 968	678	1938 N 98		
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13	" P 635	177	" N 394	351	" L 561	508	" L 819	684	1938 B 38		
17	" A 740	179	" R 443	352	1938 N 39	509	" A 795	688	1937 S 310		
19	" P 657	182	" N 396	354	1937 A 770	510	" L 253	690	" M 295		
23	" A 755	184	" B 458	362	" C 284	511	1938 N 16	697	" N 288		
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27	" P 672	194	" B 456	370	" N 383	516	1937 P 589	705	" " 91		
28	" A 764	195	" P 651	371	" R 469	518	" C 514	708	" M 107		
31	" " 768	197	" R 467	372	1938 N 47	519	" L 119	712	1937 S 300		
32	" " 769	198	" P 642	373	1937 L 802	520	" H 278	715	1938 N 78		
33	" C 261	200	" L 844	374	" S 293	530	1938 O 80	717	1937 C 401		
37	" L 552	202	" P 639	382	" M 792	532	1937 O 396	720	1938 PC 38		
43	" N 237	203	" N 349	384	1938 O 51	536	1938 O 57	722	1937 S 291		
47	" M 451	204	" " 274	387	1937 P 669	540	1937 Pesh 99	724	1938 PC 34		
51	1938 N 106	213	1938 N 52	388	" L 631	542	1938 O 81	729	1937 C 548		
52	1937 R 252	215	1937 P 640	389	" N 400	543	1937 N 321	731	" " 752		
54	" " 336	216	" A 760	392	" L 239	545	" " 882	732	" S 305		
55	" C 365	218	" L 653	394	" N 308	547	1938 N 75	734	" R 453		
56	" R 407	221	" S 261	395	" R 466	548	1937 O 405	736	" L 719		
57	" A 742	224	" A 753	396	" M 808	550	" R 354	737	" P 665		
66	" R 439	225	" P 647	393	" L 182	553	" L 186	739	" C 750		
70	" M 536	223	" N 341	401	" B 496	560	" O 468	741	" P 612		
72	" A 691	233	" B 477	402	" L 242	565	1938 N 79	743	" L 708		
75	" R 484	234	" P 654	403	" S 279	567	1937 L 572	744	" P 656		
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81	1938 O I	237	" P 534	406	" M 585	573	1938 N 50	751	1937 P 670		
89	" N 37	240	" B 453	407	" L 716	574	1937 R 339	753	" A 766		
90	1937 M 597	241	" R 316	408	" B 472	575	" S 311	755	" C 500		
92	" B 461	243	" C 3-8	412	" L 200	576	" M 642	761	" A 798		
94	1938 O 35	244	" M 777	413	" R 452	578	" L 841	764	1938 B 43		
97	1937 N 227	248	" L 664	414	" O 495	579	" M 653	765	1937 A 756		
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102	" R 419	249	" B 479	420	" B 490	581	1937 M 666	769	" L 688		
104	" L 97	250	" L 254	421	1938 N 64	582	" " 795	771	1938 PC 15		
106	" R 450	251	" M 725	422	1937 R 380	584	" B 483	775	1937 R 406		
109	" P 586	253	" R 283	426	" L 211	591	" O 761	776	" M 741		
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113	1938 N 103	257	" R 299	433	" N 335	595	" L 193	785	" P 21		
115	1937 P 621	259	" L 602	435	" O 481	598	" Pesh 103	786	" PC 26		
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120	" P 614	266	" L 180	438	" L 608	606	" " 433	797	1937 M 677		
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125	" P 618	271	" B 465	443	" " 20	611	" A 783	803	" L 712		
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129	" P 561	282	" O 222	448	" R 361	617	" A 754	807	" C 583		
130	1938 N 76	285	" A 658	449	" L 837	619	" L 176	811	1938 M 66		
131	1937 S 315	287	" N 264	451	" B 449	622	" S 281	812	1937 N 345		
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134	" R 401	289	" N 205	458	" PC 240	632	" " 762	827	" C 673		
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138	" P 550	297	1938 O 40	464	" B 494	635	1937 A 796	837	1937 R 340		
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146	" C 697	300	1937 B 464	463	1937 M 779	642	1937 A 785	847	" " 33		
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155	" P 624	310	1937 O 510	481	" L 634	649	" PC 61	858	" N 97		
156	1938 N 110	313	" L 442	482	" C 384	653	1937 A 792	862	" O 81		
158	1937 L 683	315	" C 305	485	" M 951	655	1938 O 62	865	1937 R 504		
159	" P 643	319	" L 660	487	" L 638	658	1937 A 781	866	1938 M 35		
160	" B 480	320	" C 572	488	" R 412	660	" L 196	868	1937 R 512		
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879	1937 R 518	910	" N 126	935	1938 P 35	959	" O 17	981	" PO 87
880	1938 N 51	911	1937 R 513	937	1937 R 528	962	" A 36	985	" " 71
881	" A 15	914	" C 517	940	1938 P 15	963	1937 L 641	987	1937 O 755
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896	1938 A 48	919	" B 6	944	1938 P 12	967	1938 A 46	993	" PO 73
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IN

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- Ali Mahomed v. Emperor, (1911) 226 P L R 1911 = 35 P W R 1911 = 11 I C 588 = 12 Cr L J 404 Overruled in A I R 1937 Lah 133.
- Des Raj v. Fazal Karim, (1936) 38 P L R 700 = A I R 1936 Lah 388 = 163 I C 119 Reversed in A I R 1937 Lah 204.
- Emperor v. Abdul Aziz, (1924) 4 Lah 462 = 25 Cr L J 1131 = A I R 1924 Lah 262 = 81 I C 955 Overruled in A I R 1937 Lah 133.
- Godar Shah v. Fazal Ilahi, (1936) 38 P L R 357 = A I R 1936 Lah 570 = 164 I C 59 Reversed in A I R 1937 Lah 1.
- Harnam v. Emperor, (1925) 5 Lah 448 = 26 Cr L J 322 = A I R 1925 Lah 228 = 84 I C 546 Overruled in A I R 1937 Lah 133.
- awaya v. Empress, (1890) 30 P R 1890 Cr. " A I R 1937 Lah 133.
- Kaku v. Empress, (1894) 26 P R 1894 Cr. " A I R 1937 Lah 133.
- Matu v. Jati, (1937) 39 P L R 127 = A I R 1937 Lah 485 Reversed in A I R 1937 Lah 653.
- Ralla Ram v. Khazan Singh, (1937) 39 P L R 712 = A I R 1937 Lah 419 " A I R 1937 Lah 839.
- Ram Chandra v. Daryoo Singh, (1933) 14 Lah 365 = 34 P L R 168 = A I R 1933 Lah 593 = 141 I C 483 Overruled in A I R 1937 Lah 148.
- Raman Mal v. Nathu Mal, (1934) A I R 1934 Lah 895 = 153 I C 1010 Reversed in A I R 1937 P C 124.
- Shiv Nath v. Bishambar Das, (1935) 37 P L R 31 = 1935 Cr O 239 = 36 Cr L J 217 = A I R 1935 Lah 153 = 152 I C 1006 Overruled in A I R 1937 Lah 259 & 892.
- Sidhu Ram v. Nur Mohammad, (1937) 39 P L R 743 = A I R 1937 Lah 506 Reversed in A I R 1937 Lah 740.

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Lahore High Court

*** A. I. R. 1937 Lahore 1**

ADDISON AND ABDUL RASHID, JJ.

Fazal Ilahi—Defendant—Appellant.

v.

Guddar Shah and another—Plaintiffs—Respondents.

Letters Patent Appeal No. 67 of 1936, Decided on 9th June 1936, from decree of Jai Lal, J., D/- 18th February 1936, as reported in *A I R 1936 Lah 570*.

*** (a) Limitation Act, Art. 75—Instalment bond—Bond giving option to creditor to sue for either three defaulted instalments or for entire sum—Creditor choosing to sue for entire sum—Art. 74 and not Art. 75, is applicable : 38 P L R 357 = A I R 1936 Lah 570 = 164 I C 59, Reversed.**

An instalment bond gave the creditor the option to demand payments of three instalments if default was made together with interest thereon from time to time, and also gave the creditor an option to bring a suit for the whole amount due under the bond, if the creditor chose to exercise his right in the whole amount :

Held : that in view of the wording of the bond Art. 74 and not Art. 75, Limitation Act, applied, and hence it was open to the creditor to sue at any time for all those instalments which had become payable within three years of the institution of the suit: 38 P L R 357 = A I R 1936 Lah 570 = 164 I C 59, Reversed. [P 2 C 1]

(b) Practice—Relief—Plaint crudely drafted—Evidence on proper issues—Proper relief should be granted.

Where on account of badly drafted plaint the relief sought was not clearly brought out but evidence was laid on right issues and no party was prejudiced, the proper relief should be granted to the plaintiff : *A I R 1926 Lah 417, Rel. on.*

[P 2 C 1, 2]

Mohammad Monir—for Appellant.

Khalifa Suja-ud-Din — for Respondents.

Abdul Rashid, J. — This appeal arises out of a suit brought by Guddar Shah and Murari Lal, plaintiffs, against Fazal Ilahi, defendant, for recovery of Rupees

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940 on the basis of a bond. The suit was dismissed by the trial Court, and this decision was affirmed by the learned District Judge on appeal. The plaintiffs preferred a second appeal to this Court which was accepted by a learned Single Judge in part, and the plaintiffs were awarded a decree for Rs. 495 with proportionate costs. Against this decision the defendant has preferred an appeal under Cl. 10, Letters Patent. The bond, which forms the subject-matter of the present litigation, was executed by defendant on 1st October 1929. It was recited in the bond that Fazal Ilahi, executant, had borrowed the sum of Rs. 800 from Ram Das, the father of the plaintiffs, and that this sum would be paid by monthly instalments of Rupees 10 each. The first instalment would become payable on the 1st November 1929. It was further recited that if the executant did not pay three instalments, the creditor would be entitled to realise the sum of Rs. 34 being the amount of three instalments and interest thereon, or to realise the entire balance by means of a suit. The plaintiffs in their plaint stated that the defendant had not paid any instalments on the bond, that 27 instalments had become barred by limitation, and that they were entitled to recover the entire balance amounting to Rs. 530 at once. Rs. 410 were claimed on account of interest on the sum of Rs. 530.

It was contended by the learned counsel for the appellant that as the plaintiffs had chosen to sue for the entire balance due on the basis of the bond after deducting the amount of 27 instalments which had become barred by limitation, the present suit fell within the purview of Art. 75 of Sch. 1, Limitation Act. It was urged that the plaintiffs' right to sue accrued

when default had been made in the payment of the first three instalments, i. e., in January 1930, and that as the plaintiffs had not sued within three years of the default, the suit for the balance due on the bond was barred by limitation. It was maintained that the payees had not established that they had waived the benefit of the provisions regarding default in the payment of the first three instalments, and that they could not, therefore, base their claim on default being made in the payment of the 25th, the 26th and the 27th instalments. Reliance was placed by the learned counsel in this connexion on a Full Bench ruling of the Punjab Chief Court reported in 188 P R 1883,¹ where it was laid down that a mere forbearance to sue or mere inaction on the part of obligee did not amount to waiver within the meaning of Art. 75 of Sch. 1, Limitation Act. Reference was also made to A I R 1934 Lah 283,² A I R 1934 All 1039³ and 47 All 552.⁴ In our opinion no question of waiver arises in the present case. The bond gave the creditor the option to demand payment of three instalments if default was made together with interest thereon from time to time. It also gave the creditor the option to bring a suit for the whole amount due under the bond if the creditor chose to exercise his right to call in the whole amount.

In these circumstances it was open to the creditor to sue at any time for all those instalments which had become payable within three years of the institution of the suit. In view of the wording of the bond, we are of the opinion that the present case falls within the purview of Art. 74, Limitation Act. It is, no doubt, true that the plaint has been very crudely drawn up, but that is no reason why the plaintiff should not be given a decree for Rs. 360 on account of principal that being the amount of the last 36 instalments. It was held in A I R 1926 Lah 417,⁵ that where on account of a badly drafted plaint the relief sought was not clearly brought out

but evidence was led on right issues and no party was prejudiced, the proper relief should be granted to the plaintiff. The calculation of the amount of interest due on the sum of Rs. 360 presents some difficulty. Interest will have to be calculated on Rs. 10 for 36 months, on another Rs. 10 for 35 months, on another Rs. 10 for 34 months and so on. The amount of interest at 6 per cent per annum on the sum of Rs. 360 amounts approximately to Rs. 33.

For the reasons given above, we accept this appeal in part, and in lieu of the decree awarded by the learned Single Judge, award the plaintiffs a decree for Rs. 393, (Three hundred and ninety three) with proportionate costs throughout. As the plaintiffs originally sued for the entire balance due under the bond, they would be debarred from bringing any further suit on this bond.

B.D./R.K.

Order accordingly.

*** A. I. R. 1937 Lahore 2**

JAI LAL, J.

Daulat Ram-Vidya Parkash and others
—Creditors—Appellants.

v.

Bansi Lal and others—Debtors and
others—Respondents.

Misc. First Appeal No. 646 of 1935, Decided on 24th October 1935, from order of Dist. Judge, Ludhiana, D/- 19th January 1935.

(a) **Insolvency—Creditor aggrieved by order of District Judge — Creditor can appeal against such order.**

Section 75, Provincial Insolvency Act, is sufficiently wide to enable a creditor, who is aggrieved by an order passed by the Insolvency Judge, to lodge an appeal : A I R 1922 All 196; A I R 1915 Mad 1177; A I R 1924 Mad 345; A I R 1932 Mad 162 and A I R 1934 Lah 968, Foll. [P 3 C 2]

* (b) **Insolvency—Sale by receiver—Objector claiming title to property sold and objecting to sale—Objection should be under S. 4 and not under S. 68, Provincial Insolvency Act—Order under such objection is appealable.**

An objection to a sale by Receiver was raised by an application under S. 68, Provincial Insolvency Act. The objection was that the objector was the owner of the property sold. The District Judge upheld the objection. Question was whether there could be an appeal from the order of the District Judge without obtaining leave of the Court:

Held: that though the District Judge was moved under S. 68, which was not one of the sections mentioned in Sch. 1 mentioned in S. 75 (2), Provincial Insolvency Act, the investigation, which he is expected to make in a case like the present, should be under S. 4 of the Act, and any order passed by

1. Khairuddin v. Atumal, (1883) 188 P R 1883 (F B).

2. Ramchand v. Nanga, A I R 1934 Lah 283=149 I C 972.

3. Sukh Lal v. Bhura, A I R 1934 All 1039=153 I C 205=1934 A L J 1056.

4. Kanhai v. Amruit, A I R 1925 All 499=87 I C 162=47 All 552=23 A L J 424.

5. Sundar Das Virbhan v. Jassa Singh Jiwan Singh, A I R 1926 Lah 417=93 I C 928=27 P L R 344.

him under S. 4 was appealable as of right to the High Court: *A I R 1928 Lah 556, Rel. on.*

[P 3 C 2; P 4 C 1]

R. L. Chawla and Barkat Ali for M. C. Mahajan—for Appellants.

Nawal Kishore — for Respondents (Debtors).

Judgment.—Achhru Mal and others were adjudicated insolvents and two receivers were appointed of their estate. It appears that the appellants, Daulat Ram-Vidya Parkash, had a money decree against the insolvents which they executed by attachment of half a share in a house and tawela, etc., which they alleged belonged to the judgment-debtors. This was before the adjudication order was made. An objection was raised by the respondent Bansi Lal that he was a purchaser for consideration of the property attached. This objection having been allowed a suit under O. 21, R. 63, Civil P. C., was filed by the attaching decree-holders and was ultimately decreed, it having been held that the sale by the judgment-debtors was fraudulent as against the creditors. The receivers in insolvency then took possession of the property attached by the appellants, Daulat Ram-Vidya Parkash, and sold the same in the insolvency proceedings. Bansi Lal thereupon made an application under S. 68, Provincial Insolvency Act, to the Insolvency Court, praying that the action of the receivers was illegal, as he (the objector) was the owner of the property. The learned District Judge has granted this application, holding that the decree granted in a suit under O. 21, R. 63, was operative only so far as the execution proceedings were concerned and that it did not enure for the benefit of the other creditors and consequently of the receivers in insolvency. He therefore set aside the sale by the receivers. The creditors, including Daulat Ram-Vidya Parkash, have presented this appeal against the order of the District Judge.

A preliminary objection is taken that the appellants, the creditors of the insolvents, are not competent to appeal from the order of the District Judge but that such an appeal is competent only by the receivers. It may here be mentioned that the receivers seem to have conceded, in my opinion wrongly, before the District Judge that they could not sell the property in dispute under the circumstances and probably it is on account of this admission by them that the creditors of the insolvents

have come up to this Court on appeal. In support of the preliminary objection the learned counsel relies upon 39 All 152¹ in which it was held that the only person who can appeal under circumstances similar to those in this case is the Official Receiver. The subsequent cases of the Allahabad High Court however have taken the contrary view. In 47 All 849² it was held that S. 75 of the present Provincial Insolvency Act was sufficiently wide to enable a creditor, who is aggrieved by an order passed by the Insolvency Judge, to lodge an appeal. 44 All 71,³ 39 Mad 479,⁴ 47 Mad 673,⁵ 55 Mad 313⁶ and A I R 1934 Lah 968⁷ also support the contention of the appellants' counsel that an appeal lies at the instance of a creditor under the circumstances disclosed in this case. 67 M L J 942⁸ and A I R 1926 Mad 556,⁹ cited by the respondents' counsel, do not really decide the question which is before me. They merely discuss the definition of a "person aggrieved" for the purposes of S. 75. The weight of authority is certainly on the side of the appellants and I have no option but to overrule the preliminary objection.

Yet another objection is raised by the respondents and that is that under the circumstances of this case no appeal lies without the leave either of the District Judge or of this Court. His contention is that the order passed by the District Judge is not covered by Sch. 1 mentioned in S. 75 (2), Provincial Insolvency Act, but I am inclined to think that though the District Judge was moved under S. 68, which is not one of the sections mentioned in Sch. 1, the investigation, which he is expected to make in a case like the present, should be under S. 4, Provincial In-

1. Jhabba Lal v. Shib Charan, A I R 1917 All 160=37 I C 76=39 All 152=15 A L J 1.

2. Niadar v. Ramji Lal, A I R 1925 All 549=88 I C 944=47 All 849=23 A L J 503.

3. Shikri Prasad v. Aziz Ali, A I R 1922 All 196=63 I C 601=44 All 71=19 A L J 862.

4. Thiruvankata Chariar v. Thangai Ammal, A I R 1915 Mad 1177=29 I C 294=39 Mad 479=29 M L J 755.

5. Ananthanarayana Ayyar v. Rama Subba Ayyar, A I R 1924 Mad 345=79 I C 395=47 Mad 673.

6. Pulli Goundan v. Kumaraswami Goundan, A I R 1932 Mad 162=135 I C 742=55 Mad 313=61 M L J 714.

7. Barkat Rai v. Jiwan Mal, A I R 1934 Lah 968=154 I C 708.

8. Venkata Ramanayya v. Bali Bangarayya, 1935 Mad 107=154 I C 96=67 M L J 942.

9. Hari Rao v. Official Assignee, Madras, A I R 1926 Mad 556=94 I C 642=49 Mad 461=50 M L J 358 (F B).

insolvency Act, and any order passed by him under S. 4 is appealable as of right to this Court. In any case if necessary I would have taken up the case on revision, because in my opinion the order of the District Judge is obviously incorrect. But it is not necessary to do so, because I am of opinion that the appeal lies to this Court as the order must be deemed to have been passed under S. 4. An authority in support of this proposition is to be found in A I R 1928 Lah 556.¹⁰

On the merits I am of opinion that if the District Judge found that the decree passed in the suit under O. 21, R. 63 could not be taken advantage of by the Official Receiver, he could not direct the release of the property without deciding independently of that decree whether the transfer in favour of the objector Bansilal was or was not fraudulent. The question was directly raised before him according to the respective allegations of the parties and before setting aside the order of the receiver the Court should have decided this aspect of the case and this he could have done under S. 4 even if the parties have not invited his attention to that section. At the same time it appears to me, though I do not give any final decision on that point, that probably the order of the District Judge, that the decree passed in favour of Daulat Ram-Vidya Parkash was not binding in these proceedings on Bansilal and he was entitled to an independent adjudication in these proceedings on the question of the bona fide nature of the sale in his favour, is correct. I therefore accept this appeal, set aside the order of the District Judge and return the case to him with a direction to proceed under S. 4, Provincial Insolvency Act, and to decide whether the transfer in favour of Bansilal was bona fide or whether it was fraudulent. The costs of this appeal shall abide the result.

B.D./R.K.

Case remanded.

10. Ghani Mahomed v. Dina Nath Puri, A I R 1928 Lah 556=108 I C 602.

A. I. R. 1937 Lahore 4

TEK CHAND, J.

Lahori Singh—Appellant.

v.

Official Receiver, Sialkot and another—Insolvents—Respondents.

Misc. Second Appeal No. 5 of 1936, Decided on 8th May 1936, from order of Dist. Judge, Sialkot, D/- 4th Nov. 1935.

(a) **Insolvency—Power of Court—Insolvency Court has jurisdiction to try questions of title relating to property alleged to belong to insolvent.**

The insolvency Court has concurrent jurisdiction with ordinary civil Court to try questions of title relating to property alleged to belong to the insolvent. [P 5 C 2]

(b) **Civil P. C. (1908), S. 11 — General principles underlying rule of res judicata can be invoked during insolvency proceedings, although S. 11 does not in terms apply.**

Section 11 is not exhaustive of the law of res judicata and the general principles underlying the rule can be invoked in reference to matter on which the section is silent, or with regard to proceedings to which it does not in terms apply. Although S. 11 does not in terms apply to proceedings before an insolvency Court, such proceedings not being a suit within the meaning of S. 11; the general principles underlying the rule can be invoked during such proceedings. [P 5 C 2]

Where, therefore, the question of title to certain property belonging to an insolvent was directly and substantially in issue in a previous suit between the parties in which the Official Receiver was also impleaded, and had been heard and finally decided by a Court of competent jurisdiction, it is not open to either party to re-agitate the question of title again before the insolvency Court: A I R 1936 P C 78; A I R 1921 P C 11; A I R 1922 P C 80 and A I R 1933 Lah 551, Rel. on. [P 5 C 2]

M. L. Puri—for Appellant.

Hem Raj Mahajan—for Official Receiver.

Judgment.—Lal Chand, respondent 2, was adjudicated insolvent by order of the Insolvency Judge, Sialkot, dated 24th August 1929. The Official Receiver issued an advertisement for the sale of the property of the insolvent, including one-fifth share in a certain house, situate in Daska. Lahori Singh, appellant, filed an application under Ss. 4-68, Provincial Insolvency Act, objecting to the sale on the ground that the house belonged in its entirety to Vishwa Mitra and Yashpal, brothers of Lal Chand, insolvent, who had no share in it. The Official Receiver resisted the application urging that the question of Lal Chand's ownership in one-fifth of the house was res judicata by reason of the decision of Sheikh Mohammad Hussain, Subordinate Judge, dated 24th June 1932, *In re Mathra Das v. Lahori Singh*. The Insolvency Judge sustained this plea, and held that the matter was res judicata and could not be re-agitated before him. On appeal the learned District Judge has affirmed this order.

Lahori Singh has come in second appeal and it has been contended on his behalf that the previous decision is not res judicata, because: (1) The Official Receiver

was not a party to the previous suit, and (2) the decision in the previous suit was by a Court which was not competent to try the present proceedings under the Insolvency Act. After hearing Mr. Puri and examining the record I am of opinion that this contention has no force. It appears that one Mathra Das had obtained a money decree against Lal Chand, and in execution he attached one-fifth share in the house in dispute, alleging that it belonged to Lal Chand. Lahori Singh objected to the attachment, alleging that Lal Chand was not a co-sharer in the house, which on partition between Lal Chand and his four brothers had fallen to the share of Vishwa Mitra and Yashpal and they had sold it to Lahori Singh. The objection was allowed by the executing Court. Thereupon, on 31st January 1925, Mathra Das brought a civil suit against Lahori Singh, Lal Chand and his brothers for a declaration that Lal Chand owned one-fifth share in the house which was liable to attachment and sale in execution of his decree.

The suit dragged on for several years. In the meantime Lal Chand applied for adjudication as insolvent, and was so adjudicated on 24th August 1929. On Lahori Singh's application, the Official Receiver was impleaded as a defendant in the suit. He was duly served, but did not appear to oppose the suit, which was contested by Lahori Singh only. Eventually a decree was passed by Sheikh Mohammad Hussain, Subordinate Judge, on 24th June 1932, declaring that Lal Chand had one-fifth share in the house, which could be attached by Mathra Das in execution of his decree. Mr. Puri urges that the Official Receiver was not a party to the previous suit, as the title of the plaint in that suit had not been corrected, so as to show him in the array of defendants. This, however, was a mere clerical omission, and in the circumstances does not affect the rights of Lahori Singh, Mathra Das and the Official Receiver in regard to the matters decided therein. As already stated, it was Lahori Singh himself who had applied that the Official Receiver be made a party, and the Court had granted his application and passed an order expressly making the Official Receiver a party. The plaintiff put in the required process fee, and the process was issued in due course and actually served on the Receiver. The decision in that suit is, therefore, binding

on the Official Receiver as well as all parties to it.

As to jurisdiction, it is conceded that the decision in the former suit was passed by the Subordinate Judge, who was competent to try the question of title as between Lahori Singh, Mathra Das and Lal Chand, and after his adjudication as insolvent, the Official Receiver, who had been impleaded with the permission of the Court. This being so, it is not open to Lahori Singh to raise the same matter once again on an application under S. 4 before the Insolvency Court, which has concurrent jurisdiction with ordinary civil Courts to try questions of title relating to property, alleged to belong to the insolvent. This, of course, is so, not under the provisions of S. 11, Civil P. C., which does not in terms apply, but under the general principles of the rule of *res judicata*, as has been held by their Lordships of the Privy Council in 43 Cal 694,¹ 48 Cal 499,² 45 Mad 320,³ and other cases. Mr. Puri referred me to 14 Lah 369,⁴ but that case, instead of supporting his contention, is a complete answer to it.

It was explained there that S. 11, Civil P. C., is not exhaustive of the law of *res judicata*, and the general principles underlying the rule can be invoked in reference to matters on which the section is silent or with regard to proceedings to which it does not in terms apply; but as regards matters specifically provided for in the Code, the Courts are bound to limit the operation of the rule in accordance with the conditions laid down by the legislature and have no power to ignore the express provision of the Statute in order to give effect to general principles. Admittedly, S. 11 does not in terms apply to the present case, as the proceedings before the insolvency Court are not a "suit" within the meaning of that section. Therefore, the technical limitations laid down in S. 11 need not be taken into account and we must invoke the general principles under-

1. Sheoperson Singh v. Ramnandan Prasad Singh, A I R 1916 P C 78=33 I C 914=43 Cal 694=43 I A 91 (P C).

2. G. H. Hook v. Administrator-General, A I R 1921 P C 11=60 I C 631=48 I A 187=48 Cal 499 (P C).

3. Ramachandra Rao v. Ramachandra Rao, A I R 1922 P C 80=67 I C 408=49 I A 129=45 Mad 320 (P C).

4. Fazal Hussain v. Jiwan Shah, A I R 1933 Lah 551=141 I C 454=14 Lah 369=34 P L R 196.

lying the rule. It is not denied that the question of title to one-fifth share in the house in dispute was directly and substantially in issue in the previous suit between the parties, who are now before me and had been heard and decided by a Court of competent jurisdiction. It is, therefore, not open to the appellant to agitate it again. No other point was argued before me. The appeal fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1937 Lahore 6

TEK CHAND AND DALIP SINGH, JJ.

Sheo Ram and others—Defendants—Appellants.

v.

Luta Ram and another—Plaintiffs—Respondents.

First Appeal No. 505 of 1932, Decided on 2nd June 1936, from preliminary decree of Senior Sub-Judge, Ferozepore, D/- 23rd December 1931.

(a) Civil P. C. (1908), S. 11 and O. 34, R. 6—Preliminary decree specifying judgment-debtor's personal liability to pay in case sale proceeds be insufficient—Sale proceeds insufficient—Decree-holder obtaining order under O. 34, R. 6—Preliminary decree set aside on appeal—Order passed on application under O. 34, R. 6 falls to ground and cannot operate as *res judicata*.

A decree for sale of mortgaged property can validly provide that if the proceeds of sale are not sufficient to pay the mortgage debt, the mortgagor should pay the balance personally, though the personal decree would not be executed until after the property was sold and the net sale proceeds were found to be insufficient to satisfy the debt. This being so if in a suit for the sale of mortgaged property the preliminary decree incorporates the personal liability of the judgment-debtor to pay, and the sale proceeds being insufficient the decree-holder also applies under O. 34, R. 6, any order passed on the application under O. 34, R. 6 flows from the preliminary decree and therefore if an appeal against that preliminary decree succeeds, the order or decree under O. 34, R. 6 would *ipso facto* fall to the ground and cannot operate as *res judicata*: *AIR 1918 P C 159, Rel. on.* [P 7 C 1]

(b) Hindu Law—Debts—Manager of joint family borrowing money for ancestral family shop—Manager is liable to extent of his share in joint family property and also personally—Other co-parceners are liable only to extent of their interest in family property unless they consent to or ratify such debt.

In the case of debts contracted by a manager in pursuance of his implied authority in the ordinary course of the family business, the manager is liable to the extent of his share in the joint family property and also personally, that is to say, his separate property is also liable. But as regards the other co-parceners, they are liable only to the extent of their interest in the family property

unless in the case of an adult co-parcener the contract has really been entered into by them as well as by the manager or has subsequently been ratified by them directly or impliedly by conduct. [P 7 C 1, 2]

J. N. Aggarwal and A. R. Aggarwal—for Appellants.

Lala Achhru Ram—for Respondents.

Dalip Singh, J.—This is an appeal arising out of a suit brought on a mortgage executed by one Charta Ram who was a manager of a joint Hindu family. The mortgage was executed on 24th June 1920. Subsequent to that a partition is alleged to have taken place between the joint Hindu family, but it has not been contested before us that it makes any difference for the purposes of this suit. It was held after various defences had been taken by the members, or representatives of the joint Hindu family, that the money had been borrowed by Charta Ram for the purposes of the ancestral family shop then existing. It was further held that the defendants, who were members of the joint Hindu family of the deceased were liable not only to the extent of the joint family property in their hands but were also personally liable. A preliminary decree was passed to this effect and a final decree was also subsequently passed for sale of the mortgaged property. As the sale proceeds were insufficient to realize the mortgage debt, an application was also made under O. 34, R. 6 to have the defendants declared personally liable. The defendants did not appear to contest this application and an *ex parte* order appears to have been passed following the judgment given in the preliminary decree that the defendants were also personally liable. The defendants applied to have this *ex parte* order set aside, but it appears that this application was also dismissed in default some time in 1936. Defendants 1 to 8 appealed from the preliminary decree. The only point they raised in the appeal was that they were not personally liable. Subsequently the remaining defendants 3, 4, 5, 6 and 7 also applied to be made appellants in the appeal having previously been made respondents by appellants 1 to 8. This application was granted subject to all just exceptions and the present appeal may be treated as one by all the defendants on the question of their personal liability.

A preliminary objection was taken by the learned counsel for the respondents

that as the decree had been obtained under O. 34, R. 6 against all the appellants and as there had been no appeal from that decree, the present appeal was infructuous and could not, therefore, be heard, the matter being *res judicata* now. After hearing the learned counsel I do not think there is any force in this objection. It has been held by their Lordships of the Privy Council in 47 Cal 370¹ that a decree for sale under S. 88, T. P. Act, can validly provide that if the proceeds of sale are not sufficient to pay the mortgage debt the mortgagor should pay the balance personally, though the personal decree would not be executed until after the property was sold and the net sale proceeds were found to be insufficient to satisfy the debt. This being so, and the decision about the personal liability of the appellants having been incorporated in the preliminary decree, any order passed on an application under O. 34, R. 6, would certainly flow from the preliminary decree. Therefore if an appeal against that preliminary decree succeeded, the order or decree under O. 34, R. 6 would ipso facto fall to the ground. The learned counsel for the respondents has contended that as the decision in the preliminary decree had been appealed against, the matter was open for re-decision by the trial Court. This may be so but as a matter of fact no question of redecision by the trial Court arose at all and in any event I do not think this affects the question that the order under O. 34, R. 6 would flow from or be consequential upon the decision in the preliminary decree. I would, therefore, overrule this preliminary objection.

On the merits the law on the point is stated in Mulla's Hindu Law at p. 259, para. 234 (iv) and also at p. 269, para 240. It is there laid down that in the case of debts contracted by a manager in pursuance of his implied authority in the ordinary course of the family business, the manager is liable to the extent of his share in the joint family property and also personally, that is to say, his separate property is also liable. But as regards the other co-parceners, they are liable only to the extent of their interest in the family property unless in the case of an adult co-parcener the contract has really been entered into by them as well as by

the manager or has subsequently been ratified by them directly or impliedly by conduct. In the case of minor co-parceners only the second qualification would naturally arise. In this case there is no question of personal entry into the contract of any major co-parcener nor any ratification by either major or minor co-parceners. The law as stated in Mulla's Hindu Law has not been contested by the learned counsel for the respondents. He only contended that he wished to make it clear that the partition, alleged to have taken place after the incurring of the debt would not affect his right to recover the debt from the joint family property in the hands of any of the defendants. Mr. Jagannath Aggarwal does not contest this proposition. I would, therefore, accept the appeal and vary the decree of the trial Court by holding that the appellants-defendants are liable for the entire mortgage-decree to the extent of the joint family property in their hands, irrespective of the partition between them, but that their self-acquired property and their persons are not liable for the mortgage-decree. Of course any self-acquired property of Charta Ram would be liable for the debt in dispute. I would in appeal leave the parties to bear their own costs.

Tek Chand, J.—I agree.

D.S./V.V.

Appeal accepted.

A. I. R. 1937 Lahore 7

ADDISON AND ABDUL RASHID, JJ.

Bisakha Singh—Objector—Appellant.

v.

Pt. Socha Singh—Petitioner—Respondent.

First Appeal No. 2205 of 1935, Decided on 28th April 1936, from decree of Sikh Gurdwara Tribunal, Lahore, D/- 17th July 1935.

Punjab Sikh Gurdwaras Act (8 of 1925), S. 8—Nirmala Sants are Sikhs in contrast to Udasis — Institution belonging to them — Granth Sahib worshipped—Grant of land by Sikhs in the name of Granth Sahib—Institution held Sikh Gurdwara.

Nirmalas can only be described as Sikh priests. They are not a body like the Udasis who broke off from Sikhism before Sikhism had reached its final stage. The Nirmala panth was started by the 10th Guru and they were really meant to be theologians of the 10th Guru. Owing to their learning of Hindu scriptures they have certain leanings towards some of the Hindu sacred books but they are first and foremost Sikhs. An institution therefore belonging to them and used by them

¹ *Jouna Bahu v. Parmeshwar Narayan Mahtha*, A I R 1918 P C 159=49 I C 620=47 Cal 370 (P C).

for public worship and to which grants of land were made by Sikhs in the name of Granth Sahib and which has been the principal object of worship, is for all purposes a Sikh Gurdwara. [P 8 C 2]

Harnam Singh—for Appellant.

Bhagat Singh—for Respondent.

Judgment. — Government Notification No. 986/2339 II. G. G., dated 29th June 1931, was published under S. 7, Sikh Gurdwaras Act, concerning an institution at Sangatpura. On 22nd July 1931, Mahant Sucha Singh put in a petition under S. 8 (which has been tried by the Tribunal) to the effect that the Dera along with the property attached to it did not come under the Sikh Gurdwaras Act, nor could it be called a Sikh Gurdwara, that the Dera was one of Nirmala Sants, that the Sikhs in general did not worship there and that all that was done was that the Nirmalas taught and learnt Sanskrit in it. The only issue arising was, should the institution in dispute be declared to be a Sikh Gurdwara? The President and one member of the Tribunal held that it should not, but another member held that it should. The judgment of the majority prevailing, this appeal has been preferred by one of the objectors, Bisakha Singh. The President and the member who concurred with him have both come to the conclusion that the Granth Sahib has been the principal object of worship since 1910. They thought, however, that there was not sufficient evidence to establish that at the commencement the institution was used for Sikh worship. The first incumbent was Hira Singh who was succeeded by Chanan Singh, who was succeeded by Sucha Singh, respondent. It is not clear whether Chanan Singh was the chela of Hira Singh or that both Hira Singh and Chanan Singh were chelas of Bhagwan Singh. In the documentary evidence there is a discrepancy on this point. It should therefore not have been held a fault in the appellant's evidence that his witnesses stated that they did not know the connection between Hira Singh and Chanan Singh.

It has been established beyond any doubt that after the institution started in 1875 it fell down and that a new institution was built in 1910. According to the Mahant respondent he kept accounts of the expenses but he did not produce them. There is no doubt from the evidence that it was then built by Sikhs and that Sikhs made grants of land at that time to the institution in the name of Guru Granth

Sahib. The Mahant had to admit that he was present at the time of these mutations in 1911 and he must therefore be fixed with knowledge in that year when the institution was completely rebuilt, that the grants of land were made in the name of the most sacred object of the Sikh religion. Further, Nirmalas can only be described as Sikh priests. The Mahant as a witness had to admit that the Nirmala Panth was started by Guru Gobind Singh, the 10th Guru. They are not therefore a body like the Udasis who broke off from Sikhism before Sikhism had reached its final stage. They were really meant to be the theologians of the 10th and last Guru. For that purpose he sent the first members of the Order to Benares to learn the Hindu scriptures so as to be able to meet the Hindu theologians on their own ground. It may be that by means of that training they have certain leanings towards some of the sacred Hindu books, but they are first and foremost Sikh priests. There is no question, therefore that the institution was founded by Sikhs and that only Sikhs have been in office. The majority of the Tribunal were of opinion that the evidence as regards public worship of Sikhs in 1875 was too indefinite. It is of course only oral evidence but it was given by old men who were living at the time. Seeing that Nirmalas are Sikhs, I have no doubt that there has been public worship by Sikhs from the very commencement. In any case it is clear that the building completely fell down and that a new institution was built in 1910, which was purely a Sikh institution, to which gifts of land were made in the name of the Guru Granth Sahib and since when the Granth Sahib has been the principal object of worship, though the Smadh or tomb of the founder, which is situate in the garden and not in the building proper, may also have been venerated as is usual among all classes and communities in India.

The Mahants accepted these gifts in the name of the Guru Granth Sahib and the new institution built in 1910 must therefore be held to have been a Sikh institution, founded in 1910-11 for Sikh worship. Even therefore if it was not a Sikh institution prior to 1911, it had clearly become nothing but a Sikh institution then and was refounded as such. For the reasons given, the appeal must be accepted and a decree granted to the effect that the institution in question is a Sikh Gurdwara.

The parties will bear their own costs throughout.

A.L./R.K. *Appeal allowed.*

A. I. R. 1937 Lahore 9

COLDSTREAM AND BHIDE, JJ.

Abdul Qadir Shah—Plaintiff—Appellant.

v.

Siraj-ud-Din and others—Defendants—Respondents.

First Appeal No. 1119 of 1935, Decided on 6th April 1936, from decree of Sub-Judge, 1st Class, Lahore, D/- 23rd August 1933.

(a) Limitation Act (1908)—Applicability—Law applicable to suit or proceeding is law in force on date of institution of suit or proceeding.

The general rule is that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding unless there is a distinct provision to the contrary. So a suit brought in 1930 by the Sajjadanashin of a Takia to recover possession of immoveable property comprised in the wakf which had been transferred by trustee de-son-tort is governed by Art. 134-B as inserted by Act 1 of 1929 : 35 All 227 (P C); A I R 1928 All 708 and A I R 1917 Lah 144, Rel. on. [P 10 C 2]

(b) Limitation Act (1908), Art. 134—Applicability.

Art. 134 cannot be properly applied to cases of Hindu and Mahomedan religious endowments and further it applies only to cases of mortgages and not of sales : A I R 1922 P C 123 and 30 P R 1908, Rel. on. [P 11 C 1]

(c) Limitation Act (1908), Art. 144—Alienations of wakf property by person in charge of it—Succeeding de facto trustee can sue for possession but within 12 years from death of predecessor.

Where a person in charge of wakf property has alienated it, the succeeding de facto trustee can sue for possession of alienated property. Limitation would begin to run from the death of the predecessor and a suit brought more than twelve years after it is barred : A I R 1928 P C 106 ; A I R 1935 P C 44 and A I R 1933 P C 75, Rel. on. [P 11 C 1]

N. C. Mehra—for Appellant.

Jagan Nath Aggarwal, Feroze-ud-Din Ahmad, Muhammad Amin, Nand Lal, S. L. Puri, Ram Das Seth and Harbhajan Das—for Respondents.

Bhide, J.—This appeal arises out of a pauper suit for possession of certain properties alleged to be dedicated to a Mahomedan shrine known as Takia Rasulshahian situated in Landa Bazar in the city of Lahore. The plaintiff Abdul Qadir is the sajjadanashin of the Takia, and his allegation is that the properties claimed, which are now in possession of defendants 2 and 3 were unlawfully alienated by his predecessors. The contesting defendants 2 and 3 resisted the suit pleading, inter alia, (a) that

the property in question is not wakf and (b) that the suit was barred by time. Both these pleas were upheld and the suit was dismissed. From this decision the plaintiff has preferred the present appeal. The appeal was allowed to be filed in forma pauperis and plaintiff was also allowed the concession of having the record typed instead of being printed as usual. The typed record is in four parts. Part 1 contains the record of the proceedings of the learned Subordinate Judge and part 2 the documents of the parties. These parts will be referred to hereafter as part 1 and part 2. Some of the documents relied on by the plaintiff are to be found in the printed paper-book in *Civil Appeal No. 2801 of 1915*,^{1a} (hereafter referred to as paper-book A) decided by the Punjab Chief Court on the 15th December 1917. The printing of these documents was also dispensed with.

There appears to have been frequent litigation in connection with the Takia Rasulshahian since about 1879, a brief account of which will be found in the judgment of Lala Ram Chandra, dated the 23rd August 1915, which was under appeal in *Civil Appeal No. 2801 of 1915*,^{1a} referred to above (vide pp. 131-137 of paper-book A). It will appear therefrom that after the death of Nur Hassan Shah, who is said to have been the founder of the Takia Rasulshahian at Lahore, there was a dispute between Gauhar Hussain, who claimed to succeed him and Nazir Hussain who claimed the property attached to the institution under a will. This dispute was decided by the Judicial Assistant Commissioner of Lahore in favour of Gauhar Hussain on the 7th August 1879. After the death of Gauhar Hussain, however, Nazir Hussain and his brothers Hazar Hussain and Saidiq Hussain appear to have put forward their claim once more and sold the whole of the property attached to the institution to Dharm Chand, father of defendant 2. Dharm Chand instituted a suit for possession of the property on the basis of this sale in the Court of Mr. Parker, Judicial Assistant Commissioner. This suit was withdrawn owing to some technical defects and another suit on the basis of the same sale was instituted in the Court of Mr. R. Clarke, District Judge, Lahore. Mr. Clarke dismissed the suit on the 22nd December 1884, holding that the property was wakf, that one Allah Bux was a disciple of

1a. Md. Abdul Kadir v. Mt. Hussain Bibi, reported in A I R 1918 Lah 76=44 I C 874.

Gauhar Hussain and as such entitled to succeed to him and that Nazir Hussain and his brothers had no right to sell the property (vide pp. 32-33, paper-book A). The plaintiff Dharm Chand in these suits filed certain plans of the property sued for, on which the plaintiff in the present case has placed strong reliance in support of his contention that the property now in dispute is wakf, i. e. dedicated to the Takia. He has filed copies of these plans in the present case which are marked as Ex. p-13 (copy of the plan in the case decided by Mr. Clarke) and exhibit p-14 (copy of the plan in the case instituted in the Court of Mr. Parker). The plan showing the properties now in dispute, filed by the plaintiff in the present case, is Ex. p-6. The plaintiff's contention is that a comparison of Ex. p-6 with the above plans shows that the properties in dispute are part of Ahata No. 2 in Ex. p-13 (which corresponds to Ahata No. 1 in Ex. p-14) which was held to be wakf by Mr. Clarke in his judgment dated the 22nd December 1884.

The plaintiff did not state clearly in his plaint as to when and by whom the properties in suit were alienated. In para. 8 of the amended plaint he stated that Mt. Hussain Bibi, who held the property as a trustee de son tort, collusively put defendants 2 and 3 in possession of portions of Ahata No. 2 shown in Ex. P/13. He further stated that if Mt. Hussain Bibi or her father Nazir Hussain (who was also a self-constituted trustee or trustee de son tort) executed any deeds in favour of defendants 2 and 3, or their predecessors-in-interest, the deeds could not affect the property as it was wakf. The plaintiff, however, definitely took up the position later on that the alienations were, in fact, made by Mt. Hussain Bibi. This position was probably because the plaintiff could only succeed on the question of limitation on this basis and no other as will be shown hereafter. Only two points were argued in appeal before us, viz. that the learned Subordinate Judge was wrong in holding: (i) that the property in suit was not proved to be wakf and (ii) that the suit was barred by time. (After examining the evidence, his Lordship held that the property alienated was not wakf. The judgment proceeded.) On the evidence, as it stands on the record, the finding of the learned Subordinate Judge that the plaintiff has failed to prove the property in dispute to be wakf, must, I think, be

upheld. Upon this finding it is unnecessary to deal with the question of limitation. But it seems to me that the plaintiff's suit clearly fails on the question of limitation also, even if the property were assumed to be wakf and I shall therefore deal with that point.

The learned counsel for the appellant strenuously contended that the alienations in dispute were made by Mt. Hussain Bibi and not by Nazir Hussain as alleged by the defendants. But this contention seems wholly untenable in view of the evidence on the record. (His Lordship again considered the evidence and held that the sales were held by Nazir Hussain in 1892 and 1891. The judgment then proceeded.) On the above findings the plaintiff's suit is clearly time-barred. Plaintiff relied mainly on the Full Bench ruling of the Chief Court reported in 30 P R 1908¹ and a recent ruling of their Lordships of the Privy Council reported in 12 Pat 251.² Before discussing these rulings I may state that the present suit was instituted on 23rd April 1930 and would prima facie appear to be governed by Art. 134-B, Lim. Act, as inserted by Act 1 of 1929. According to this Article the period of limitation for a suit by the manager of a Hindu, Mahomedan or Buddhist religious or charitable institution of immoveable property comprised in the endowment, which has been transferred by a previous manager for a valuable consideration is 12 years from the death, resignation or removal of the transferor. The present case clearly falls within the scope of this Article and as the transferor Nazir Hussain died in 1899, the suit is barred by time. The learned counsel for the appellant contended that Act 1 of 1929 does not govern the present suit, but was unable to give any cogent reason in support of his contention. The general rule is that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding unless there is a distinct provision to the contrary: vide 35 All 227,³ 50 All 865⁴ and 101 P R

1. Basseshar Lal v. Nathu Singh, (1908) 30 P R 1908=102 P L R 1908=35 P W R 1908 (F B).

2. Ramcharan Das v. Naurangi Lal, AIR 1933PC 75=142 I C 214=60 IA 124=12 Pat 251 (PC).

3. Soni Lal v. Kanhaiya Lal, (1913) 35 All 227=19 I C 291=40 I A 74 (P C).

4. Baijnath v. Dulari Hajam, A I R 1928 All 703=110 I C 719=50 All 865=26 A L J 1371.

1916.⁵ The utmost that can be said is that if any prescriptive rights had become vested under the old limitation period, the new Act will not affect such rights; but it is the defendant and not the plaintiff who could raise any objection in this case on this ground.

In my opinion the suit is clearly barred under Art. 134-B, Lim. Act, but I may add that it would be equally barred even under the old law and on the authorities mainly relied on by the learned counsel for the appellant, viz: 30 P R 1908¹ and 12 Pat 251.² As regards the former ruling it may be pointed out that it applies Art. 134, Lim. Act, but this Article as held by their Lordships of the Privy Council in A I R 1922 P C 123⁶ cannot be properly applied to cases of Hindu and Mahomedan religious endowments. Further, according to 30 P R 1908,¹ Art. 134 applied only to cases of mortgages and not of sales. However, apart from these points it would appear that even according to 30 P R 1908,¹ limitation would begin to run as soon as a new incumbent succeeds the person in charge of the religious institution who alienated the wakf property. In the present instance, there can be no doubt that Mt. Hussain Bibi succeeded Nazir Hussain after his death in 1899 and held charge of the institution and its properties as a de facto trustee. She was held to have had this position by their Lordships of the Privy Council in 109 I C 52.⁷ She could, therefore, sue for possession of the property alienated by Nazir Hussain: cf. A I R 1935 P C 44.⁸ Mt. Hussain Bibi was apparently a minor when Nazir Hussain died in 1899 but she seems to have become a major at least by 1906 or 1907 when she sued for possession of the property in possession of Pran Nath (one of the predecessors-in-interest of defendant 3) on the ground that her mother, who was acting as her guardian in a previous suit, had colluded with the defendant: vide judgment at p. 48 of paper-book A. So, even if the period of limitation is reckoned from 1907, the pre-

sent suit is clearly barred. The Privy Council ruling, 12 Pat 251,² on which the learned counsel relied, also leads to the same result; for according to that ruling Art. 144 would govern the case and the period of limitation would run from the date of the death of the alienor Nazir Hussain, which took place in 1899.

A feeble attempt was made to argue that the period of limitation was extended because Mt. Hussain Bibi was colluding with the alienees. This argument seems to have no foundation in fact or law. There was no plea of collusion and no issue was framed on this point. As stated above Mt. Hussain Bibi actually brought a suit in 1907 for possession of the property now held by defendant 3, on the ground that the alienation by Nazir Hussain was void and that her guardian Mt. Hatan had colluded with the alienees in a previous suit. That suit was dismissed and the matter would thus appear to be res judicata also. As regards Nand Lal, defendant 2, there is no evidence on the record to show that Mt. Hussain Bibi was colluding with him. Nor was the learned counsel for the appellant able to cite any authority to support his contention that the period of limitation, once it began to run on the death of the alienor Nazir Hussain, could be extended on the ground of collusion. In my judgment the plaintiff's suit was rightly dismissed and his appeal too must therefore be dismissed with costs.

Coldstream, J.—I concur.

D.S./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 11

TEK CHAND AND DALIP SINGH, JJ.

Guranditta and others — Defendants—Appellants.

v.

Mt. Jiwani and others—Respondents.

First Appeal No. 1224 of 1933, Decided on 5th November 1935, from decree of Senior Sub-Judge, Sialkot, D/- 18th April 1933.

Hindu Law—Heir — Step sister's son is also heir.

A sister's son is an heir under the Hindu law. According to the general principle of Hindu law, there is no difference between the full-blood and the half-blood so far as either sapindas or bandhus are concerned, except in a competition inter se. So a step sister's son is also an heir: 10 W R 76; A I R 1914 P C 1; 11 Cal 69 and A I R 1931 P C 268, *Ref.* [P 14 C 1]

5. Manohar Lal v. Sadiqa Begam, A I R 1917 Lah 144=37 I C 292=101 P R 1916.

6. Vidya Varuthi Tirtha Swamigal v. Baluswami Ayyar, A I R 1922 P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).

7. Hussain Bibi v. Nur Hussain Shah, A I R 1928 P C 106=109 I C 52 (P C).

8. Mahadeo Prasad Singh v. Karia Bharathi, A I R 1935 P C 44=153 I C 1100=62 I A 47=57 All 159 (P C).

R. L. Anand I and Krishan Singh—for Appellants.

M. C. Mahajan and Shamair Chand—for Respondents (Plaintiffs).

Dalip Singh, J.—Plaintiffs in this case alleged themselves to be half-sister and half-sister's sons of the last male holder, one Puran Chand, a deceased Hindu, governed by the Mitakshara law. Plaintiffs 4 and 5 are financing the suit on behalf of plaintiffs 1 to 3 on an agreement that in case of success they shall take two-thirds of the property. The defendants are Guranditta and his wife who claim as donee and devisee respectively from Mt. Malan, mother of Puran Chand, deceased. The other defendants are alienees from Mt. Malan or Guranditta, or both. The plaintiffs alleged that these alienations by Mt. Malan and alienations by Guranditta subsequently were all void as against their rights, plaintiffs 1 to 3 being heirs under the Hindu law and also by virtue of Act 2 of 1929. They contended that Mt. Malan being the mother of the last male holder had only a limited estate in the property which she got as such mother and that she had no necessity to make these alienations and that no consideration had passed for them.

The defendants took various pleas which do not now concern us. A very large number of issues, printed at pp. 45-47 of the printed paper book, were framed. The trial Court held that plaintiffs 1 to 3 were heirs of Puran Chand, both under the Hindu law and under Act 2 of 1929, that Mt. Malan had enough income to support herself and there was no necessity for any of the alienations challenged by the plaintiffs, except one alienation which formed the subject of issue 19 in which the Court held that there was necessity for the alienation to the extent of Rs. 1,200. The Court also held that Mt. Malan had only a limited estate and that the plaintiffs were entitled to control her alienations. Qua a certain small portion of the property, 1 kanal and 14 marlas, it held that it was not proved that this portion of land had ever belonged to Puran Chand. According to the plaintiffs this property had been acquired by Mt. Malan out of the income of the estate of Puran Chand and had been merged with that estate. The Court held that there was no merger of any kind proved. Qua this portion therefore the

plaintiffs' suit was dismissed, but the plaintiffs' suit was decreed as prayed with respect to all the other property with the exception of the mortgage already mentioned in favour of Buta Mal which was held good for Rs. 1,200. Defendants Guranditta, Mt. Jamna Devi, his wife, certain mortgagees from Mt. Malan, the sons of Buta Mal, already mentioned, and one Amir Chand and one Duni Chand, mortgagees from Mt. Malan, have come in appeal. The plaintiffs have also filed cross-objections qua the Rs. 1,200 allowed to Buta Mal Khatri. Lengthy arguments have been addressed to us in the appeal, but the case resolves itself now into a very short point. Mt. Jiwani, plaintiff 1, the half-sister, herself is dead and plaintiffs 2 and 3, her sons, are her legal representatives and heirs.

The first contention of the learned counsel for the appellants has been the question of fact, namely that Mt. Jiwani is not proved to be the half-sister of Puran Chand. On this point there is a certain amount of oral evidence led by the plaintiffs. I see no reason not to accept the statements of two ladies, Mt. Jai Kaur and Mt. Jawala Devi, who were examined on commission. They are related to the parties and ought to know the facts. Both of them stated that Mt. Jiwani was the half-sister of Puran Chand. The story, according to them, is that Bhagwan Das, father of Puran Chand, first married a woman called Atma Devi by whom he had a daughter Mt. Jiwani. Subsequently, on the death of Atma Devi, he married Mt. Malan by whom he had a son Puran Chand. This story of theirs is supported by the circumstances and facts which are either admitted or proved on the record. It appears that at one time Puran Chand brought a suit against one Mt. Narain Devi, who was his father's sister, for alienating certain land. In that case Mt. Narain Devi took up the defence that she had incurred debts on the marriage of the plaintiff's (Puran Chand's) half-sister Mt. Jiwani. The reply of Puran Chand was not that Mt. Jiwani was not his sister at all. On the contrary his reply was that his mother Mt. Malan had performed the marriage of Mt. Jiwani and that Mt. Narain Devi therefore had not incurred any expenses at all. This suit was in 1887 and the significance of the implied admission is obvious. The defendants' story, as stated by their counsel in the present suit, is that Mt. Atma Devi

was a dharel woman who was bought by Bhagwan Das from one Pohu and who was kept for a time by Bhagwan Das. Mt. Jiwani, according to this story, was a pichhlag daughter of Mt. Atma Devi. In contradiction of the case, as stated by the counsel, the defendant Guranditta himself stated that Bhagwan Das was married to Atma Devi but that Mt. Jiwani was a pichhlag daughter of Mt. Atma Devi.

I would examine this story later, but for the present, the fact that no such defence was relied on by Puran Chand in the 1887 suit is not without significance. In 1914 a suit was brought by Mt. Jiwani to contest the gift made by Mt. Malan to a temple. In that case it was distinctly urged by Mt. Malan that Mt. Jiwani being only a pichhlag daughter of Mt. Atma Devi had no right to contest or control any alienation made by herself. The matter was put in issue and was decided in favour of Mt. Jiwani by the trial Court and the decision was upheld in appeal before the learned District Judge. That case is not *res judicata*, because the Munsif who tried that case was not competent to try the present suit. Nonetheless it remains a strong piece of evidence, in my opinion, against the present defendants. There was also the fact that Mt. Malan applied for the guardianship of Mt. Jiwani in 1883 as against Bhagwan Das's sister Mt. Narain Devi. The record of this case has been destroyed, but here again the fact that Mt. Malan wanted to be guardian of Mt. Jiwani is not without significance. She could hardly suppose that she had any legal right to be the guardian of Mt. Jiwani, if Mt. Jiwani was the pichhlag daughter of Mt. Atma Devi.

The defendants' case and their counsel's case in the present litigation are, as stated above, at variance with each other, and it seems to me that the variation is to be accounted for by the fact that the counsel realized in the first place that the original defence, in the suit brought by Mt. Jiwani against Mt. Malan had been that Mt. Atma Devi was only a dharel woman. Secondly, the counsel realized that it was not at all likely that a high-caste Hindu like Bhagwan Das could in those early days, 1870 or thereabout, have married a widow and a widow with a pichhlag daughter, hence the variation introduced between the case as stated by Guranditta himself and the case as stated by his

counsel. I have already shown that both these cases are improbable and unlikely in view of the circumstances and I would certainly prefer the oral evidence of the plaintiff, supported as it is by the circumstances of the case and the finding of the trial Court. I would, therefore, have no hesitation in rejecting the contention of learned counsel for the appellants.

The only other point that arises for decision in this appeal is whether the step-sister's son is an heir under Hindu law. If this is decided in favour of the plaintiffs it is conceded by the learned counsel for the appellants that his appeal must fail. It would then be unnecessary to go into the other points raised in the appeal, namely, as to whether the word "sister" in Act 2 of 1929 includes "half sister" and whether the words "sister's son" include "half sister's son." This last point, viz., "if sister includes half-sister" has been the subject of a Full Bench decision in the Allahabad High Court reported in 55 All 725,¹ and that case has been followed in 155 I C 94,² in Oudh. I would, however, as at present advised, prefer to express no opinion on this point.

On the question as to whether a sister's son is an heir, the learned counsel was only able to point to 11 M I A 386³ and 14 M I A 176⁴ at p. 196. The first case, 11 M I A 386,³ was considered in 10 W R 76,⁵ a Full Bench decision of the Calcutta High Court and has since been considered in 20 All 191,⁶ and in a ruling of the Chief Court in 11 P R 1918.⁷ The matter is discussed by Mayne in his Hindu Law at pp. 842 to 845 (Edn. 9). It is also mentioned by Mulla in his Principles of Hindu Law in S. 43, p. 40, 13 (a). It is sufficient to say that in view of these authorities and the recognition afforded to the leading case on the subject, 10 W R 76,⁵

1. Ram Adhar v. Mt. Sudesra, A I R 1933 All 491=145 I C 529=1933 A L J 680=55 All 725 (F B).

2. Mt. Kabootra v. Rampadarath, A I R 1935 Oudh 332=155 I C 94=1935 O W N 545.

3. Thakurain Saheba v. Mohun Lal, (1866) 11 M I A 386 (P C).

4. Gulab Koer v. Rao Karun, (1870-72) 14 M I A 176 (P C).

5. Asumia v. Raju Mia, (1868) 10 W R 76=1 Beng L R A C 34 (F B).

6. Raghunath Kuari v. Munnar Misr, (1898) 20 All 191=1898 A W N 13.

7. Bhag Mal v. Bhagwan Das, A I R 1918 Lah 326=41 I C 636=11 P R 1918.

by their Lordships of the Privy Council in 22 Cal 1339,⁸ 12 Cal 384⁹ and 59 Cal 576,¹⁰ as well as in 19 Mad 405,¹¹ it is beyond dispute now that a sister's son is an heir under the Hindu law.

The only question that remains is, therefore, whether a half-sister's son is similarly an heir. It was so held in 15 Mad 300,¹² their Lordships there pointing out that he too was a sapinda in the sense of offering a cake to the father of the propositus. In 11 Cal 69,¹³ under the Daya-bagha, step-sister's son was recognized as inheriting with a full sister's son. In 59 Cal 576¹⁰ their Lordships of the Privy Council remarked, approving of this case, that:

So far as their Lordships can see there is no reason why a different rule should be thought to prevail in the Benares school.

That being so, it seems to me that the matter is again concluded both by authority, and on the general principle of Hindu law which recognizes no difference between the full blood and the half-blood so far as either sapindas or bandhus are concerned, except in a competition inter se. I would, therefore, hold that in Hindu law a step-sister's son is an heir. The defendants are admittedly remoter heirs. It was conceded by the learned counsel for the appellants that Mt. Malan had only a limited estate. It follows, therefore, that plaintiffs 2 and 3 are entitled to control the alienation made by her. There was no argument addressed on the finding of the trial Court that Mt. Malan had no necessity to make these alienations. The learned counsel for the appellants barely contended that issue 13 also arose in the appeal. This issue concerns the rights of plaintiffs 4 and 5 to bring a suit. The trial Court had held that it was not open to the defendants to raise this objection which could only be raised by plaintiffs 1 to 3. The agreement between plaintiffs 1 to 3 and plaintiffs 4 and 5 was made after the death of Mt.

Malan when the succession had opened out. If, therefore, plaintiffs 2 and 3 were heirs of Mt. Malan, as held above, they had a right to dispose of the property in any way they chose and the defendants who are remoter heirs cannot possibly contest or object to their dealing with the property. There is, therefore, no force in this objection. The result is that the appeal fails and is dismissed with costs.

As regards the cross-objection by the plaintiffs, they concern only Rs. 1,200 found to be a valid necessity in the mortgage in favour of Buta Mal Khatri, father of defendants 9 to 12, for Rs. 1,200. The trial Court found that so far as this item was concerned it was duly paid to Milkhi Ram, plaintiff 4, in discharge of a bond due to Milkhi Ram executed a year and a half previously. This sum had been borrowed according to the bond from Milkhi Ram for the payment of land revenue. The reasoning of the trial Court appears to be that as Milkhi Ram is himself a plaintiff, the bona fides of the transaction are proved, the debt undoubtedly existed and had been originally incurred for a valid necessity, namely, the payment of land revenue, and that, therefore, Buta Mal, a third party, who had discharged this debt, could plead that this item, at any rate, was for valid necessity. The reasoning appears to me to be correct and the learned counsel for the respondents has not been able to show that it is incorrect. I would, therefore, dismiss the cross-objections with costs.

Tek Chand, J.—I agree.

B.D./R.K. *Appeal and cross-objections dismissed.*

A. I. R. 1937 Lahore 14

ADDISON AND ABDUL RASHID, JJ.

Mt. Wanti and another—Defendants—Appellants.

v.

Bindraban Dass and others—Plaintiffs—Respondents.

First Appeal No. 1164 of 1935, Decided on 4th May 1936, from decree of Sub-Judge, First Class, Sargodha, D/- 11th May 1935.

Custom (Punjab)—Succession from Guru to Chela established—Last Mahant not having any Chela but leaving will in favour of his wife and daughter—Suit for management of Gaddi after obtaining sanction under S. 92, Civil P. C.—Circumstances proving wakf-nature of property—Wife and daughter

8. Babu Lal v. Nankuram, (1895) 22 Cal 339.

9. Ram Chandra v. Vinayak, A I R 1914 P C 1=25 I C 290=41 I A 290=42 Cal 384 (P C).

10. Jotindra Nath Roy v. Nagendra Nath Roy, A I R 1931 P C 268=135 I C 637=58 I A 372=59 Cal 576 (P C).

11. Muthuswami Mudaliar v. Muthu Kumaraswami Mudaliar, (1896) 19 Mad 405=23 I A 83=7 Sar 45 (P O).

12. Subba Raya v. Kylasa, (1892) 15 Mad 300.

13. Bhola Nath Roy v. Rakhs Dala Mukerjee, (1885) 11 Cal 69.

must prove personal nature—Entry in Revenue papers—Value of.

The succession to the gaddi of a Thakaradwara was established to be from Guru to Chela. The last Mahant, however, was a married person. He died without leaving any chela but leaving behind him a will in favour of his wife and daughter. Certain persons brought a suit for the framing of a scheme for the management of the Thakaradwara after obtaining sanction under S. 92, Civil P. C.; the wife and daughter claiming that the property was the Mahant's personal property defended the suit as natural heirs to the Mahant:

Held: under these circumstances the institution must be held to be wakf. In order that heirs should succeed, they must establish that the property was not dedicated property but was the private property of the mahant. This could not be so because succession had always been from Guru to Chela. The mere fact that in the revenue papers the mahant was named as owner of the revenue paying land amounted to nothing: 40 Cal 297 (P C) and A I R 1934 Lah 449, Ref.

[P 15 C 2; P 16 C 1]

*J. L. Kapur and R. C. Manchanda—*for Appellants.

*Mehr Chand Mahajan and Ratan Lal Chawla—*for Respondents.

Addison, J.—The plaintiffs having obtained the sanction of the Collector under S. 92, Civil P. C., have brought the present suit for a declaration to the effect that the Bhagwan Daswala Tikana, together with houses and land attached thereto, was wakf and dharamarth and that Bawa Mathra Das, the mahant, had no right to make a will in respect of those properties in favour of his wife and daughter, the defendants. It was further prayed that there should be a scheme arranged for the management of the Tikana. The suit has been decreed and defendants have appealed. The thakardwara in question is situated in village Girod in Khushab Tahsil of Shahpur District. It was founded in 1853, the first mahant being Bhagwan Das, the second Lal Das and the third Mathra Das. There is a mandir attached to the thakardwara in which Thakarji has been installed and is worshipped by the Hindu public. The first two mahants were celibates, but Mathra Das married. His daughter by this marriage is Mt. Tulsi Bai, defendant 2. On the death of his first wife he married Mt. Wanti, defendant 1, and it is stated that he secured her as his wife by giving his daughter Tulsi Bai in marriage to the brother of Mt. Wanti. Mathra Das died on 1st October 1924 without appointing a chela. It is claimed, therefore, that the management reverted to the bairagi bhik and that Mathra Das had no power to

will away his property to his wife and daughter.

The defendants admitted the existence of the thakardwara but pleaded that it was the personal property of the Mahant Bhagwan Das. It was claimed that the property had never been dedicated and was not wakf. In this connection the statement of the Counsel of defendants recorded on 10th July 1934 is important. He admitted that the first mahant of the Tikana in question was Bhagwan Das, the second Lal Das, who was the chela of Bhagwan Das, and the third Mathra Das, who was the chela of Lal Das. He also admitted that the mahant was nominated by the preceding mahant. He then went on to claim that the two defendants were mahants though women. Shortly afterwards he resiled from this statement and made another statement to the effect that the defendants did not maintain that they were mahants. They claimed to succeed to the property as the personal heirs of the last mahant. He then made another contradiction by adding that there was no mahant now and that Mathra Das even was not a mahant. On the evidence nothing can be clearer than that the three persons named were mahants and that succession was from guru to chela. It is also clear that the public worshipped at this bairagi institution and subscribed to its funds. Two of the defendants' own witnesses, namely Jiwan Das and Tara Chand, have gone considerably against the defendants. The former stated that succession had been from guru to chela and that there were sewaks of the mahant of this gaddi. He further admitted that a new temple or mandir was under construction and that one Khem Chand had donated a sum of Rs. 300 for this work. The latter stated that a mahant among the bairagis can marry and that no one had objected to the marriage of Mathra Das. He admitted in cross-examination that this was a bairagi institution run by a mahant.

Bairagis are of two classes: celibates and married. The first two mahants of this institution were celibates, but Mathra Das, after he had succeeded, did marry. This would not necessarily cause him to be excluded from the institution. He appointed no chela, however, and defendants claim as his natural heirs. In order that they should succeed, they must establish that the property is

not dedicated property but the private property of the mahants. This is disproved by the plaintiffs' witnesses as well as certain witnesses of the defendants who have established that succession has always been from guru to chela and there are many authorities to the effect that in these circumstances the institution must be held to be wakf. The mere fact that in the revenue papers the mahant is named as owner of the revenue paying land does not amount to anything. See in this connection 40 Cal 297,¹ as well as A I R 1934 Lah 449.² The usual entry in the revenue papers is in the mahant's name. Even in the will under which the defendants claim, Mathra Das stated that the legatees would have no right to alienate any of the property. This shows that he knew that it was religious property. The mahant is manager and the succession is clearly from guru to chela. That being so, and as no chela has been appointed, the suit was properly brought for a scheme to be made. No attack was made before us against the scheme which is as follows:—Invitations are to be issued to the mahants of bairagi institutions in Rawalpindi, Peshawar, Campbellpur, Mianwali, Shahpur, Jhelum, Gujrat, Dera Ismail Khan, Bannu and Jhang Districts. A special invitation is to be issued to the President of the Katas Raj Mandal, the head of the bairagi bhek. These persons are directed to meet and elect a mahant who will be declared the mahant of the gaddi and will manage the institution. The suit has been properly decided and we dismiss the appeal with costs.

B.D./R.K.

Appeal dismissed.

1. Court of Wards v. Ilahi Bakhsh, (1913) 40 Cal 297=17 I C 744=40 I A 18=27 P R 1913 (PC).
2. Raghunath Das v. Gajpat Rai, A I R 1934 Lah 449=155 I C 554=35 P L R 443.

A. I. R. 1937 Lahore 16

JAI LAL AND ABDUL RASHID, JJ.

Kalandar Shah — Defendant—Appellant.

v.

Devi Das and another — Plaintiffs—Respondents.

First Appeal No. 2172 of 1935, Decided on 19th June 1936, from decree of Senior Sub-Judge, Multan, D/- 10th August 1935.

(a) Punjab Regulation of Accounts Act (I of 1930), S. 5, Proviso—Mere part payment of debt does not amount to fresh transaction.

The mere part payment of a debt does not amount to a fresh transaction within the meaning of proviso to S. 5. [P 17 O 1]

(b) Usurious Loans Act (1918), S. 3 (1) (a)—Debtor executing bond to save property from creditors—No security given for loan—Rate of interest at Rs. 1-4 p. c. p. m. is not excessive.

Where there is no security for the loan and the intention of the debtor appears to be to save for himself certain property inherited by him by executing a bond in favour of his creditors, a rate of interest at Rs. 1-4 p. c. p. m. is not excessive but is just and reasonable, being within the maximum limits provided for the province of the Punjab for purposes of the Usurious Loans Act. [P 17 O 2]

(c) Decree — Instalments—Debtor making defaults in payment of instalments as provided for in bond is not entitled to instalment decree.

A debtor making defaults in payment of instalments as provided by the bond executed by him is not entitled to a provision for payment of the decretal amount by instalments, more so when there is no evidence to show that he is unable to pay the amount. [P 17 C 2]

Shuja-ud-din and *M. M. Aslam Khan* —for Appellant.

Nand Lal Salooja and *S. L. Puri*—for Respondents.

Jai Lal, J.—The respondents *Devi Das* and *Fateh Chand* instituted a suit against the appellant *Kalandar Shah* for recovery of Rs. 14,154-10-9 claimed to be due on two bonds executed by the appellant on 26th February 1930 for Rs. 9,753-10-0 and Rs. 4,000 respectively. The amount payable under these bonds was to carry interest at the rate of Rs. 1-4 per cent per mensem. The interest was to be calculated from the date on which the default be made in the payment of instalments which were stipulated to be paid in the bonds. Some payments were admitted to have been made by the respondents. They amounted to Rs. 3,685. The suit was for the balance which was claimed by the plaintiffs to be both principal and interest, Rs. 14,154-10-9. Both these bonds were registered, but the appellant denied receipt of consideration and further pleaded that interest was excessive. He also claimed the protection of the Usurious Loans Act and pleaded that the plaintiff was not entitled to costs because he had not complied with the provisions of the Punjab Regulation of Accounts Act. The Senior Subordinate Judge has found against the appellant on all these points and has decreed the suit in full and has further directed that the decretal amount shall bear interest at 6 per cent per mensem from the date of the decree till payment. He has refused to grant instalments to the

appellant on the ground that there was no proof that the defendant was unable to pay the amount.

The consideration for the two bonds was previous debts due to the respondents from Jafar Hussain Shah, deceased brother of the appellant, and Rs. 753-10-0 due from the appellant personally. The amount due from Jafar Hussain Shah was evidenced by two bonds executed by him on 9th March 1924 for Rs. 3,000 and Rs. 5,000 respectively. The burden of proving want of consideration was on the appellant and the Court has rightly held that he has given no satisfactory evidence in support of his plea. On the other hand, the respondents have produced the previous bonds and their account books and have proved the execution of these bonds by good and reliable evidence. The main plea of the appellant's counsel before us, however, was that the lower Court should have applied the provisions of the Punjab Regulation of Accounts Act to this case. That Act came into force on 31st July 1931 and, as I have already stated, the bonds in suit were executed on 26th February 1930. The Act has no retrospective effect as it is clearly provided in S. 5 that the provisions of the Act shall not apply to any loan advanced before the commencement of this Act. The learned counsel, however, relies on the proviso to this section which is that if any fresh transaction relating to a loan advanced before the commencement of this Act is made after the commencement of this Act such transaction shall be subject to the provisions of this Act. It is contended that, as after the commencement of the Act some payments were made by the appellant to the respondents, therefore there had been some transaction relating to the loan after the commencement of the Act and to that extent the Act is applicable. In my opinion the mere part payment of a debt does not amount to a fresh transaction within the meaning of the proviso to S. 5, and this is clear from the limitation imposed upon the application of the Act to the transaction which has taken place after the commencement of the Act. If the mere payment were held to be such a transaction, then I cannot conceive how the provisions of the Act can be made to apply to a payment alone. In my opinion, therefore, the Punjab Regulation of Accounts Act has no application to the present case as no transaction took place between the parties relating to the

loan in question after the commencement of the Act.

The other question raised by the learned counsel is that the rate of interest being excessive the lower Court should have reopened the accounts under the provisions of the Usurious Loans Act. The trial Judge, however, has held that the rate of interest is not excessive; on the other hand he is of opinion that it is 'fair, just and reasonable.' With this opinion I agree. Having regard to the fact that there was no security for the loan and the appellant had inherited the property of his deceased brother which he wanted to save for himself by executing the bonds in favour of his creditors, the rate of interest is reasonable and within the maximum limit now provided for this Province for the purposes of the Usurious Loans Act. This limit has been provided in the case of unsecured loan by the Punjab Relief of Indebtedness Act and is fixed at 18 $\frac{3}{4}$ per cent per annum simple. The only other question raised on behalf of the appellant is that the appellant should have been allowed to pay the amount of the decree by instalments, but he produced only one witness who could give no satisfactory evidence as to the financial condition of the appellant and in any case this is not a case in which the appellant is entitled to a provision for payment of the decretal amount by instalments because he had already been given that opportunity in the bond and has made default in the payment of the instalments. Taking into account all the circumstances of the case, in my opinion, the trial Court exercised a fair discretion in granting a decree to the respondents without any condition as to instalments. I would dismiss this appeal with costs.

Abdul Rashid, J.—I agree.

R.M./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 17

MONROE AND RANGI LAL, JJ.

Sardara—Plaintiff—Appellant.

v.

Akbar and others—Defendants—Respondents.

Second Appeal No. 146 of 1933, Decided on 14th January 1935, from Addl. Dist. Judge, Shahpur, D/- 24th October 1932.

Evidence Act (1872), S. 90—Rule of presumption in S. 90 must be applied with great caution.

The rule of presumption laid down in S. 90 must be applied with great caution and ancient documents which are unsupported by any evidence

that might free them from the suspicion of being fabricated, should not be acted upon; and if the lower Courts have exercised their discretion after considering all the circumstances, the High Court will not lightly interfere with it. [P 18 C 2]

M. L. Puri and R. C. Manchanda—for Appellant.

M. C. Sud—for Respondents.

Rangi Lal, J.—The plaintiff-appellant sued on the basis of a will purporting to be executed by one Baru on 1st February 1898, that is, more than 30 years before the institution of the suit. It was said to be written by one Sher Ali and attested by two witnesses, namely, Ghazi Khan and Mohammad Khan. Baru, Sher Ali and Ghazi Khan are dead but there is nothing to show whether Mohammad Khan is dead or alive. Baru neither signed nor thumb-marked the will. There is a mark below his name and apparently it was made by the scribe. It may be true that Baru did not sign the will because he was illiterate and did not thumb-mark it because thumb-marks had not then come into vogue. Still the fact remains that the most important evidence which could allay the suspicion of the Court is lacking in this case. The witnesses who profess to identify the signatures of Sher Ali and Ghazi Khan have been disbelieved. The oral evidence produced regarding the execution of the will has also been disbelieved. The stamp paper on which the will is written bears an endorsement showing that it was sold to Baru by Piara Ram, stamp vendor, on 28th January 1898. Piara Ram appeared as a witness for the plaintiff and swore that the endorsement was in his handwriting and was correct. His testimony has been disbelieved because his register which could have afforded strong corroboration of it was not forthcoming. Even if his testimony be believed, it would not go to show that the will was executed on 1st February 1898. It has also been found that the will was not a natural one under the circumstances of the case. There is nothing to show where the will remained and why it was not made known during the long period of more than 30 years. For these reasons the presumption under S. 90, Evidence Act, regarding the genuineness of the will has not been drawn by the Courts below and the suit has been dismissed. The plaintiff has filed a second appeal to this Court.

It is clear that it is not open to us to interfere lightly with the exercise of the

discretion allowed by law to the Courts below and I am by no means satisfied that the discretion was improperly exercised. It has been repeatedly laid down that the rule of presumption must be applied with great caution and ancient documents which are unsupported by any evidence that might free them from the suspicion of being fabricated should not be acted upon. The Courts below have dealt with the case in accordance with this principle and I would dismiss the appeal with costs.

Monroe, J.—I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 18

SKEMP, J.

Mt. Durga Devi — Decree-holder — Appellant.

v.

Mathra Das and others — Judgment-debtors—Respondents.

Misc. First Appeal No. 942 of 1935, Decided on 9th January 1936, from order of Senior Sub-Judge, Ferozepore, D/- 5th March 1935.

Execution — Compromise decree — Managership of Math—D with M and others appointed joint managers by compromise decree — Another suit by D for removal of M and others from managership — Defendants removed from managership — New decree simply substituted D for D, M and others — Old decree remains executable.

In a certain suit for the management of certain Math property a compromise decree was passed appointing D, M and others to the suit as managers. Later on D brought another suit for the removal of M and others from the trusteeship. This suit was also decreed and D alone was substituted as the manager. In execution of the first decree:

Held: that the new decree merely substituted D for D, M and others as managers and hence the old decree was still executable. [P 19 C 1, 2]

Ram Lal Anand 1—for Appellant.

Shamair Chand and Qabul Chand—for Respondents.

Judgment.—On 11th May 1923 Mahant Harnam Das, Mahant of the Dera Thakardwara Moga Jit Singh, made a will leaving moveable and immoveable property to be disposed of by 12 executors. Mt. Durga Devi, the wife, and Mt. Vidyawati, the daughter, of the deceased Mahant, brought a suit for a declaration that the will was null and void and did not affect the plaintiff's right. This suit was disposed of by a compromise in the High Court and a de-

decree dated 25th May 1932 in terms of the compromise as follows:

1. The will of Mahant Harnam Das, dated 8th May 1923, be declared ineffective and the property, both moveable and immoveable, left by the late Mahant Harnam Das, be declared to be the property of Thakardwara Moga Jit Singh.

2. The net amount realized and the decrees obtained by the executors and the documents or other moveable property in the possession of the executors or any one of them shall be handed over to the following three persons to be held by them on behalf of Dera Thakardwara Moga Jit Singh, pending any scheme for the future management of the institution that may be framed by a competent Court :—

1. Mt. Durga Devi, Plaintiff.
2. Daulat Ram
3. Raghunath Das

} Defendants.

These persons shall have power to bring suits and to recover debts and execute decrees in respect of the property left by the Mahant Harnam Das. The respondents-executors will render an account to the three persons named above of the assets of the deceased which have come into their hands.

3. The moneys made over by the defendants to the above-named three persons shall be deposited in the Punjab National Bank, Ltd., in their joint names and the interest of the deposit shall be utilized for the maintenance of the plaintiff and the improvements and upkeep of the Dera.

Subsequently Mt. Durga Devi and another person brought a suit under S. 92, Civil P. C., against Daulat Ram and Raghunath Das, and on 3rd April 1934 obtained a decree

removing the defendants from the trusteeship of the Thakardwara known as Thakardwara Moga Jit Singh and appointing plaintiff 1, Mt. Durga Devi, as the sole mutawalli or manager thereof. This scheme however is not final and if the Thakardwara suffered in the plaintiff's hands in any way the public will have a right to claim her removal and to propose another better scheme. The plaintiff Mt. Durga Devi shall fulfil all the conditions laid down in the decree of the High Court, dated 25th May 1932, and shall keep an account of the income and expenditure relating to the Thakardwara. The moneys realized by her will be deposited in the Punjab National Bank, Ltd.

It will be noticed that the practical effect of this decree is to substitute Mt. Durga Devi for the three managers, Mt. Durga Devi, Daulat Ram and Raghunath Das named in the High Court decree. On 20th July 1932, Mt. Durga Devi applied in the trial Court for execution of the High Court decree and the executors handed over some documents to her and filed some accounts. Her application was dismissed, but on appeal a learned Judge of this Court remanded the case for reconsideration. On 8th April 1933, Mt. Durga Devi put in another application for execution of that decree. The executors took objections to the execution of the decree on

various grounds and the learned Subordinate Judge framed four issues. He decided three of the issues in favour of Mt. Durga Devi but found the fourth in favour of the executors and dismissed the application. The ground on which he dismissed it was that because Mt. Durga Devi had obtained a fresh decree, that decree was substituted for the High Court decree which could not be executed. Mt. Durga Devi has appealed through Mr. Ram Lal Anand.

I think the appeal must be accepted because although the principle relied upon by the learned Subordinate Judge is in general a sound principle, in the present case there is rather a substitution of Mt. Durga Devi for the three managers named in the High Court decree than a substitution of the whole decree. I therefore think that Mt. Durga Devi is still entitled to execute the original decree. Mr. Shamair Chand who represents the executors argued that even conceding that this is correct, nevertheless Mt. Durga Devi's applications for execution were made before the date of the present decree and that the High Court decree could be executed only by the three managers jointly. This is one of the points taken before the learned Subordinate Judge and he rightly held that it was *res judicata* because the objectors had handed over documents and accounts to Mt. Durga Devi without raising any objection. With this conclusion I agree. I therefore accept the appeal and direct that execution can proceed on the applications made by Mt. Durga Devi on 27th July 1932 and 8th April 1933. This order is not intended to prevent the executors from taking defences on the merits. The learned Subordinate Judge directed the parties to bear their own costs and I think that a similar order will be proper in this appeal.

B.D./R.K.

Appeal allowed.

A. I. R. 1937 Lahore 19

TEK CHAND AND DALIP SINGH, JJ.

Chanda Singh and others—Plaintiffs—Appellants.

v.

Prithi Singh and others—Defendants—Respondents.

First Appeal No. 707 of 1934, Decided on 16th March 1936, from decree of Senior Sub-Judge, Ferozepore, D/- 1st March 1934.

Civil P. C. (1908), S. 11 — *Cis-Sutlej and Trans-Sutlej territories — Settlement Of-*

ficer during period between 1849 to 1865 only judicial authority competent to decide question of title relating to agricultural land—His decision of 1853 on question of title is *res judicata*.

In Cis-Sutlej and Trans-Sutlej territories, during the period between 1849 and 1865, Settlement Officer was the only judicial authority competent to decide the question of title relating to agricultural land. So the Settlement Officer's decision of the year 1853 on a question of title operates as *res judicata* and that question cannot be re-agitated in Civil Courts. [P 21 C 2]

Badri Das and *Achhru Ram*—for Appellants.

Nawal Kishore and *Kharak Singh*—for Respondents.

Tek Chand, J.—This appeal arises out of a suit instituted by the plaintiffs-appellants for a declaration that they and defendants 12 to 47 are the owners of the land in dispute and that defendants 1 to 11 are merely jagirdars but have been wrongly described as proprietors in the revenue papers. The suit has been dismissed by the Court below. The plaintiffs appeal. In the revenue papers from the first settlement of the Ferozepore District to the last jamabandi, the contesting defendants 1 to 11 have been shown as owners, and the plaintiffs and the pro forma defendants as occupancy tenants under them. The plaintiffs contend that these entries are erroneous. The onus, therefore, lies heavily on them to prove the contrary. It appears that as early as 27th December 1851 the predecessors-in-interest of the plaintiffs brought a suit in the Court of the Settlement Officer of Ferozepore claiming that they were owners of the land in dispute. In that suit a compromise was filed signed by the defendants and a few of the plaintiffs, in which it was admitted that the defendants were the owners and that the plaintiffs were the occupancy tenants, not liable to pay malikana, and possessing rights to plant trees and dig wells on the land, but having no power to sell or mortgage the tenancy. The Settlement Officer accepted the compromise and ordered that entries in the revenue-papers be made in accordance with its terms.

From that order, some of the plaintiffs appealed to the Commissioner, who not being satisfied that the compromise represented a genuine agreement between all the plaintiffs and the defendants, remanded the case to the Settlement Officer for enquiry on merits. Accordingly the Settlement Officer held an elaborate investiga-

tion into the rights of the parties and passed an order on 28th December 1853, holding that the ancestors of the present defendants were the original founders of the village and that during the Sikh rule they had granted the land in occupancy tenancy to the ancestors of the plaintiffs. Following this order, the defendants were entered in the revenue papers as proprietors and the plaintiffs as occupancy tenants under them, not liable to pay any malikana but liable to pay the Government revenue, cesses and malba. No appeal against this order was made by the plaintiffs to any higher authorities. About 14 years later, the predecessors of the present defendants brought a suit against the predecessors of the plaintiffs for recovery of Rs. 26 as malikana. The latter denied that they were occupancy tenants and also pleaded that they were not liable to pay malikana. That case was eventually decided by a Division Bench of the Chief Court on 13th February 1868 (Civil Appeal No. 954 of 1867), who held that the question that the relationship between the parties was that of landlord and occupancy tenant and also the question that the latter were not liable to pay malikana were *res judicata* by reason of the decision of the Settlement Officer dated 28th December 1853 above referred to.

In 1889, in the course of the revised settlement of the Ferozepore district, the predecessors of the present defendants again raised the question of the liability of the plaintiffs to pay malikana. The plaintiffs resisted the claim on the strength of the decision of 28th December 1853. The Settlement Officer, Mr. Francis, rejected the plea holding that the order of 1853, to the effect that no malikana was payable, held good during the currency of the first regular settlement only and was not intended to be a perpetual bar to levy or enhancement of malikana by the defendants from the plaintiffs. He accordingly passed a decree declaring that the present plaintiffs were occupancy tenants under S. 5 (a), Tenancy Act and that they were liable to pay the present defendants malikana at the rate of two annas per rupee of the land revenue assessed, with effect from kharif 1888. This order was duly given effect to in the revenue papers, and it appears from certain proceedings before the Tahsildar held on 20th January 1890 that the rent (malikana) for the previous harvest was actually paid at the rate fixed. The parties

are not agreed as to whether the rent was paid between 1891 and 1929. The plaintiffs allege that they never paid it, while the defendants have produced their account books showing such payments during this period at regular intervals. It appears, however, that in 1929 and 1930 the defendants brought several suits against the plaintiffs in Revenue Courts for recovery of the rent at Re. 0-2-0 per cent of the jama. In defence the plaintiffs again denied that they were tenants under the defendants, but their pleas were overruled and the suits decreed. In order to have the question of title determined, the plaintiffs have instituted the present suit in the civil Court for a declaration that they are the owners of the land and not occupancy tenants as shown in the revenue papers.

The lower Court has held the question of title to be *res judicata* by reason of the decision of the Settlement Officer dated 28th December 1853. In the memorandum of appeal presented by the plaintiffs in this Court, it was urged that the decision of the Settlement Officer on a question of title could not be *res judicata*, as civil Courts alone have jurisdiction to determine such question. It appears, however, that in 1851-53 the Settlement Officers in this part of the Punjab had exclusive jurisdiction to decide questions of title relating to agricultural land. It is no doubt true, that under (Bengal) Regulation 7 of 1822, a defeated claimant before a Settlement Officer was given the right to contest his decision on a question of title in a civil Court, and this Regulation was brought in force in Ferozepore District after its annexation about 1845. But at the request of the Board of Administration of the Punjab, conveyed in their letter No. 94 dated 14th August 1849, these provisions of the Regulation were modified by the Government of India so far as the Cis-Sutlej and Trans-Sutlej territories of the annexed districts were concerned, and it was ordered that the decisions given by the Settlement Officers on the merits of all disputes relating to land be made final, subject to the usual revenue appeals. These orders will be found in letter No. 1602 dated 1st September 1849 from the Secretary to the Government of India to the Board of Administration for the affairs of the Punjab: see Berkeley's "Non-Regulation Law of the Punjab," p. 41 (1871 Edn.). It

appears that these orders remained in force till 1865, when civil Courts were given exclusive jurisdiction to decide such questions.

It is thus clear that in 1851-53 the Settlement Officer was the only judicial authority competent to decide questions of title relating to agricultural land. In view of this, Mr. Badri Das conceded before us that the decision of 1853 is *res judicata*, and the question of title cannot be re-agitated in civil Courts now. This concludes the plaintiffs' appeal. It may, however, be remarked that even if for any reason the Settlement Officer's decision above-mentioned were held not to bar the present suit, the plaintiffs, on whom the onus admittedly lay to prove that the revenue entries which have been repeated in the various settlements and jamabandis for more than 80 years are incorrect, have failed to produce any evidence to prove their claim. The appeal fails and is dismissed with costs.

D.S./R.K.

Appeal dismissed.

* A. I. R. 1937 Lahore 21

ADDISON AND ABDUL RASHID, JJ.

Allahabad Bank, Ltd.—Decree-holder—Appellant.

v.

Rattan Lal and another—Judgment-debtors—Respondents.

Letters Patent Appeal No. 20 of 1936, Decided on 26th May 1936, from judgment of Jai Lal, J., D/- 6th January 1936.

(a) Stamp Act (1899), S. 36—Document containing two different powers of attorney bearing single stamp admitted—Objection cannot be taken in appeal.

Where the document containing two different powers of attorney and executed on a single stamp was admitted and it was objected in appeal that there should have been two stamps on the document:

Held: that the objection could not be taken at that stage, as the document had already been admitted in evidence. [P 22 C 2]

* (b) Civil P. C. (1908), S. 11—Execution proceedings—Prior execution case—Judge dismissing objection on ground of vagueness but not raising question whether A had power to represent B personally—Application for review dismissed as incompetent on ground that A had no power to represent B personally—Question held, not finally decided—Decision could not operate as *res judicata* in subsequent execution case.

Where in a prior execution case of the same decree, the Judge dismissed the objection by A on the ground that it was vague but did not raise the question whether A was authorized to appear for

B in his personal capacity and when *A* subsequently made an application to have his order reviewed, the application was dismissed on the ground that it was incompetent, *A* having no power to represent *B* personally:

Held: that this decision could not operate as res judicata in subsequent execution case. It was only the general principles of res judicata that applied in execution proceedings and as the order rejecting an application for review was under O. 47, R. 7 (1), Civil P. C., it was not appealable. Hence the question whether *A* was authorized to appear for *B* in his personal capacity could not be said to have been finally decided. [P 22 C 1, 2]

Partap Singh—for Appellant.

J. L. Kapur and Ved Kumar Ranade—for Respondents.

Addison, J.—The Allahabad Bank obtained a decree against Hans Raj and in execution thereof attached and sold certain land belonging to the judgment-debtor, the land being purchased by the Bank, decree-holder. Objections were raised on behalf of Hans Raj that there was material irregularity and substantial loss to the judgment-debtor and that the sale should, therefore, be set aside. These objections were filed by one Moti Ram, alleging himself to be an attorney of Hans Raj, the power of attorney being dated 10th November 1924. The Subordinate Judge, First Class, held that the power of attorney did not confer any power on Moti Ram to represent Hans Raj in litigation concerning his personal property or in any proceedings brought against him personally but that it authorized him only to act on behalf of the joint family consisting of Hans Raj and his two younger brothers and consequently dismissed the objections. Against this decision there was an appeal to this Court and it was heard by a single Judge.

Before him it was contended that the executing Court had misinterpreted the power of attorney and that it did authorize Moti Ram to appear for Hans Raj personally. In this respect the single Judge disagreed with the finding of the executing Court. It was, however, contended before him on behalf of the respondent that the question was barred by res judicata by virtue of a previous decision by the same Judge on the same question in another execution proceeding. The learned single Judge repelled this contention and on the merits accepted the appeal, remanding the case to the executing Court to be adjudicated upon on the merits. Against this decision this Letters Patent appeal has been preferred by the Allahabad Bank. On the merits the question is very

simple. We have been through the document. In the first part of the document Hans Raj as Manager of the joint family authorizes Moti Ram to act on behalf of the joint family, but in the second half he clearly also authorizes Moti Ram to act for him personally in all matters with the exception that he had no power to sell his property. When this was pointed out to the counsel for the appellant, he contended that on this finding there should have been two stamps on the document as it practically amounts to two different powers of attorney. This may be correct but under S. 36, Stamp Act, the objection cannot be taken at this stage, the document having been admitted. On the merits, therefore, we are in agreement with the decision of the learned single Judge that Moti Ram had power under the power of attorney to put in the objections on behalf of Hans Raj in his personal capacity.

It is generally speaking correct to say that a prior decision in an execution case will operate as res judicata in a subsequent case, but here there was no decision in a prior execution case. What happened was that Moti Ram on behalf of Hans Raj put in a similar objection about another sale in execution of the same decree. This objection was dismissed on 3rd July 1934 on the ground that it was vague and indefinite. Moti Ram then put in a subsequent application on behalf of Hans Raj to have this order reviewed. The decree-holder took the objection that the application for review did not lie as Moti Ram had no power under the deed to represent Hans Raj in his personal capacity. On 10th October 1934 the executing Court dismissed the review application on the ground that it was incompetent, Moti Ram having no power to represent Hans Raj personally. Under O. 47, R. 7 (1), an order of a Court rejecting an application for review shall not be appealable. It, therefore, in our judgment, cannot be said that the question was finally decided. It is only the general principles of res judicata that apply in execution proceedings and, if it had been decided in the original application that Moti Ram had no power to present it, it may have been the case that the matter would have been res judicata; for an appeal would have been competent and the result of that appeal would have been binding on the parties; and, if there was no appeal, the original decision would have been binding; but, as pointed out,

the original decision was that the application was vague and was, therefore, liable to be dismissed. That order was appealable but that did not raise the question now arising. As the general principles of res judicata only apply in execution proceedings we are unable to hold that there was any final decision of the question by reason of the rejection of the review petition on the ground that the review petition was incompetent by reason of the fact that Moti Ram had no power to represent Hans Raj in his personal capacity. For the reasons given we dismiss this appeal but parties will bear their own costs in it.

D.S./R.K.

*Appeal dismissed.***A. I. R. 1937 Lahore 23**

COLDSTREAM, J.

Brahm Nath—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 234 of 1936, Decided on 23rd July 1936, from order of Sess. Judge, Lyallpur.

(a) Motor Vehicles Act (1914), S. 16 and Punjab Motor Vehicle Rules, R. 49—Superintendent of Police fixing only week for inspection but not date—Inspector fixing particular date within that week—No delegation of Superintendent's power to Inspector—Lorry driver failing to produce his lorry on that date but producing it on subsequent date during that week—Lorry driver held could not be convicted.

In cases where peculiar powers are exercised by officials against private persons technicalities are of importance and their observance is to be insisted upon. [P 25 C 1]

The Superintendent of Police fixed a week for the inspection of the lorries. The Inspector however fixed a particular date within that week for the inspection. The lorry driver failed to produce his lorry on that particular date but produced it on a subsequent date within the week fixed by the Superintendent of Police :

Held : that under R. 49, only Superintendent of Police was authorised to fix dates. The particular date on which the driver failed to produce his lorry was not fixed by the Superintendent and there was no proof of delegation of this power of the Superintendent to the Inspector. The driver, having produced his lorry during the week fixed by the Superintendent, could not be convicted. [P 25 P 1]

(b) Motor Vehicle Act (1914), S. 16 and Punjab Motor Vehicles Rules, R. 49—Rule does not directly place on lorry owner duty of producing lorry for inspection—Lorry owner not producing it cannot be charged with offence.

It is desirable that when a person is to be punished for a breach of duty that duty must be directly stated in the rule. R. 49 does not directly

place on the lorry owner the duty of producing the lorry for inspection and so no offence can be charged against him for not producing the lorry for inspection. [P 24 C 2; P 25 C 1]

Asa Ram—for Petitioner.*Ram Lal*—for the Crown.

Facts.—The facts of this case are as follows : Brahm Dass was convicted under S. 16, Motor Vehicles Act, for violation of Rule 49 of the Motor Vehicle Rules, namely, for his violation to produce his lorry No. P. 6617-B for mechanical inspection before Mr. Ryan, Inspector, Motor Vehicles, at Lyallpur, on 24th September 1935. The prosecution story is that Mr. Ryan, P. W. 1, noted down in the permit the date 24th September 1935 as the date of the next inspection. He made a similar note on the history sheet which he kept with himself. The accused admitted his knowledge of the said date but took the plea that his lorry was under repairs on the said date and that that date was not fixed by the Superintendent of Police, as required by the rules and that his failure to produce his lorry was not an offence under the law. The accused, on conviction by Rai Sahib Lala Nathu Ram, M. B. E., exercising the powers of a Magistrate of 1st Class in the Lyallpur District was sentenced, by order dated 30th September 1935, under S. 16, Motor Vehicles Act, to Rs. 50 fine or in default to one month's simple imprisonment.

Grounds. — The learned Magistrate found that the accused carried goods in the lorry on 21st September from Lyallpur to Ludhiana and that he could not have expected the lorry back before the 23rd, that if he had any sense of duty he should have got the repairs made earlier. Of the second plea there is no indication on the file and I can assume that it was not taken there. It can however be taken in appeal or revision because it raises merely a point of law. The learned counsel for the petitioner has urged that Mr. Ryan was not competent to fix the date and that the date should have been fixed by the Superintendent of Police. This is true, for R. 49 runs as follows :

Every light motor bus shall be inspected before registration and subsequently once every quarter at such time and at such place as the Superintendent of Police may direct, and the result of such inspection shall be recorded on the permit ; provided that, in the case of vehicles now at the time of original registration, no further inspection shall be necessary unless the Superintendent of Police, for reasons to be recorded, otherwise

directs, until the end of the second quarter after the date of such registration.

The Superintendent of Police fixed the dates extending over a week, and in terms of R. 49 it was open to the petitioner to produce his lorry for inspection on any of those dates. It is admitted before me by Mr. Ryan that the lorry was produced on the 25th and the permit shows that ultimately it was passed on 8th October 1935, at Lahore by Mr. Ryan himself. Thus the case for the prosecution would in strict law fail on the ground that the date 24th September 1935 was not fixed by the Superintendent of Police. The learned Public Prosecutor has however urged that the date 24th September fell within the week fixed by the Superintendent of Police and that Mr. Ryan should be taken to have the delegated authority for choosing a particular date out of the week fixed. For this delegation there is no warrant in law. Under these circumstances the conviction would be bad in law. It is then urged that no place was fixed by the Superintendent of Police except Lyallpur and that the word 'Lyallpur' would not give the lorry drivers notice of the particular place where the Inspector or the Superintendent of Police wanted the lorries to be exhibited. This objection can be overruled with the simple remark that the accused the very next day presented his lorry at Lyallpur on the 25th and that he knew that place in Lyallpur was meant for the inspection. It is not necessary to be too technical in the matter. I am told that the inspection is always held in the police lines and that this lorry driver had been presenting his lorry there on previous occasions. The present objection is therefore simply a piece of hair-splitting. A very difficult question of law is then raised that even if the date or place were to be assumed as properly fixed, R. 49 does not cast upon the lorry driver the duty of presenting his lorry for inspection, that all that is required by R. 49 is that the lorry shall be inspected every quarter. This is no doubt true. In this connexion it will be interesting to mention that in Bombay, Rules Nos. 5 and 9 run as follows:

5. A motor vehicle shall be liable to examination by the District Superintendent of Police or by a Sub-divisional Gazetted Police Officer specially authorized in that behalf by him at such times as the District Superintendent of Police or the Sub-divisional Gazetted Police Officer, where such officer is authorized as aforesaid, may prescribe and the owner's permit may be suspended or cancelled by him if the vehicle does not comply

with the requirements of these rules or with those of the Bombay Vehicle Rules of 1915, as amended up to 1st April 1925, and subsequently thereto, or is not passed by the District Superintendent of Police or the Sub-divisional Gazetted Police Officer as fit to ply for hire, or is not produced for examination at the time and place prescribed as aforesaid.

9. Every motor vehicle intended to be let or plied for hire must be taken to the place appointed by the District Superintendent of Police or the Sub-divisional Gazetted Police Officer authorized in that behalf by the District Superintendent of Police, for inspection. The owner or person in charge of such motor vehicle shall at the same time produce a certificate of registration of the motor vehicle under the Bombay Motor Vehicle Rules, 1915, as amended up to 1st April 1925, and subsequently thereto.

Similarly the Madras rules also take the precaution of directing that the owner of vehicles shall arrange for the examination of the vehicle every six months:

4. The owner of the vehicle, if it be a motor bus, shall arrange for its examination once in every six months by a person approved by the District Magistrate or the Commissioner of Police as to its structural strength, conditions and running order generally, and his certificates as to its fitness for use on the road should be submitted by the owner to the District Magistrate or the Commissioner of Police as the case may be. The vehicle shall not be let or plied for hire for a period exceeding six months without its being examined and certified in the manner specified above.

5. The vehicles shall at all times be open to inspection by (1) any Magistrate of or above the second class or (2) any Police Officer not below the rank of Inspector of Police. If any such officer considers the vehicle to be unfit for use on the road he shall record the reasons in writing and shall communicate them to the owner as well as to the District Magistrate or the Commissioner of Police as the case may be. The vehicle shall not then be let or ply for hire without the special permission of the District Magistrate or the Commissioner of Police as the case may be, until a certificate as to its fitness has been produced from a person approved by the authority.

The learned Public Prosecutor however urges that although the rule does not directly state that the lorry driver shall produce the lorry for inspection, but it indirectly fastens on him the duty of producing it for inspection at the time and place directed by the Superintendent of Police. It is certainly a difficult point of law and I have mentioned it with the object of drawing the attention of the authorities to the desirability of laying down the duty of producing the lorry on the lorry driver in unequivocal terms. It is desirable that when a person is to be punished for a breach of duty that duty must be directly stated in the rule as has been done in Bombay and Madras. Rule 49 does not directly place on the lorry owner the duty of producing the lorry for inspection.

tion and so no offence can be charged against him for not producing the lorry. For reasons given above, I forward the case to the High Court of Judicature at Lahore with the recommendation that the conviction and the sentence may be set aside. The fine has not been yet paid.

Order.—The facts in this case are given in full by the Sessions Judge in his referring order. It is argued for the Crown that a valid delegation by the Superintendent of Police to his subordinate of his power to fix actual dates for inspection must be assumed. The Superintendent had fixed a week for the inspection but the particular dates, though within that week, had been fixed by an Inspector. I am unable to see force in this objection. There is no proof of any power to delegate, let alone of any valid delegation. The only requisition made by the Superintendent of Police was complied with, the car having been duly produced on one of the days within the week fixed. The petition is no doubt based on a purely technical ground. But in cases where peculiar powers are exercised by officials against private persons, technicalities are of importance and their observance is to be insisted upon. For the reasons given by the Sessions Judge I accept the recommendation and set aside the conviction of the petitioner.

D.S./R.K. *Conviction set aside.*

A. I. R. 1937 Lahore 25

ADDISON AND ABDUL RASHID, JJ.

Nathu Ram—Plaintiff—Appellant.

v.

Mula and others—Defendants—Respondents.

Second Appeal No. 1778 of 1935, Decided on 17th March 1936, from decree of Dist. Judge, Gurdaspur, D/- 24th June 1935.

Specific Relief Act (1877), S. 42—Suit in respect of rights arising out of contract affecting only pecuniary relationship—S. 42 held not applicable.

A suit for a declaration that the defendant would be liable to contribute to the plaintiff all moneys which the plaintiff as the defendant's surety would be liable to pay does not come under S. 42 as it affects only the pecuniary relationship between the parties to the contract: *A I R 1915 Mad 584* and *A I R 1930 Bom 331, Rel. on; A I R 1922 Pat 432, Applied.* [P 25 C 2]

Mehr Chand Mahajan—for Appellant.
Mela Ram—for Respondents.

Abdul Rashid, J.—*Nathu Ram*, plaintiff, *Zorawar*, defendant 1, and *Mula*, defendant

2, executed two entries in the bahi of defendants 3 to 6, on 17th June 1929 and 29th June 1929 respectively. On the basis of these entries defendants 3 to 6 instituted a suit against the plaintiff and defendants 1 and 2. A decree was passed in favour of defendants 3 to 6 on 14th December 1932, for a sum of about Rs. 7,000. On 23rd January 1933, *Nathu Ram*, plaintiff, instituted the present suit for a declaration to the effect that *Zorawar* and *Mula*, defendants 1 and 2, were the principal debtors of defendants 3 to 6, that the plaintiff was simply a surety, and that in case the debt was realised from the plaintiff, defendants 1 and 2 were liable to compensate the plaintiff to the extent of the said payment. The trial Court decreed the plaintiff's claim. On appeal the learned District Judge held that a suit for a declaration that the plaintiff was the surety did not lie under S. 42, Specific Relief Act. Against this decision the plaintiff has preferred a second appeal to this Court.

It was contended by the learned counsel for the appellant that by becoming a surety the plaintiff became entitled to a "legal character" within the purview of S. 42, Specific Relief Act, and that he was entitled to a declaration that he was merely a surety and not the principal debtor. In our opinion this contention is without any force. It was held by a Division Bench of the Patna High Court in 2 Pat 1,¹ that a suit for a declaration that the plaintiff would be entitled to contribution from the defendant if and when occasion arose did not fall within S. 42, Specific Relief Act. It was further held in 39 Mad 80,² that S. 42, Specific Relief Act, was not ordinarily applicable to cases where a declaratory relief was sought in respect of rights arising out of a contract which would affect only the pecuniary relationship between the parties to the contract. To the same effect is *A I R 1930 Bom 331*.³

We therefore hold that the learned District Judge rightly dismissed the plaintiff's suit. The appeal, consequently fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

1. *Tian Sahu v. Mulchand Sahu*, *A I R 1922 Pat 432=67 I C 631=2 Pat 1=3 P L T 460*.
2. *Rama Krishna Pattar v. Narayana Pattar*, *A I R 1915 Mad 584=26 I C 883=39 Mad 80=27 M L J 634*.
3. *Sripat Rao v. Shankar Rao*, *A I R 1930 Bom 331=127 I C 330=32 Bom L R 207*.

A. I. R. 1937 Lahore 26

AGHA HAIDAR, J.

Mohammad Ali and another—Defendants—Appellants.

v.

Labh Singh and another, Plaintiffs and *another*, Defendant—Respondents.

Second Appeal No. 234 of 1936, Decided on 8th June 1936, from decree of Senior Sub-Judge, Gurdaspur, D/- 29th November 1935.

(a) Custom (Punjab)—Proprietary body—Long existence of kacha mosque on site occupied by non-proprietors—Proprietor of site not objecting for many years—Non-proprietors held entitled to convert mosque into pacca structure.

Where a kacha mosque was in long existence on a site occupied by the non-proprietors and the mosque was dedicated to worship from a long time without any objection by the proprietors of the site :

Held: the non-proprietors were entitled to convert the mosque into a pacca structure : *A I R 1935 All 891, Rel. on.* [P 28 C 1]

(b) Evidence Act (1872), S. 167—Finding of fact based on legal evidence on record—It is binding in second appeal even if inadmissible evidence has been admitted.

Where there is legal evidence on the record in support of the finding of fact recorded by the lower appellate Court, the finding is binding in second appeal even if the lower Court has admitted inadmissible evidence : *19 Cal 249 (P C), Rel. on.* [P 27 C 2]

Mohsin Shah—for Appellants.

Mehr Chand Mahajan and Ratan Lal Chawla—for Respondents.

Judgment.—This appeal arises out of a suit for a perpetual injunction restraining the defendants from using the site indicated in the plan attached to the plaint for the purpose of building a mosque and also for possession of a certain area indicated in the plaint which has been enclosed by walls and on which the defendants intend to build a mosque. There was a further claim for a sum of Rs. 20, the price of a certain tree which was standing on the site in dispute and which it was alleged had been cut down by the defendants. The plaintiffs are certain proprietors of the village and their case is that the site in dispute had been occupied by Bagh and Buta and on their death it came into the possession of one Mangtu who died 4 or 5 years ago and on his death it reverted to the proprietors. The plaintiffs further allege that there was a kotha on the site which was burnt down by them about 2½ years ago and that the defendants are now raising certain walls and intend to build a

mosque on the site of the old kotha. The case for the defendants is that there had been a kacha mosque on the site in dispute and all that they intended to do was to convert it into a pacca building.

The trial Court dismissed the plaintiffs' suit holding that, although defendants 1 and 2 were not the owners of the site, they had been making use of the mosque which had existed for a long time and that it was too late for the plaintiffs to raise any objection. The plaintiffs went up in appeal. The lower appellate Court held that there was a kacha mosque on the disputed site but the defendants had no right to convert it into a pacca building. It accordingly held that the defendants can use the land in dispute as a place for offering prayers by maintaining only a kacha mosque on it. The plaintiffs were, therefore, granted an injunction restraining the defendants from making any use of the site *alif, sin swad* and *toe* excepting a portion 23 ft. x 35 ft. towards the north-west of the area. This portion the defendants were allowed to use as a place for offering prayers and they were given liberty to maintain a kacha mosque thereon. The claim regarding the price of the tree was rejected. The plaintiffs' suit for possession of the portion *alif, be, jim* and *dal* was dismissed. The defendants have come up to this Court in second appeal and the plaintiffs have filed cross-objections. The sole question argued on behalf of the appellants was that the lower appellate Court, having recorded a finding of fact that there was a kacha mosque on the site in dispute, its decision was wrong in so far as it gave an injunction to the plaintiffs restraining the defendants from converting the kacha mosque into a pacca mosque. The lower appellate Court has referred to two authorities of the Punjab Chief Court. In 19 P R 1904,¹ the finding of the Divisional Judge was that the evidence was not sufficient to show that there was a regular mosque at the spot. The learned Judges rightly pointed out that the defendants, who were kamins, and as such held land from the proprietary body, were not competent to build a mosque without the consent of the proprietors. This case therefore has no application. In the same way 108 P W R 1918² is inapplicable. In that case a takyadar

1. *Kalu v. Wasawa Singh*, (1904) 19 P R 1904.

2. *Sawan v. Mehr Din*, A I R 1918 Lah 117=45 I C 963=108 P W R 1918.

attempted to convert a thara on which some Muhammadans had been saying their prayers into a mosque. This he was not allowed to do as the land had been given to him with the primary object of maintaining a takya only.

In the present case the lower appellate Court has recorded a clear finding that after 1865 the mosque came into existence on a portion of site occupied by non-proprietors and was dedicated very many years ago as a place of worship. It arrived at the conclusion that there was a mosque in the village on the place marked *alif, be, jim* and *dal* in the plan Ex. D/1, and that the proprietors could not be allowed, in view of the use to which the land had been put for many years without any objection on their part, to contend that the defendants are not entitled to use the same as a mosque. It accordingly came to the conclusion that the defendants are entitled to an area of 35 ft. x 23 ft. for the purpose of offering their devotions. While holding that the place was more than a mere prayer thara, he went on to say that there was no mosque in the very strict sense of the term. I have given my careful consideration to this unsatisfactorily worded sentence and have come to the conclusion that what the Judge really meant was that the building had not the shape which tradition associates with an ordinary mosque. This is made clear by the operative portion of the judgment in which he held that the defendants can only be allowed to use the area referred to above as a place for offering prayers and as a kacha mosque but not for erecting a pacca structure thereon. Reading the judgment as a whole there cannot be any doubt that after a consideration of the evidence on the record the learned Judge came to the conclusion that there was a kacha mosque on the site in dispute though the appearance of that mosque was not the same as that of an ordinary mosque and that the origin of the mosque must be taken to have been a lawful one and the proprietary body never raised any objection to it for a long period of time.

Mr. Mehr Chand Mahajan, counsel for the respondents, has assailed the finding of fact recorded by the lower appellate Court on the ground that the deposition of Amir Hussain, dated 18th August 1914, and the judgment of the Munsif bearing the same date were inadmissible in evidence and that the Court below was not

justified in referring to them. So far as the statement of Amir Hussain is concerned, I do not think that it was admissible in evidence. The judgment however stands on a different footing. The suit was no doubt for the recovery of a sum of Rs. 55, but in the course of the judgment the learned Munsif, while giving the history of the case, referred to a certain mosque in the village. According to the evidence on the record there is no other mosque in the village except the mosque in dispute. Therefore the judgment is admissible in evidence, at any rate, under the provisions of Ss. 9 and 11, Evidence Act. Mr. Mehr Chand Mahajan has argued on the authority of 2 Lah 271,³ 8 Lah 651⁴ and other cases that a finding based upon inadmissible evidence is vitiated because it is impossible to divine how far the mind of the lower appellate Court was influenced by a piece of evidence which was inadmissible under the law. This objection of course, in view of what has been stated above, would apply to the evidence of Amir Hussain only which, so far as I can see, is not admissible in evidence under any provision of the Evidence Act. I have once again studied 19 Cal 249⁵ carefully and have not been able to trace any reference to this high authority either in 2 Lah 271³ or in 8 Lah 651.⁴

In that case their Lordships of the Privy Council, while dealing with the finding of fact in a second appeal, observed that it has now been conclusively settled that the third Court cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court, and that if there is evidence to be considered the decision of the second Court, however unsatisfactory it might be, if examined, must stand final. This authority has for many years been considered by the Allahabad High Court to mean that so long as there is legal evidence on the record in support of the finding of fact recorded by the lower appellate Court the finding would be binding in second appeal. In this connexion the provisions of S. 167, Evidence Act, are worthy of note. In order, however, to avoid the necessity of remand I allowed the parties to refer to

3. Balwant Singh v. Baldeo Singh, A I R 1921 Lah 119=64 I C 929=2 Lah 271.

4. Lajpat Rai v. Faiz Ahmed, A I R 1927 Lah 448=103 I C 889=8 Lah 651=29 P L R 74.

5. Ramratan Sukal v. Nandu, (1892) 19 Cal 249=19 I A 1 (P C).

the evidence of witnesses relied upon by the lower appellate Court. In fact the parties confined themselves to this evidence only. The evidence of Sultan Ali, D. W. 1, and Devi Singh, D. W. 2, and the statement of Labh Singh clearly indicate that there was a mosque of a somewhat crude type on the spot. I am, therefore, satisfied in my mind, on a perusal of the evidence indicated above, that there was a kacha mosque on the site in dispute. This being established, the recent decision of the, Allahabad High Court, reported in A I R 1935 All 891,⁶ applies with full force, and there cannot be any doubt that the defendants were entitled to improve the existing mosque by converting it into a pacca structure.

The standards of comfort vary from time to time and houses which were good enough for our ancestors are considered unfit for human habitation by the present generation. In the same manner places of worship consisting of kacha walls and rude materials are being every day replaced by more imposing and substantial buildings which, while pleasing to the eye, also protect the worshippers from inclemencies of weather all the year round. I, therefore, allow the appeal and modify the decree of the lower appellate Court to this extent: that the injunction asked for and partially granted by the lower appellate Court shall be vacated and the defendants shall be allowed to convert the kacha mosque into a pacca one. The appellants shall get their costs of this appeal. The objections of the respondents fail and are hereby dismissed with costs. In case the respondents desire to file an appeal against this judgment under the Letters Patent, I grant them permission to do so.

D.S./R.K.

Appeal allowed.

6. *Miru v. Ramgopal*, A I R 1935 All 891=156 I C 942=1935 A L J 1269.

A. I. R. 1937 Lahore 28

TEK CHAND, J.

(Firm) Jowahir Singh-Sunder Singh—
Plaintiff—Petitioner.

v.

Flaming Shaw & Co., Ltd., Amritsar—
Defendant—Opposite Party.

Civil Revn. No. 252 of 1936, Decided on 29th May 1935, from order of Sub-Judge, First Class, Amritsar, D/- 16th March 1936.

Civil P. C. (1908), O. 11, R. 1—Order declining to re-issue interrogatories — High Court cannot interfere under S. 44, Punjab Courts Act but can do so under S. 107, Government of India Act (1919).

Under S. 44, Punjab Courts Act, High Court has no jurisdiction to entertain an application for revision from an interlocutory order declining to re-issue interrogatories but as the High Court's powers under S. 107, Government of India Act, are not merely administrative but also judicial, it can interfere to prevent injustice where the lower Court in an interlocutory order wrongly declines to re-issue interrogatories : A I R 1933 Lah 259; A I R 1936 Lah 140 and A I R 1924 Lah 425 (F B), Foll. [P 28 C 2; P 29 C 1]

Dev Raj Sawhney—for Petitioner.

Norman Edmunds—for Opposite Party.

Order.—This is a petition under S. 44, Punjab Courts Act, and S. 107, Government of India Act (1919) for revision of the order of the Subordinate Judge, 1st Class, Amritsar, dated 16th March 1936, declining to re-issue interrogatories for the examination of a witness named Sham Singh at Penang. The relevant facts are that issues in the suit were framed on 22nd May 1935, when the parties were ordered to file lists of witnesses on 29th May. The plaintiff complied with this order, and in the list of witnesses mentioned one Sham Singh, resident of Penang, and prayed that interrogatories be issued for his examination. The Court granted the prayer, and the interrogatories were filed by the plaintiff on 18th June 1935, when they were handed to counsel for the defendant for filing the cross-interrogatories. This was done on 27th June 1935, when the plaintiff was directed to deposit £ 5 for the expenses of the commission. In accordance with this order, the plaintiff deposited £ 5 on the date fixed and the interrogatories were actually issued on 24th July 1935 without any objection by the defendant. They were however returned with the remark that the expenses would be \$ 48.50, which is about Rs. 75 in Indian currency. The return was laid down before the Court on 16th March 1936 when the plaintiff expressed his willingness to make good the deficiency, but the Court rejected the application and declined to re-issue the interrogatories on the ground that it would delay the disposal of the suit. It may be noted that the case had been fixed for recording the plaintiff's oral evidence in Court on 7th and 8th July.

A preliminary objection has been raised that this Court has no jurisdiction to interfere with an interlocutory order of this kind under S. 44, Punjab Courts Act, or

S. 107, Government of India Act. The objection is well-founded so far as S. 44 is concerned: 5 Lah 288;¹ but it has been decided by this Court in several cases that this Court's powers under S. 107, Government of India Act, 1919, are not merely administrative but are also judicial, and that the Court can interfere under that section to prevent injustice in appropriate cases: see inter alia 144 I C 515² and A I R 1936 Lah 140.³ It may be noted that the judicial powers of the High Court under S. 107 have been taken away under the Government of India Act, 1935, (S. 224), but this portion of the new Government of India Act has not yet come into force. S. 107 of the Act of 1919 can therefore be applied in appropriate cases. As I have already stated, no objection was raised to the issue of the interrogatories in July 1935, and the interrogatories had actually issued. The plaintiff was required to deposit £ 5 for the expenses, which he had done within the time fixed. It was discovered later that the amount necessary for the execution of the commission was short by about Rs. 10. It is obvious that the plaintiff was not in any way responsible for the delay. Further, it seems to me that if the Court had issued the interrogatories on 16th March 1936, they would in all probability have been received back after compliance by the 7th July when the rest of the plaintiffs' evidence was to be heard in Court. In that event there would have been no delay in the disposal of the suit. In the peculiar circumstances of the case, I am constrained to hold that the order of the lower Court was wholly wrong, and that in order to avoid a possible remand of the appeal from the final decree, it is necessary in the interests of justice that I should interfere at this stage.

I accept the petition, set aside the order of the lower Court and remand the case, with the direction that the interrogatories for the examination of this witness be sent without delay. Both counsel have been directed to cause their respective clients to be present in the Court of Lala Sardari Lal, Subordinate Judge, on 8th June 1936, when the plaintiff will deposit

Rs. 25 to meet the additional expenditure. An effort should be made to have the letter of request sent by "air mail", at the expense of the plaintiff and the Penang authorities should be requested to return the papers also by "air mail". If the plaintiff fails to appear before the Subordinate Judge on the 8th June, or to deposit the amount mentioned above, the interrogatories shall not issue. The Deputy Registrar will take steps to have the records transmitted forthwith.

D.S./R.K.

Petition accepted.

A. I. R. 1937 Lahore 29

AGHA HAIDAR, J.

Jalal Din and another — Plaintiffs — Appellants.

v.

Sant Ram and others—Defendants—Respondents.

Second Appeal No. 2298 of 1935, Decided on 28th April 1936, from decree of Senior Sub-Judge, Amritsar, D/- 28th August 1935.

(a) Civil P. C. (1908), S. 151—Execution proceedings—Formal order, with consent of parties, releasing portion of property from attachment—On application by decree-holder, decree executed against whole property without excepting portion ordered to be exempted—Further proceedings after order held not under S. 47, but results of fraud—Court can under inherent power restore property wrongfully attached.

In execution proceedings a formal order was passed with the consent of the parties releasing certain portion of property from attachment. In further proceedings in the collectorate the collector, on application by the decree-holder, executed the decree by leasing out the whole property without excepting the portion ordered to be exempt from attachment:

Held: that the order being the consent order was final and not appealable. Hence the portion ordered to be exempt from attachment finally and completely passed out of the ambit of execution proceedings and therefore the proceedings after the order could not be held to be those under S. 47, Civil P. C., in respect of the portion exempt from attachment. They were the results of fraud perpetrated by the decree-holder, and the Court could restore the property wrongfully attached in exercise of its inherent powers under S. 151.

[P 31 C 2]

(b) Execution Sale — Purchaser's title—Some portion released from attachment—Judgment-debtor ceases to be so with respect to that property — Auction purchaser purchasing it cannot resist judgment-debtor's claim in respect of it.

There is no guarantee that the auction-purchaser's title is perfect and unassailable. He merely obtains the right, title and interest of the judgment-debtor. So, where by a formal order of

1. Lalchand Mangal Sen v. Beharilal Mehrchand, A I R 1924 Lah 425=84 I C 259=5 Lah 288=6 L L J 558 (F B).

2. Ganesh Das Shankar Lal v. Asa Nand Radhesham, A I R 1933 Lah 259=144 I C 515=34 P L R 781.

3. Barkat Ram v. Suggar Electric Stores, Ludhiana, A I R 1936 Lah 140=161 I C 518.

the Court certain portion of the property is released from execution, the judgment-debtor ceases to be the judgment-debtor in respect of the portion ordered to be exempt from execution and therefore the auction-purchaser cannot resist the claim of the judgment-debtor in respect of the portion which could not be sold in execution of decree but which he purchases at auction. His position, in respect of that portion, is merely that of a trespasser : 13 Bom 31, Rel. on. [P 32 C 1]

B. I. Ali Khan—for Appellants.

Shamair Chand and *Qabul Chand*—for Respondents.

Judgment.—This is an appeal by two unfortunate plaintiffs, who have been victimised by Santa Ram, decree-holder (D. 4). It arises in the following way: Sant Ram obtained a decree for a sum of Rs. 13,648-2-3 and costs in the Court of the Senior Subordinate Judge, Gurdaspur. That decree was transferred to the District Judge, Amritsar, who sent it to the Court of Chaudhri Niamat Khan, Senior Subordinate Judge, on the 2nd July 1927, for execution. The original judgment-debtor was Hakim Khan, the father of the present plaintiffs and defendants 1, 2 and 3. Hakim Khan died and was succeeded by his sons as his legal representatives. Certain lands were attached in execution of the decree. Lal Din and Jalal Din, the present plaintiffs, raised objection that 2/5ths of the land belonged to them as it was their self-acquired property and therefore execution could not proceed against this fractional share in the decree against their father. On the 9th July 1928 Mr. Balmokand Bhatia, pleader for the decree-holder, admitted that that 2/5th share of the total area of land consisting of 174 kanals 16 marlas of land which had been attached belonged to Jalal Din and Lal Din and he definitely agreed to release that portion of the attached land. Accordingly on the same date Mr. Zutshi, the then Subordinate Judge, formally released the 2/5th share of the land and made an order to this effect. He then asked the Collector if he wished to proceed under S. 72, Civil P. C., in respect of rest of the land.

On the 19th October 1928 Mr. Zutshi stayed execution of the decree as a declaratory suit had been brought in respect of the property by some third parties. With the rest of the proceedings we are not concerned. The file was consigned to the record room and the decree-holder was directed to commence proceedings from that stage after the declaratory suit had been decided. On the 5th August 1931, the decree-holder, through the same

pleader, Mr. Balmokand Bhatia, made an application to the Subordinate Judge for the execution of his decree and asked that the case may be sent to the Collector for further proceedings. On the 7th December 1932 the Collector leased out the whole land without excepting the 2/5th share which had been specifically released in favour of the present plaintiffs, Lal Din and Jalal Din, by the Subordinate Judge under his order dated the 9th July 1928. One Hardas Singh, defendant 5 in the present case, became the lessee for twenty years for a sum of Rs. 4,500 of the whole area. On the 11th April 1933 Lal Din and Jalal Din made an application before the Senior Subordinate Judge that the decree-holder Santa Ram had their 2/5th share in the land leased out in spite of the fact that it had been released by the Court from the process of execution with the consent of the decree-holder. The application is curiously worded. It purports to have been made under Ss. 47, 60 and 151, Civil P. C. On the 2nd October 1933 the Senior Subordinate Judge, Mr. Indar Singh, found that it had been formally admitted by the decree-holder that 2/5th of the land had been released, but, as the lease had been granted in execution of the decree to Hardas Singh and the decree had been satisfied, the application under S. 47, Civil P. C., was not entertainable and was time-barred. He further held that Hardas Singh was a bona fide purchaser and therefore restitution could not be ordered against him. In the concluding portion of his judgment Mr. Indar Singh observed

that the decree-holder should not have proceeded against the entire property when he fully knew that part, viz. 2-5th, had been released long before he applied against the judgment-debtors' land and that the judgment-debtors can pursue the remedy open to them.

With this very mild disapprobation of the thoroughly dishonest conduct of the decree-holder the learned Senior Subordinate Judge, Mr. Indar Singh, dismissed this application. Thereupon on 15th January 1934, Lal Din and Jalal Din brought the present suit for a declaration that 2/5ths of the land measuring 174 kanals 16 marlas was not liable to be leased out to Hardas Singh, defendant 5, in execution of the decree in favour of defendant 4. The trial Court decreed the plaintiffs' suit. On appeal the learned Senior Subordinate Judge held that Sardar Indar Singh was in error in holding that the decree had already

been satisfied and that consequently no application under S. 47, Civil P. C., could be entertained inasmuch as the land had been farmed out for a sum of Rs. 4,500 only and the rest of the decretal amount still remained due. He further held that the proper remedy of the present plaintiffs was to prefer an appeal against the order of the Senior Subordinate Judge, Mr. Indar Singh, dated 2nd October 1933. He was definitely of opinion that Sant Ram's action in proceeding against the released portion belonging to Lal Din and Jalal Din is not only open to serious objection but might perhaps amount to criminal concealment of the real facts which may render him liable to prosecution. He also observed that the plaintiffs had been misled into bringing the present suit in consequence of the suggestion thrown out by the learned Senior Subordinate Judge, Mr. Indar Singh, in the concluding portion of his judgment. In conclusion the learned Judge added that he had every sympathy with the plaintiffs who appeared to have been defrauded by Sant Ram but that sympathy should not in any way result in coming to a conclusion which is contrary to law. He accordingly allowed the appeal and dismissed the plaintiffs' suit.

The plaintiff has come up in second appeal to this Court. He has also filed an appeal against the order of the Senior Subordinate Judge, Sardar Indar Singh, dated 2nd October 1933. This appeal having been filed beyond the period of limitation an affidavit has been put in this Court affirming that the appellant had been misled by the order of the Senior Subordinate Judge and had sought his remedy by filing a regular suit, that he succeeded in the trial Court but the lower appellate Court dismissed his suit holding that it was not maintainable. Hence the delay in presenting the appeal. In my opinion the appeal against the order of the Senior Subordinate Judge dated 28th August 1935 must succeed. In the application of Lal Din and Jalal Din dated 11th April 1933 although there is a reference to S. 47, Civil P. C., in my opinion it was really an application under S. 151, Civil P. C., and the Court could take steps under its inherent powers in order to promote the cause of justice and equity.

The reasoning of the lower appellate Court is erroneous. When on 9th July 1928 Mr. Balmokand Bhatia, counsel for

the decree-holder, admitted that the 2/5th share, which Lal Din and Jalal Din plaintiffs claimed as their private and exclusive property, should be released and the Court made an order releasing the property from the process of execution, the matter passed completely out of the ambit of execution proceedings. The most effective decree of a Court is the one which is based upon the consent of the parties. That it is so, can readily be gathered from the principle underlying S. 96 (3), Civil P. C., according to which no appeal lies against a consent decree. This is exactly what took place in the present case and therefore the execution proceedings which were carried on in the collectorate could have nothing to do with the fractional share which had been definitely protected by the order of the Court, which had become final. This fact was not kept clearly in mind by the learned Senior Subordinate Judge who treated the subsequent proceedings as if they had been proceedings in execution, discharge and satisfaction of the decree, from the operation of which the 2/5th share belonging to the plaintiffs was not immune.

This being my view, it follows, as a matter of course, that the rest of the proceedings after the order of 9th July 1928 were the result of fraud perpetrated by the decree-holder Sant Ram, defendant 4, both upon the present plaintiffs as well as upon the Court. The present plaintiffs, who as the legal representatives of their father Hakim Khan, were the judgment-debtors could not possibly suspect that the decree-holder Sant Ram through an abuse of the process of the Court had been proceeding against their property which had already been placed beyond the reach of the process of execution by the order of the Court. They were undoubtedly the legal representatives of Hakim Khan in respect of that portion to which they laid no claim. The proceedings taken by the decree-holder in which he dishonestly made use of the machinery of the Court were nothing short of an act of spoliation and could not defeat the plaintiffs' right. As already stated, after the order dated 9th July 1928 passed by Mr. Zutshi there were no proceedings under S. 47, Civil P. C., in respect of this share and therefore if the plaintiffs had been deprived of their property in the manner detailed above, surely the law should come to their help and restore the property to them.

As regards the position of Hardas Singh defendant 5, he is an auction-purchaser no doubt. No one guarantees a perfect and unassailable title to the auction-purchaser, who merely obtains the right, title and interest of the judgment-debtor. By the order dated 9th July 1928 the present plaintiffs ceased to be judgment-debtors in respect of the 2/5th share which was held to be their exclusive property. They remained judgment-debtors only for the purpose of execution proceedings in respect of the property which, as legal representatives of their father, had devolved upon them. Therefore the auction-purchaser cannot resist the claim of the plaintiffs in respect of the property which could not be sold in execution of the decree but which he had purchased at auction. His position is merely that of a trespasser so far as the 2/5th share of the plaintiffs is concerned and there does not appear to be any reason why the property should not be restored to the rightful owner. The point raised in the present appeal is one of first impression, though there is authority in support of the view which I have taken in 13 Bom 34.¹ No authority has been cited to the contrary. I therefore allow the appeal and, setting aside the decree of the lower appellate Court, restore that of the trial Court decreeing the plaintiffs' claim. The plaintiffs shall get their costs throughout.

D.S./R.K.

Appeal allowed.

1. Shiv Ram Chintaman v. Jivu, (1889) 13 Bom 34.

A. I. R. 1937 Lahore 32

TEK CHAND, J.

Ram Partap—Defendant—Appellant.

v.

Kishen Singh, Plaintiff and another, Defendant—Respondents.

Second Appeal No. 262 of 1936, Decided on 8th May 1936, from decree of Dist. Judge, Ambala, D/- 26th November 1935.

Punjab Pre-emption Act (1 of 1913), S. 15—Sub-divisions—Essentials of—For patts to be distinct sub-divisions, they must be distinct entities, having nothing in common between them, each having homogeneity of area or descent.

The fact that the patts have separate lambar-dars for them is not conclusive to decide whether they are distinct sub-divisions. The real question is whether the patts are distinct entities, having nothing in common between them, each having homogeneity of area or descent. So where the two patts of a taraf did not possess any of these

essential attributes they could not be distinct sub-divisions and the right of the proprietor of one patti to pre-empt the land in that patti could not be superior to that of the proprietor of another patti of the taraf: *A I R 1914 Lah 335, Disting.; 142 P L R 1905, Appl.* [P 33 C 1, 2]

*M. L. Puri—*for Appellant.*Harnam Singh—*for Respondent (Plaintiff).

Judgment.—Des Raj, defendant 2, sold 46 bighas 19 biswas and 3 biswansis of land situate in mauza Anandpur Jalbera to Ram Partap, defendant 1. Out of the land sold 1 bigha 5 biswas is situate in Patti Gulab Singh and the rest in patti Gurmukh Singh. Kishen Singh, plaintiff, who is a proprietor in patti Gurmukh Singh, instituted a suit to pre-empt the sale of the land situate in that patti, alleging that the patts were distinct "sub-divisions" of taraf Jalbera of the village, that the plaintiff was a proprietor in patti Gurmukh Singh, while the defendant vendee owned no land in that patti, but was a proprietor in patti Gulab Singh. He therefore, claimed that his right was superior to that of the vendee so far as the land in patti Gurmukh Singh was concerned, and he claimed possession thereof on payment of Rupees 2,636-10-6, leaving the land in patti Gulab Singh to the defendant-vendee. The vendee pleaded that patti Gurmukh Singh and patti Gulab Singh were not distinct "sub-divisions" of the village within the meaning of S. 15, Punjab Pre-emption Act, and as he and the plaintiff were both proprietors in taraf Jalbera, the plaintiff did not have a superior right to pre-empt. The Courts below have held that the two patts were distinct "sub-divisions" and have passed a decree in favour of the plaintiff for possession of the land in patti Gurmukh Singh on payment of Rs. 3,300. On second appeal it has been contended on behalf of the vendee that the learned District Judge has not considered material documentary evidence on the record, that he has made certain unwarranted assumptions of fact, and that on the facts as admitted or proved by the documentary evidence on the record, the two patts do not constitute distinct sub-divisions.

It appears that the village is divided into two well-defined tarafs, known as taraf Anandpur and taraf Jalbera. On this point there is no dispute between the parties, both of whom are proprietors in taraf Jalbera. The plaintiff, however, contends that taraf Jalbera is further sub-divided into two distinct patts, patti Gulab Singh

and patti Gurmukh Singh, and that these two pattis are distinct "sub-divisions." It is no doubt true that in the settlement papers, the two pattis are mentioned and there are separate lambardars for them. But these facts are by no means conclusive on the point. The number of lambardars appointed in a village, or the sub-division thereof, is a matter of administrative convenience, depending on a variety of considerations. In some places a single lambardar is considered sufficient for a whole village; in others several lambardars are appointed for one sub-division. The real question is whether patti Gurmukh Singh and patti Gulab Singh are distinct entities, having nothing in common between them, each having homogeneity of area or descent. Now it appears from the revenue papers that the tenure in the village is bhaya chara and in each patti "possession is the measure of ownership." In Ex. D-7, which is a copy of the Wajib-ul-arz of the village prepared in the settlement of 1917-18, it is stated that the shamilat of the pattis is under the management of the lambardars, who collect the produce and "distribute it among all the co-sharers of the village according to their holdings, *hasab rasad khewat*." This important document, however, has been completely ignored by the learned District Judge. Counsel for respondent has not been able to explain how this community of interest of all the proprietors of the village in the shamilat of the pattis is consistent with their being distinct sub-divisions.

Again, we find that the fields of the two pattis are intermixed and there is no territorial division on a homogeneous basis. Further, it has not been shown that the proprietors in each patti are the descendants of one man or transferees from them. It seems therefore that these pattis do not possess any of the essential attributes of a sub-division, which will make it a distinct entity for the purposes of the Pre-emption Act. It may be mentioned that the patwari has deposed in the witness-box that the division between the fields of the two pattis was on the khet bat system and not the chak bat system. This statement, however, appears to have been challenged on appeal before the District Judge and he sent for the kanungo with the relevant papers. He did not pursue the inquiry further and contented himself with the observation that a cursory examination could not satisfactorily dis-

close whether the division into tarafs or pattis was on chak bat system or khet bat system. There seems to be no reason to doubt the patwari's statement on oath in the witness box, especially when the plaintiff had ample opportunity to cross-examine him. The learned District Judge has observed that the present case is "on all fours" with 60 P R 1914.¹ But in that case it had been found, that each thulla had a separate shamilat in which the proprietors of the other thulla had no share. The tests laid down in that case, as well as in 142 P L R 1905,² and other cases, have not been fulfilled, and I am constrained to hold that the learned Judges of the Courts below were in error in holding that patti Gulab Singh and patti Gurmukh Singh were distinct "sub-divisions" of the village. This being so, and both the plaintiff and the defendant vendee being admittedly proprietors in taraf Jalbera, the plaintiff's right of pre-emption is not superior to that of the vendee.

I accept the appeal, set aside the judgment and decree of the learned District Judge and dismiss the plaintiff's suit. Having regard to all the circumstances, I leave the parties to bear their own costs throughout.

D.S./R.K.

Appeal accepted.

1. Basawa Singh v. Natha Singh, A I R 1914 Lah 335 = 23 I C 151 = 60 P R 1914 = 128 P L R 1914.
2. Sher Singh v. Maluk Singh, (1905) 142 P L R 1905.

A. I. R. 1937 Lahore 33

BHIDE, J.

Nur Din—Plaintiff—Petitioner.

v.

Ahman and another—Defendants—Opposite Parties.

Civil Revn. No. 158 of 1936, Decided on 25th June 1936, from order of Dist. Judge, Gujranwala, D/- 24th June 1935.

Punjab Alienation of Land Act (13 of 1900), S. 21-A, sub-s. (2)—Consent decree of civil Court in contravention of Act is not appealable—Revision to High Court only lies—High Court is not empowered to take action suo motu.

A consent decree passed by a civil Court in contravention of the Act is not appealable and revision lies to the High Court, but where the Deputy Commissioner, after being informed, does not move the High Court under S. 21-A, sub-s. (2) of the Act within two months of such information, the High Court cannot pass an order suo motu: 11 I C 34 and 8 P R 1913, *Rel. on.*

[P 34 C 1]

Ghulam Mohyud Din and Abdul Aziz
—for Petitioner.

D. Ram Lal—for Opposite Parties.

Order.—This is a petition for revision of an order of the District Judge, Gujranwala, setting aside a decree of a civil Court as being in contravention of the Punjab Alienation of Land Act. The order was passed under S. 21-A of that Act, but it appears that the decree in question was a consent-decree and as no appeal lay from it, a petition for revision should have been made to this Court (vide S. 21-A, sub-s. 2 of the Act). This was conceded by the learned Government Advocate but he merely prayed that the High Court may act suo motu in these proceedings and pass the same order as was passed by the learned District Judge under S. 21-A. However, the High Court can only pass such an order on being moved by the Deputy Commissioner within two months of his coming to know of the order sought to be set aside. This period of two months admittedly expired long ago and there is no application made to this Court by the Deputy Commissioner. It seems to me that this Court has no jurisdiction to take any action suo moto in the circumstances. The contention of the learned counsel for the petitioner that the order passed by the learned District Judge was without jurisdiction is fully supported by 11 I C 34¹ and 8 P R 1913² on which he relied. I accept the petition for revision and set aside the order of the learned District Judge with costs.

R.W./K.S.

Petition accepted.

1. *Katara v. Arjan Singh*, (1911) 11 I C 34=200 P L R 1911.
2. *Milki v. Bishen Das*, (1913) 8 P R 1913=16 I C 957=9 P L R 1913.

A. I. R. 1937 Lahore 34

ADDISON AND ABDUL RASHID, JJ.

Dalip Singh—Surety—Appellant.

v.

Kishan Chand and others — Respondents.

Letters Patent Appeal No. 59 of 1936, Decided on 2nd June 1936, from order of Jai Lal, J., D/- 13th February 1936.

Surety — Surety bond — Surety supplying bond in proceedings to set aside ex parte decree, undertaking liability to pay amount if decreed by Court — Suit compromised — Surety held discharged from liability—Inclusion or exclusion of compromise in surety bond is always question of fact.

The question whether a compromise was or was not excluded by a surety bond is always a question of fact. [P 34 C 2]

During the proceedings to set aside an ex parte decree, it was ordered, that the defendant should furnish security for the amount decreed. A surety furnished the necessary bond which provided: "I stand surety and agree that if decision is given against the defendant, whatever amount is found due to the decree-holder I will pay." The suit was ultimately compromised and the plaintiff proceeded against the surety for the amount under compromise. Surety contended he was discharged from his bond as it did not include a compromise:

Held: that the plaintiff could not proceed against the surety. [P 34 C 2; P 35 C 1]

J. R. Agnihotri for *Nanak Chand*—for Appellant.

J. L. Kapur—for Respondents.

Addison, J.—The sole question in this appeal under the Letters Patent is whether the decree can be executed against the surety-appellant, Dalip Singh. A money decree was passed against Sher Singh and others ex parte. Sher Singh applied to have this decree set aside and an order was made to the effect that it would be set aside if security was given for payment of the amount decreed. Dalip Singh stood surety, the bond being dated 21st March 1931. It runs as follows:

I, Pandit Dalip Singh, am a resident of Hansi. In the above application for setting aside the ex parte decree it has been ordered that the ex parte decree be set aside on the defendants furnishing security. Accordingly I stand surety for the defendants and agree that if a decision is given against the defendants in the above case (*agar mukadama mazkur khilaf muda-alaiham faisil hua*) whatever amount is found due to the decree-holder, I shall pay.

It is well established that the question whether a compromise was or was not excluded under the terms of a surety bond is a question of fact in each case. A Division Bench of the Patna High Court in 11 Pat 590¹ had to consider a bond very similar to the bond in dispute before us, the terms of which were:

If, God forbid, the suit is decided against the defendants and a decree for mesne profits is passed in favour of the plaintiffs, the plaintiffs would realize the amount of decree for mesne profits from the property mentioned in this deed.

The suit was compromised and the decree-holder took steps to enforce the surety bond against the surety in the process of execution. The surety objected that by reason of the compromise he was discharged from his liability. It was held on the construction of the document that the liability envisaged by the surety was that

1. *Narsingh Mahton v. Nirpat Singh*, A I R 1932 Pat 313=140 I C 564=11 Pat 590.

if a decree for mesne profits was passed by the Court against the defendants, he would be liable for such amount as might be decreed up to Rs. 500 and therefore that by reason of the compromise the surety was discharged from liability. The case before us is much stronger in that the words used, which I have set forth both in English and the vernacular, indicate very clearly that there had to be a decision of the Court against the defendants. This follows from the use of the word "faisil." In this view it seems unnecessary to discuss the other authorities and it follows that the surety was discharged by the compromise between the parties, on a proper interpretation of his contract of suretyship. We therefore accept the appeal and set aside the orders of the Courts below allowing execution to proceed against the surety. The appellant will have his costs before us and before the single Judge but the parties will bear their own costs elsewhere.

B.D./R.K.

*Appeal allowed.***A. I. R. 1937 Lahore 35****TEK CHAND AND DALIP SINGH, JJ.***Vir Bhan and another* — Plaintiffs — Appellants.

v.

Salig Ram and others—Defendants—Respondents.

Second Appeal No. 526 of 1934, Decided on 7th November 1935, from decree of Addl. Dist. Judge, Amritsar, D/- 10th July 1933.

(a) Charge—Document executed to secure repayment of loan—Document described as zamanatnama—Stamp for mortgage proper not used — Condition restricting executant from alienating certain property—Meaning of such restriction explained — Document, held created charge and not mortgage.

To secure repayment of loan advanced, a document was executed which was described as a zamanatnama or a security bond and not as a rahannama and was not executed on a proper stamp for a mortgage and the only condition affecting the interest of the executant was a condition restricting him from alienating certain property. It was contended that the condition of restriction amounted to a transfer of interest and the document should be construed as a mortgage :

Held : that under the circumstances the instrument amounted to create a charge and not a mortgage. Moreover the covenant against alienation may be said to be a covenant divesting the executant of a portion of his interest in the property in question, but it does not vest that interest in any one else. From a more general point of view, the covenant against alienation did no more

than offer an assurance to the person advancing the money that there would be property available for the realization of a simple money decree, in the event of his being driven to obtain one. Something more than this was required before it could fairly be said that the executant of the document either expressly or impliedly, conferred on the mortgagee a right to cause this particular property to be sold : 33 Cal 985 and A I R 1917 All 4 (F B), Rel. on. [P 37 C 1, 2]

(b) Charge—Subsequent mortgage — Priority over—Notice of charge should be shown.

Charge-holders can have no priority over a subsequent mortgagee of the same property, unless the latter is shown to have notice of the prior charge. [P 37 C 2]

Chiranjiva Lal Aggarwal — for Appellants.

Shamair Chand Qabul Chand — for Respondents.

Tek Chand, J. — On 22nd May 1926, Sant Ram and Hari Ram (defendants 1 and 2) executed a deed in favour of the plaintiffs' firm Vir Bhan Bansi Lal, stating that they had agreed to raise a loan to the extent of Rs. 5,000 from the latter, that the said amount would be taken by means of hundis drawn by them on the plaintiffs from time to time and that a certain house, situate at Amritsar belonging to these defendants was to remain security for re-payment of the loan. This deed was registered on 1st June 1926.

On 28th March 1929, the plaintiffs instituted a suit for recovery of Rs. 4,900 alleged to be due on two hundis drawn by defendants 1 and 2 on 3rd and 20th April 1928, in pursuance of the above arrangement, and prayed that the same be realized by sale of the house above-mentioned. The defendants impleaded were the debtors Sant Ram and Hari Ram (defendants 1 and 2) and the Sahukara Bank, Limited (defendant 3) who claimed to be a mortgagee of the same house, but whose priority was denied by the plaintiffs. The Bank resisted the suit on the plea (1) that the house in question had been "equitably mortgaged" by defendants 1 and 2 with the Bank on 28th January 1926, i. e., about four months before the transaction with the plaintiffs, and (2) that the legal mortgage for Rupees 4,000 had been created on the house by defendants 1 and 2 in favour of the Bank by a formal deed executed and registered on 27th April 1928, and that, apart from the equitable mortgage above-mentioned, this legal mortgage had priority over the transaction relied on by the plaintiffs which created merely a charge

and not a mortgage on the house as alleged by the plaintiffs. The trial Judge upheld these pleas and passed a preliminary decree in favour of the plaintiffs for Rs. 4,900 against defendants 1 and 2 with costs, recoverable from the house, subject to the Bank's mortgage and dismissed the suit against the Bank with costs. This decree was affirmed on appeal by the Additional District Judge. The plaintiffs have preferred a second appeal to this Court.

The first question to be decided is whether the defendant Bank can rely upon the "equitable mortgage" effected on 28th January 1926. The case for the Bank is that on that date defendants 1 and 2 borrowed from the Bank Rs. 3,000 on a promissory note, and as a collateral security for its repayment deposited the title-deeds of the house with the Bank. On the same day a memorandum, Ex. D-8, passed from defendants 1 and 2 to the Bank. The plaintiffs contended that the document Ex. D-8 was not genuine, that the title-deeds were not deposited and that no "equitable mortgage" had been created as alleged by the defendants. They further pleaded that the document Ex. D-8, if at all proved to be genuine, required registration. The Courts below have concurrently found for the Bank on all these points. They have held that the memorandum, Ex. D-8 was genuine, that the title-deeds were in fact deposited with the Bank as collateral security for repayment of the loan raised on that date, and that the memorandum did not require to be compulsorily registered. The first two are findings of fact which cannot be challenged on second appeal and, therefore, the learned counsel for the appellants has confined himself to the point of registration. He contended that the document Ex. D-8 did not merely contain a recital of a completed past transaction, but that it was executed contemporaneously with the taking of the money and the deposit of the title-deeds, and was the sole repository of the terms of the contract between the first two defendants and the Bank and, therefore, it was inadmissible in evidence without registration. I do not, however, think it necessary to go into this point, as from an examination of the Bank's own accounts, it is clear that the equitable mortgage, even if it was validly created on 28th January 1926, had ceased to exist on 27th April 1928, when a regular mort-

gage-deed was effected by defendants 1 and 2 in favour of the defendant Bank for Rs. 4,000 and a formal deed (Ex. D-1-A) was executed and registered. The account shows that on 28th January 1926, Rupees 3,000 had been advanced to defendants 1 and 2 on a demand promissory note. After some repayments and further advances, the sum of Rs. 1,204 was due in April 1928, which was paid off on 27th of that month and the account closed.

On that date, as already stated, a regular mortgage-deed was executed in respect of the same house by defendants 1 and 2 in favour of the Bank for Rs. 4,000. In this deed it was expressly stated that there was no mortgage or charge or other encumbrance existing on the house at that time. There is no mention in the deed that there was any debt due by the mortgagors to the Bank on an earlier account which partially formed the consideration for the mortgage-deed. On the other hand, it was clearly recited that the entire mortgage money, i. e., Rs. 4,000 would be paid in cash by the mortgagee to the mortgagors before the Sub-Registrar. The document was duly presented before the Sub-Registrar on the same day, and in his presence, the sum of Rs. 4,000 was paid in currency notes by the Manager of the Bank to defendants 1 and 2. There is, therefore, no doubt that the account under the equitable mortgage had been cleared off before the regular mortgage-deed was executed, and in this view of the case no question of the merger of the "equitable" into the "legal" mortgage arises. Consequently, the Bank cannot rely upon the alleged equitable mortgage as giving it priority over the plaintiffs' transaction. On this finding, the competition is between the transaction evidenced by the plaintiffs' registered deed, Ex. P-1, dated 22nd May 1926, and the regular mortgage in favour of the defendant Bank dated 29th April 1928, (Ex. D. 1. A). It will be seen that the plaintiffs' deed is earlier in date, but its priority depends upon the determination of the real nature of the transaction embodied in it. If it is found to be a mortgage, there is no question that it will take precedence over the subsequent mortgage in favour of the Bank. If, however, it merely created a "charge," it can take priority only if the Bank had notice of it.

The Courts below have held it to be a 'charge' and not a mortgage, and after

examining the document and hearing arguments, I am of opinion that this finding is correct. In the first place, we hold that the document is described as a zamanatnama or security bond and not a rahnnama or a mortgage-deed. Secondly, it was not stamped as a mortgage-deed, but bears a stamp of Rs. 5 only. Thirdly, there are no words in the body of the deed from which it may be inferred that there was transfer of an interest in the house by the executants to the plaintiffs. It was merely recited that the executants were in need of Rs. 5,000 for carrying on their business, that they had entered into an agreement with the plaintiffs for an advance of the sum of Rs. 5,000 for this purpose, which would be paid by means of hundis drawn by the executants on the plaintiffs' firm, from time to time, and that till the discharge of these hundis, the house in question would remain security with the plaintiffs. It was also stated that the house was free from any charge or encumbrance, and that until re-payment in full of the amount which might be advanced by the plaintiffs, the executants would not have the right to alienate the property in any way, and that if it was discovered that the house was already encumbered or in contravention of the stipulation to the contrary, the executants alienated the house, they would be liable criminally and such alienation would be invalid.

The learned counsel for the appellants, while admitting that there is no express transfer of interest in the house, urged that the covenant restricting the executants' right to alienate the property indicates that there was a transfer of interest in the house and consequently the transaction must be held to be a mortgage and not a charge. In my opinion, this contention is without force. It will, I think, be sufficient to refer to 33 Cal 985:¹ see the judgment of Mookerjee, J. at p. 992 and 39 All 244,² in both of which the same argument was raised, but rejected. In the latter case, Piggott, J. put the matter very clearly and succinctly as follows: see p. 253:

In the present case we are asked to infer from the covenant against alienation that there has been a transfer of interest by the executant in favour of the transferee. The covenant against

alienation may be said to be a covenant divesting the executant of a portion of his interest in the property in question, but it does not vest that interest in any one else. From a more general point of view, it may be said that the covenant against alienation does no more than offer an assurance to the person advancing the money that there will be property available for the realisation of a simple money-deed, in the event of his being driven to obtain one. Something more than this is required before it can fairly be said that the executant of the document either expressly or impliedly, conferred on the mortgagee a right to cause this particular property to be sold.

With this exposition of the legal effect of the covenant, I am in respectful agreement. I would accordingly hold that the document Ex. P-1 merely created a 'charge' in favour of the plaintiffs, and not a 'mortgage.' It is not disputed that on this finding, the plaintiffs as charge-holders can have no priority over a subsequent mortgagee of the same property unless the latter is shown to have notice of the prior charge. Admittedly, there is no proof of express notice in the case, but it is argued by Mr. Chiranjiva Lal Aggarwal that the circumstances are such as to raise a presumption that the Bank had such notice. The learned counsel conceded that according to the law, as it was in force at the time, mere registration did not per se amount to notice but he relied upon the circumstances namely, that the house in dispute was situate in the town of Amritsar which is a great commercial centre, that the subsequent mortgagee was a joint stock company doing banking business, and that as the usual practice of Banks before accepting a transfer of immoveable property is to make enquiries in the office of the Registrar with a view to ascertain if the property had any encumbrance upon it, he contended that in these circumstances, it is reasonable to presume that the defendant Bank made such enquiries before taking the mortgage in question, and that if it did not do so, its failure showed lack of care and caution, which shifted the onus to the defendant Bank to prove that they had no notice of the prior transaction in favour of the plaintiffs. In my opinion, this argument is without force and I do not think that they are sufficient either individually or collectively to justify a finding that the defendant Bank had notice of the plaintiffs' transaction. In agreement with the Court below, I hold that the plaintiffs' charge has no priority over the defendants' mortgage, and this appeal must fail.

1. Royzuddi Sheikh v. Kali Nath Mookerji, (1906) 33 Cal 985=4 C L J 219.

2. Mohan Lal v. Indomati, A I R 1917 All 4=39 I C 18=39 All 244=15 A L J 174 (F B).

There is one small point which it seems necessary to make clear. The decree, as passed by the trial Court and affirmed by the Additional District Judge, while granting the plaintiffs a decree for Rs. 4,900 against defendants 1 and 2 on the security of the house, subject to the charge of defendant 3, does not clearly specify the particulars of the charge. This should be done now. I would accordingly order that the decree shall read as follows:

A preliminary decree is granted to the plaintiffs for Rs. 4,900 against defendants 1 and 2 with costs as a charge on the house described in the plaint, but subject to the payment of the amount due to defendant 3 on foot of the registered mortgage, Ex. D-1.-A, for Rs. 4,000 dated 27th April 1928, executed by defendant 3.

The order of the lower Courts allowing defendant 3 his costs against the plaintiffs in those Courts shall stand, but the parties shall bear their own costs in this Court.

Dalip Singh, J.—I agree.

B.D./R.K. Order accordingly.

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FULL BENCH

COLDSTREAM, BHIDE AND DIN
MOHAMMAD, JJ.

Deputy Commissioner, Jhang—Petitioner.

v.

Budhu Ram and others — Opposite Parties.

Civil Ref. No. 10 of 1936, Decided on 28th October 1936, from order of Dist. Judge, Shahpur, D/- 13th February 1936.

(a) Punjab Alienation of Land Act (13 of 1900), Ss. 16 (2) and 12—S. 16 (2) is independent of S. 12—Civil Court is empowered to lease out land belonging to member of agricultural tribe for full period of twenty years irrespective of previous encumbrances by owner, although effect of such order is to extend combined period of alienations beyond twenty years.

A Civil Court is empowered to pass order leasing the land of the member of an agricultural tribe for a full period of twenty years irrespective of the encumbrances created thereon by the owner himself, although the effect of the order is to extend the combined period of the temporary alienations beyond a period of twenty years.

[P 39 C 1; P 40 C 1]

Section 16 (2) is independent of S. 12 and a civil Court can exercise its powers under S. 16 (2) to the fullest extent, no matter what the owner may have done. To hold otherwise would be to clothe the owner with the authority of debarring a civil Court permanently from exercising its powers under S. 16 (2) and to enable him to deprive successfully all his creditors of the only remedy open to them of realising their decrees. A curtailment of the right of the civil Court acting

under S. 16 (2) cannot be inferred from the surrounding circumstances alone in absence of an express provision to that effect: *A I R 1930 Lah 1034, Ref.*; *A I R 1935 Lah 56* and *A I R 1936 Lah 545, Disting.* [P 39 2; P 40 C 1]

(b) Interpretation of Statutes—Rights of Court—Right vested in Court cannot be curtailed by mere inferences depending on individual interpretations in absence of unequivocal terms.

A right vested in a Court cannot be curtailed or circumscribed within any limits by mere inferences depending on individual inclinations or interpretations and if it is intended to do so, it must be done in unequivocal terms. [P 39 C 2]

(c) Interpretation of Statutes—Language—Enactment must be interpreted according to its plain language—Court should not speculate about intention of legislature when language is plain.

One of the cardinal rules of the interpretation of statutes is that an enactment must be interpreted according to its plain language and it is not for the Court to speculate as to the intention of the Legislature where the language is plain. A case not provided for in a statute cannot be dealt with merely because there seems to be no reason why it should have been omitted and the omission may appear unintentional. [P 40 C 2]

Ram Lal—for Petitioner.

Manohar Lal Mehra and *A. D. Malik* for *A. G. Maurice*—for Opposite Parties.

Din Mohammad, J.—This case has been heard by us in the following circumstances. It originally came on for hearing before Agha Haidar, J. but considering that the question was one of considerable importance he recommended that the case be referred to a Division Bench. It was accordingly laid before a Division Bench composed of Jai Lal and Abdul Rashid, JJ. who have, however, referred it to a Full Bench without expressing any opinion of their own. The facts bearing on the point of law involved in this case are these: One Pathana, who is a member of an agricultural tribe, had executed a mortgage of his land for eleven years which had to run from Rabi 1929 and end in Kharif 1940. In 1935, the same land was under the orders of the Senior Subordinate Judge, Jhang, leased to the creditors of Pathana for a period of 14½ years commencing from Rabi 1941. The Deputy Commissioner, Jhang, considering that the order of the Subordinate Judge was contrary to the provisions of the Land Alienation Act presented an application for revision to the District Judge to whom appeals from the orders of the Subordinate Judge lay. The District Judge, however, did not agree with the Deputy Commissioner and dismissed the application. It

was against that order of the District Judge that the present application was presented to this Court under S. 21-A (3), Land Alienation Act.

The only question that falls for determination in this case is whether the Subordinate Judge could lease for 14½ years the land which had already been mortgaged by its owner for eleven years. In other words, we are called upon to decide whether a civil Court is empowered to pass an order leasing the land of a member of an agricultural tribe for a full period of twenty years irrespective of the encumbrances created thereon by the owner himself, although the effect of the order is to extend the combined period of the temporary alienations beyond twenty years. The contention raised on behalf of the Deputy Commissioner is that S. 16 (2) Land Alienation Act, bars the course adopted by the Subordinate Judge and that that section cannot be read alone but should be interpreted in the light of Ss. 6, 11 and 12 of the Act. S. 6 deals with the forms of mortgages permitted under the Act, S. 11 treats of leases and farms by the owners themselves and S. 12 imposes certain restrictions on the powers of the owners in respect of such leases and farms. The argument advanced on behalf of the Deputy Commissioner is that inasmuch as no mortgage or lease can be granted by the land owner himself for a period exceeding twenty years and the power of the Court to grant a lease is also restricted to a period of twenty years under sub-s. 2 of S. 16, if the power has once been exercised by the land owner, the Court is bound to respect it and to take into account the period for which the private lease has already been granted. It is consequently urged that the order of the Subordinate Judge is opposed to the provisions of the law, as, taken along with the mortgage granted by the owner himself, the effect of the order is to burden the land with two temporary alienations which when combined extend beyond twenty years. In support of this contention, reliance is placed on two judgments of this Court reported as A I R 1935 Lah 56,¹ and 17 Lah 531.² In A I R 1935 Lah 56,¹

Skemp, J. in a case where in the execution of two different decrees of a civil Court leases had been allowed for a double period of twenty years, one commencing after the other, held that this was not permissible under the law. The main reason on which that judgment was based was that as the owner could himself not encumber his land in any way for a period exceeding twenty years, the Court also was debarred from doing so inasmuch as the Court could not exercise a right greater than the owner himself. The same principle was reaffirmed by a Division Bench of this Court composed of Sir James Addison and Abdul Rashid, JJ. in 17 Lah 531,² and the observations made by Skemp, J. were approved. I have no hesitation in saying that those judgments do not afford any help in the determination of this case. Here the order of the Subordinate Judge standing alone does not contravene the provisions of any law. The problem that is to be solved in this case is whether the order of a civil Court which is otherwise valid is invalidated on account of anything done by the owner himself previous to the passing of the order, and for this problem there is no solution in those judgments. As the law stands, the Court does not suffer under the same disability as the owner, and while the powers of the owner have been expressly limited by the language used in S. 12, no such restriction has been imposed on the Court under S. 16 (2). It is well recognised that a right vested in a Court cannot be curtailed or circumscribed within any limits by mere inferences depending on individual inclinations or interpretations, and if it is intended to do so, it must be done in unequivocal terms; such unambiguous expression being clearly lacking in this case, to my mind, a curtailment of the right of the civil Court acting under S. 16 (2) cannot be inferred from surrounding circumstances alone.

It may be useful to remember in this connection that sub-section (2) of S. 16 was for the first time inserted by an Amending Act in 1931, apparently to remedy the defect in the principal Act brought to light by a judgment of this Court, which laid down that as the law then stood, the restriction of twenty years did not apply to leases granted by a civil Court: see 127 I C 363.³ At the time of

1. Deputy Commissioner, Muzaffargarh v. Joint Hindu Family Sukh Dial Chander Bhan, A I R 1935 Lah 56=157 I C 1028.

2. Deputy Commissioner, Muzaffargarh v. Joint Hindu Family of Tahliaram, A I R 1936 Lah 545=160 I C 947=17 Lah 531.

3. Wir Bhan Jivan Das v. Surain Singh, A I R 1930 Lah 841=127 I C 363.

the enactment of this sub-section it cannot be imagined that it was not present to the mind of the Legislature that cases would arise where during the currency of a temporary alienation by the owner, a Court would be called upon to grant a further lease or farm. But, in spite of this and of the prohibition imposed on the owner in such cases, the Legislature did not use any such language as would expressly tend to limit the period for which a Court could grant a lease or farm in similar circumstances. It cannot, therefore, be urged that the power conferred on the Court by S. 16 (2) was in any manner to be controlled or governed by what the owner had already done. In my view, therefore, S. 16 (2) is independent of S. 12 and a civil Court can exercise its power under that section to the fullest extent, no matter what the owner may have done. To hold otherwise would open the door to abuses of the worst kind. As pointed out by Agha Haidar, J. an owner in those circumstances would be clothed with the authority of debarring a civil Court permanently from exercising its power under S. 16 (2) and would thus be enabled to deprive successfully all his creditors of the only remedy left open to them to realize their decrees. It is inconceivable that the Legislature ever intended to countenance such fraud as would undoubtedly result if that construction was adopted. I would, accordingly, hold that the order of the Subordinate Judge was in accordance with law and that he could under the provisions of sub-s. (2) of S. 16 grant a lease of the land of Pathana for a period of $14\frac{1}{2}$ years commencing from the expiry of the prescribed term of the previous mortgage. To meet the contingency of the earlier redemption of the mortgage, however, if it ever arose, I would modify the order of the Subordinate Judge to this extent: that I would order that the period of $14\frac{1}{2}$ years would, instead of running from Rabi 1941, start from the date of the extinguishment of the mortgage if that event happened earlier.

Bhide, J.—I agree with my learned brother Din Mohammad, J. The argument of the learned counsel for the Deputy Commissioner, who made the present application was based mainly on the assumption that the powers of an executing Court under S. 16, Punjab Alienation of Land Act, must be taken to be subject to the same restrictions as those imposed on the powers of a

member of an agricultural tribe in making an alienation voluntarily. I am unable to find any support for this argument in the plain language of S. 16. One of the cardinal rules of interpretation of statutes is that an enactment must be interpreted according to its plain language and it is not for the Court to speculate as to the intention of the legislature where the language is plain. A case not provided for in a statute cannot be dealt with merely because there seems to be no reason why it should have been omitted and the omission may appear unintentional (cf. Maxwell on Interpretation of Statutes, Edn. 7, p. 12). In the present instance, I am not even sure that this is a case of unintentional omission; for there are other differences also between the powers of a Court acting under S. 16 and those of a private individual as will be pointed out hereafter. There is nothing in the language of S. 16 to show that the powers of the executing Court in respect of mortgages are subject to the restrictions laid down in S. 12. The section does say that if a mortgage is effected it shall be in one of the forms mentioned in S. 6, but it makes no reference to S. 12.

There is, moreover, doubt in my mind as to whether there has been any contravention of the provisions of S. 12 at all in this case even if that section were applicable. The land in dispute was originally mortgaged from "Rabi 1929" to "Kharif 1940" and in 1935, the Senior Subordinate Judge, Jhang, ordered it to be mortgaged in execution of a decree from "Rabi 1941" to "Rabi 1955." It will be observed that no definite dates are given for the commencement and the termination of the periods of the mortgages and the interpretation thereof is not free from difficulty. I take it that the interpretation should be uniform and if "Rabi 1929" means the commencement of Rabi 1929 then "Kharif 1940" should also mean the "commencement of Kharif 1940." If so, there was clearly an interval between the period of the two mortgages. But even if "Rabi 1929 to Kharif 1940" is to be taken to mean "from the commencement of Rabi 1929 to the termination of Kharif 1940," there will, I think, still be an interval between the two periods. For "Kharif 1940" cannot be taken to extend beyond December 1940, or at the most perhaps a month or two later, while "Rabi 1941" cannot be taken to commence till about October in the year 1941.

This is apparently the sense in which the second mortgage was taken to have been effected for a period of 14½ years. For the second mortgage was ordered to take effect from "Rabi 1941 to Rabi 1955," and if this means "from the commencement of Rabi 1941 to the end of Rabi 1955," the period would come to 14½ years. There was thus an interval of some months at least between the periods and from this point of view there was in my opinion no contravention of the provisions of S. 12. The learned counsel for the Deputy Commissioner argued that a second mortgage of this kind was not permissible even if there was an interval between the two periods and that a member of an agricultural tribe cannot throughout his life make alienations of his land, even with intervals, for periods aggregating in all to more than 20 years. No authority was cited in support of the interpretation and it seems to me too far-fetched to need any discussion.

It may be pointed out further that the powers of an executing Court acting under S. 16 differ from those of a member of an agricultural tribe in certain other respects also. For instance, a member of an agricultural tribe is at liberty to make a permanent alienation of his land, without any restriction, in favour of another member of the same tribe or of a tribe in the same group, or even in favour of a non-agriculturist with the sanction of the Deputy Commissioner. But no such power is conferred on the executing Court by S. 16, which absolutely prohibits the sale of land belonging to a member of an agricultural tribe. It was accordingly held by a Division Bench of this Court in 12 Lah 367,⁴ that a Court or a receiver had no power to sell such land in insolvency proceedings even in favour of an agriculturist owing to the provisions of S. 16, Punjab Alienation of Land Act. The legislature may have had good reasons for making a distinction as regards the restrictions imposed on the powers of an executing Court and those of a member of an agricultural tribe in making voluntary transfers. In any case, the Courts have to construe a statute according to its plain language as pointed out already and if the intention of the legislature was different to what has been held above, it is for the

legislature to give effect to it by expressing it in clear and unambiguous language.

Coldstream, J.—I agree. If it is the intention of the legislature to prohibit the passing of any order by an executing Court which has the effect of keeping a judgment-debtor who is member of an agricultural tribe out of possession of his land for more than twenty years it should express this intention in clear words. I am unable to find in the section any such prohibition. As pointed out by my learned brother sub-s. 2, S. 16 was inserted in 1931, in order to define further the restrictions, intended to be placed on the powers of executing Courts in alienating temporarily the lands of agriculturists, and had it been intended to limit the powers of the Courts to the powers of the proprietors this would presumably have been made clear. As it stands the sub-section does not mention the powers of the Courts in cases where temporary alienations effected by the judgment-debtors themselves are in force and it cannot be assumed that the powers of this Court are less wide when dealing with land already temporarily alienated by its proprietor, than with other property. There is no general statutory or customary bar to temporary alienations by agriculturists for more than twenty years. The incapacity of members of agricultural tribes is one peculiar to such persons created by special provisions of the Act and I can find no justification for extending that incapacity to Courts of law dealing with their property in the absence of a definite and clear statutory enactment to this effect.

Order of the Court.

We dismiss the petition but modify the order of the Senior Subordinate Judge, Jhang, in accordance with the decision of Din Mohammad, J. No order as to costs.
R.M./R.K. *Petition dismissed.*

**** A. I. R. 1937 Lahore 41**

MONROE, J.

On difference between

JAI LAL AND COLDSTREAM, JJ.

Hargulal Mal—Plaintiff—Appellant.

v.

Mohammad Ata Elahi Khan and another—Defendants—Respondents.

First Appeal No. 1958 of 1933, Decided on 15th May 1936, from decree of Addl. Sub-Judge, First Class, Delhi, D/- 28th August 1933.

4. *Mirza v. Jhanda Ram*, A I R 1930 Lah 1034=130 I C 419=31 P L R 842=12 Lah 367.

* * Limitation Act (1908), S. 15 (2)—Scope—Question of limitation is itself a rule of procedure—S. 54, U. P. Court of Wards Act, enacts a rule of procedure only—Rules of procedure of one province cannot affect procedure of Courts in another province—Rules of procedure to be considered while considering the question of limitation are those of *lex fori*—S. 54 not being applicable to Delhi province, suit brought against ward on notice to Collector but after limitation, held barred. (Per *Coldstream* and *Monroe, JJ.*; *Jai Lal J. contra.*)

S. 54, U. P. Court of Wards Act, enacts a rule of procedure only like S. 80, Civil P. C. The question of limitation is itself one of procedure and if a consideration of that question involves a consideration of other rules of procedure, the rules of procedure which must be considered are those of the *lex fori*. [P 49 C 2]

Where, therefore, a suit was brought in Delhi province, against a ward on giving two months' notice to the Collector as required by S. 54, U. P. Court of Wards Act and the suit was brought after the expiry of these two months but after the prescribed period of limitation:

Held: (Per *Coldstream* and *Monroe JJ.*; *Jai Lal J. contra*) that the suit was barred by limitation as there was no enactment within the meaning of S. 15 (2), Limitation Act, in force in Delhi province requiring notice to be given to the Collector for instituting a suit against a Ward. *Case law discussed.* [P 49 C 2]

Ram Kishore, Naval Kishore, R. K. Tandon, Kishen Dayal and Bishen Narain—for Appellant.

R. C. Soni and Inder Dev—for Respondent 2.

Jai Lal, J.—(25th July 1935).—On 25th May 1932, the appellant Hargulal Mal instituted a suit for recovery of Rs. 6,893-5-3 on the basis of a promissory note against Mohammad Ata Elahi Khan, Rais of Shahpur, District Muzaffarnagar in the United Provinces of Agra and Oudh, and the Court of Wards, District Muzaffarnagar, in charge of the estate of Mohammad Ata Elahi Khan through the Collector of Muzaffarnagar. The suit was instituted in the Court of the Senior Subordinate Judge, Delhi. It was based on a promissory note executed on 28th March 1929 by Mohammad Ata Elahi Khan. It appears that on 1st April 1931, the Court of Wards in the United Provinces of Agra and Oudh acting under the United Provinces Court of Wards Act, 1912, assumed superintendence of the estate of Mohammad Ata Elahi Khan. The description of defendant 2 is not quite correct but there is no doubt that the suit was intended to be in the name of the Collector in charge of the property of defendant 1 under S. 55 of the Act.

Defendant 1 admitted the claim of the plaintiff but defendant 2 contested it on the merits and also raised preliminary objections: one of which was that the Court of the Senior Subordinate Judge, Delhi, had no jurisdiction to entertain this suit; the other was that the suit was barred by time. Consequently two preliminary issues were framed by the trial Judge; the first relating to jurisdiction was found in favour of the plaintiff and against defendant; the second as to limitation was found in favour of the defendant and the suit was dismissed. The plaintiff has consequently presented this appeal in this Court. It is contended that the conclusion of the trial Judge that the suit was barred by time is wrong. The decision of this question really turns upon whether the plaintiff is entitled to take advantage of S. 15 (2), Lim. Act. There is no doubt that the normal period prescribed for instituting the suit has expired, and that if the plaintiff can bring his case under S. 15 (2), then alone can it be held to be within time. That section provides that:

In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded.

In the present case the plaintiff gave a notice in accordance with the requirements of S. 54, United Provinces Court of Wards Act, which runs:

No suit relating to the person or property of any ward shall be instituted in any civil Court until the expiration of two months after notice in writing has been delivered to or left at the office of the Collector or other person in charge of the property, stating the name and place of abode of the intending plaintiff, the cause of action, and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

That such notice was given was stated in the plaint and is not denied; but the contention of the respondent, the Collector in charge of the property of the ward, is that no suit lies against him in the civil Courts having jurisdiction outside the United Provinces and that a plaintiff, as in this case, must, if at all, proceed against the ward in his own name in such Courts and, therefore, neither S. 54, United Provinces Court of Wards Act, nor S. 15 (2), Lim. Act can avail the plaintiff. This contention has found favour with the learned Judge of the trial Court. The respondent's case is that S. 15, Lim. Act prescribes a

rule of procedure and so does S. 54, United Provinces Court of Wards Act, and that it is a well recognized rule of law that no local Legislature can provide for procedure in Courts which have jurisdiction outside the limits of the province in respect of which that Legislature has been constituted. S. 15 (2), however, forms part of an enactment of the Indian Legislature and is, therefore, applicable to the proceedings in civil Courts in the United Provinces as well as the Punjab including Delhi. The question, therefore, is whether the expression "requirements of any enactment for the time being in force" is restricted to enactments which are in force in the province in which the suit has been brought. In my opinion the decision of this question depends partially on whether the Court of Wards in the United Provinces is competent to assume superintendence of the property of the ward situated outside the United Provinces; in other words whether the disqualification imposed by the Act on the ward is restricted to the United Provinces or accompanies him wherever he goes. This matter has been discussed by the Allahabad High Court in two cases cited before us: In 25 All 195¹ a Division Bench of the Allahabad High Court observed as follows:

The cases in which the property of a minor is situated in more than one province must then have been, and must now be, of frequent occurrence, specially when the minors are residents in districts bordering upon another province. It would manifestly not be in the interests of the disqualified proprietors, but would clearly run counter to them if it were the law that only that portion of a minor's property would fall under the superintendence of the Court of Wards which was situate within the province in which the proprietor had been by law disqualified.

In that case a disqualified proprietor in Oudh attempted to sell a small portion of his property situated in the North-Western Provinces, and it was held:

The disqualification imposed as a consequence of proceedings legally taken against him was a personal disqualification and extended to all dealings of the disqualified proprietor with any property wheresoever situate.

No doubt this case related to the capacity of the disqualified proprietor to enter into a valid contract outside the province in which he had been declared as such, but the principle underlying is the same in the present case, as in that case, because the disqualification to contract implies disqualification to be sued personally.

1. Lachmi Narain v. Fateh Bahadur Singh, (1903) 25 All 195=1903 A W N 8.

In the recent case A I R 1930 All 602² also a judgment of a Division Bench, it was held that:

The whole of the moveable and immoveable property of a ward is deemed to be under the superintendence of the Court of Wards and it is immaterial whether as a matter of fact the Court of Wards has discovered or taken possession of the entire estate or not.

It was also held that:

The ward has no *locus standi* to institute a suit in his own name even in respect of properties over which superintendence has not been taken and the real party to the suit is the Collector himself.

Section 55, United Provinces Court of Wards Act, was interpreted in the manner stated above and it was observed that:

That section is in no way confined to suits relating to properties over which superintendence has been taken. The section is quite wide in its scope and there is no good ground for restricting its meanings. It prohibits all suits by all wards otherwise than by and in the name of the Collector. The present suit undoubtedly is a suit by a ward and was not properly instituted.

It was previously observed in the same judgment that:

The language of S. 16, Court of Wards Act, is specific, and is to the effect that the whole of the moveable and immoveable property of a ward shall be deemed to be under the superintendence of the Court of Wards. The only exception is with regard to properties acquired subsequently by the ward otherwise than by inheritance.

The same question was considered by a Division Bench of the Calcutta High Court in 35 I C 634.³ In that case also the question was of the interpretation of the United Provinces Act. The learned Judges observed:

The first question that has been urged in this appeal is that the Court of Wards of the United Provinces of Agra and Oudh has no jurisdiction to deal with the property of a disqualified proprietor situated outside the limits of the territories subject to the Lieutenant-Governor of the United Provinces of Agra and Oudh.

After discussing arguments of the Counsel they held:

The expression 'the whole of the moveable and immoveable property of the ward' means what it says and is not limited to the moveable and immoveable property situated within the limits of the territories subject to the Lieutenant-Governor of the United Provinces of Agra and Oudh.

According to these rulings, therefore, the Court of Wards of the United Provinces has jurisdiction to deal with any property that the ward may have in the Punjab and Delhi and the disqualification of defendant 1 accompanies him wherever he

2. Balwant Singh v. Collector of Saharanpore, A I R 1930 All 602=130 I C 689=1930 A L J 807.

3. Gadadhar Bhatta v. Sarat Chandra Mukherjee, A I R 1917 Cal 601=35 I C 634.

may be. It follows therefore that he is not competent to have a decree passed against him in the same manner as he is not competent to incur a liability by entering into a fresh contract and it is the Court of Wards alone which must be sued and is competent to defend any suit which may result in affecting the ward personally or his property ultimately. 56 Cal 704,⁴ a judgment of a learned Judge sitting in Single Bench of the Calcutta High Court, has been relied upon by the respondent. That case however does not, in my opinion, directly affect the present case, though there are some observations made by the learned Judge which tend to support the contention of the learned counsel. In that case a decree had been passed against a firm and the question arose in execution proceedings whether a person who was a ward of the Court of Wards of the United Provinces was a partner in the judgment-debtor's firm and an inquiry was held under O. 21, R. 50 (2), Civil P. C. The contention raised on behalf of the defendant was that he being a disqualified person under the United Provinces Court of Wards Act, no inquiry could be held against him till the Court of Wards had been impleaded. The learned Judge held that the United Provinces Court of Wards Act had no application to case before him and that the rules of procedure prescribed by the Act did not govern the exercise of jurisdiction by him as the Act had been passed by the local legislature of the United Provinces.

While I am prepared to assent to the general proposition, that mere rules of procedure prescribed by the local legislature govern the Courts only in the province for which that local legislature has been constituted, I consider that the observations of the learned Judge should be restricted to the peculiar facts of the case which was before him. That case arose out of execution proceedings, a decree having already been passed, and I am not aware of any procedure which governs the formal impleading of parties in such proceedings. Moreover I do not think that in this case the question involved is one merely of procedure. The decision of this case depends upon the effect of the United Provinces Act upon the capacity of the disqualified person to sue and be sued in

this province, and such a disqualification is a question not of procedure but of substantive law as laid down in 25 All 195.¹

42 All 609,⁵ a judgment of their Lordships of the Privy Council, is clearly distinguishable. In that case, before the superintendence of the property of the disqualified person had been assumed by the Court of Wards in the Punjab, the Deputy Commissioner issued an injunction to the proposed ward in respect of the property situated in the United Provinces and at a time when such person was outside the province of the Punjab. The question arose whether the sale of property by the ward was legal and their Lordships held that the Deputy Commissioner had no jurisdiction to issue the injunction and therefore the sale could not be impugned on that ground. I have no doubt that if the Court of Wards had assumed superintendence of the estate of the ward and an order had been issued by the Deputy Commissioner as the officer in charge of the estate, under the Punjab Court of Wards Act, relating to the prosecution or management of the property of the ward, such an order would have been held to be binding on the ward and others concerned. I do not think the judgment of their Lordships of the Privy Council can be held to lay down that the Court of Wards in the Punjab has no jurisdiction to assume superintendence of the property of the ward situated outside the Punjab. In my opinion it would defeat the objects of the Court of Wards Act if such a view is upheld and I consider that it is not supported by anything contained either in the United Provinces Court of Wards Act or the Punjab Court of Wards Act. S. 13, Punjab Act, provides that:

Upon the publication of a notification under S. 9, in respect of the property of any person, the whole of such property shall vest in the Court of Wards.

Section 16, United Provinces Act, says:

The whole of the moveable and immoveable property of a ward shall be deemed to be under the superintendence of the Court of Wards.

The United Provinces Act is, if at all, more comprehensive than the Punjab Act. 46 I C 316⁶ deals with a case which arose under the Bengal Court of Wards Act and is not, therefore, of material assistance in

4. Chhattoo Lal Misser & Co. v. Naraindas Baijnath Prasad, A I R 1930 Cal 53=121 I C 403=56 Cal 704.

5. Mohammad Rustam Ali Khan v. Mushtaq Hussain, A I R 1921 P C 105=57 I C 329=42 All 609=47 I A 224 (P C).

6. Mohammad Abdus Salam v. Rani Kamalmukhi, A I R 1918 Pat 520=46 I C 316.

the present case. The distinction between the two Acts has been brought out by Sulaiman, J. in A I R 1930 All 602.² I am, therefore, of opinion that by virtue of the United Provinces Court of Wards Act, no suit will lie against a disqualified person personally even in Courts outside the United Provinces as he is neither competent to contract nor to sue or to be sued in his name anywhere so long as the disqualification lasts. It follows that the only person who can sue or can be sued in such cases is the Court of Wards and that all suits must be filed in the name of the Collector in charge of the property of the disqualified person. If that is so, it is obvious that the Collector can be named as a defendant only under S. 55, United Provinces Court of Wards Act, and under S. 54 of that Act no suit can be brought against him unless the prescribed notice is given.

There is no justification for restricting the scope of S. 15 (2), Lim. Act, an Act which is binding on the Courts in this province, in the manner suggested by the respondent. The phraseology of this section is, in my opinion, sufficient to include a notice which has been given in accordance with the requirements of an enactment of a local Legislature. The Act imposes a disqualification on defendant 1 and a qualification and corresponding liability on defendant 2 who alone is liable to be sued and competent to defend this suit and he cannot be sued without the prescribed notice. The matter is not, therefore, merely of procedure. If the contention of the respondent is accepted as correct, then an anomalous situation will be created as the same person would be considered to be disqualified on the other side of the Jumna river, while on this side he would be considered to be a qualified person competent to raise loans, to deal with his property, and to suffer judgments to be given against him, so as to bind his property. This situation could not have been contemplated by the Legislature; on the other hand, in my opinion, the phraseology of Ss. 16, 54 and 55, United Provinces Court of Wards Act, is intended to prevent such a situation from arising and this intention is sufficiently expressed in these sections. If the suit is to be brought only in the name of the Collector under S. 55, then, in my opinion, it necessarily follows that S. 54 also governs the case and the suit is within time. I would,

therefore, accept this appeal, set aside the decree of the trial Judge and remand the case to him with directions to proceed with it in accordance with law. I would refund the court-fee on the memorandum of appeal to the appellant and direct that the other costs should abide the result.

Coldstream, J.—(25th July 1935)—The suit out of which this appeal arises was instituted in the Court of the Additional Subordinate Judge, First Class, Delhi, on 25th May 1932, by the appellant Hargul Mal to recover Rs. 6,893-5-3, principal and interest due to him upon a promissory note for Rs. 5,000, alleged to have been executed by the respondent Mohammad Ata Elahi Khan on 28th March 1929. Mohammad Ata Elahi Khan who resided in Muzaffarnagar District in the United Provinces, had on 1st April 1931, become a ward under the provisions of the United Provinces Court of Wards Act. S. 54 of that Act provides that no suit relating to the person or property of any ward shall be instituted in any civil Court until the expiration of two months after notice in writing has been delivered to or left at the office of the Collector or other person in charge of the property. In S. 55, the Act goes on to provide that :

No ward shall sue or be sued nor shall any proceedings be taken in the civil Court otherwise than by and in the name of the Collector in charge of the property or such other person as the Court of Wards may appoint in this behalf.

Having regard to these provisions the plaintiff had on 25th March 1932 given notice to the Collector of Muzaffarnagar, who in accordance with the scheme of the Act, was in control of Muhammad Ata Elahi Khan's estate. At the time of the notice the suit would have been within limitation, but at the time the suit was instituted, the period of limitation had expired. The plaintiff however claimed that this suit was still within time as he was entitled to exclude from the period of limitation under the provisions of S. 15 (2), Lim. Act, the period of two months prescribed for the notice required by S. 54, Court of Wards Act. The suit was resisted by the Court of Wards on the grounds that the Delhi Court had no jurisdiction, that the Court of Wards was not a necessary party as the United Provinces Court of Wards Act had no application to suits in Delhi and that therefore the plaintiff was not entitled to exclude the period of the notice and the suit was barred by limitation. It was further pleaded that the

promissory note was without consideration and that Muhammad Ata Elahi Khan was not competent to execute it. The last plea had reference to the provisions of Ss. 9 and 37, Court of Wards Act, the application of which has not been made clear, inasmuch as it would appear from the written statement that the inquiry under S. 9 was not gazetted until after October 1930. The proceedings were ex parte against Mohammad Ata Elahi Khan.

The impleading of the Court of Wards was not in accordance with the provisions of S. 55 of the Act, but this was a technical error which I do not think material. The notice was given to the Collector under S. 54 and the suit purported to be against Mohammad Ata Elahi Khan 'through the Collector of Muzaffarnagar.' The Additional Subordinate Judge of Delhi found that he had jurisdiction to try the suit, but upheld the objection raised on the point of limitation, deciding that as the United Provinces Act was not in force in Delhi, notice under S. 54 of that Act was not necessary for the suit, and that the period of that notice could not be excluded under S. 15 (2), Lim. Act. It is contended on appeal that this decision was wrong. The learned Additional Subordinate Judge based his decision on the point of limitation on 56 Cal 704.⁴ In that case a decree had been obtained in Calcutta against a firm and it was sought in execution proceedings to make one Bhagwan Das liable under the decree as a partner. Bhagwan Das pleaded that he was a ward under the United Provinces Court of Wards Act and that the Calcutta Court was not competent to hear a case against him or to decree it unless the provisions of that Act were observed. This plea was rejected by Remfry, J., who held that the local legislature had no jurisdiction to legislate save for its own provinces and the Act did not purport to extend beyond those provinces and that the Act would have no effect outside the jurisdiction of its own legislature. "In my opinion," he observed,

no local legislature can prescribe any procedure for any Court beyond its territorial jurisdiction and any Act passed by the local legislature for its own Courts cannot be enforced beyond those territories. As far as this Court is concerned, the Act is in the same position as the legislation of a foreign country, and though such legislation can define the status of its own citizens and such status will be recognized by foreign Courts, when

the actual status of a person is not affected, the Municipal law of a foreign country cannot control or affect in any way the procedure of a Court of another country. As Bhagwan Das has the status of an ordinary British subject, he cannot be allowed to set up the special procedure of local Act as a defence to this proceeding.

The learned Additional Subordinate Judge found further support for his decision in the judgment of the Privy Council in 42 All 609.⁵ The facts in that case were as follows. Nawab Azmat Ali Khan, who owned landed property in Karnal in the Punjab and Muzaffarnagar in the United Provinces, fearing that the Deputy Commissioner of Karnal was about to place him and his property under the Court of Wards, went to Muzaffarnagar and executed a wakfnama dedicating some of his property in Muzaffarnagar to religious purposes. Before the wakfnama was registered, the Deputy Commissioner of Karnal, acting under Ss. 11 and 12, Punjab Court of Wards Act, which contain provisions of a nature similar to those of S. 9, United Provinces Act, and empower the Deputy Commissioner to control the property of a person into whose circumstances he is enquiring, issued an injunction restraining the Nawab from alienating his property. The wakfnama was nevertheless registered in Muzaffarnagar. The Nawab died and the property was entered in the revenue papers as having passed to his heirs. Some years afterwards a suit was instituted in Meerut by persons who claimed to be trustees of the dedicated property to have it declared that the property was wakf. The question for decision was whether the wakfnama was valid and binding on the Nawab's heirs. The suit succeeded and the trial Court's decree was affirmed by the Allahabad High Court. In dismissing an appeal by the heirs of the Nawab, their Lordships of the Privy Council observed that the fact that at the time when the order was made both the Nawab and the property were outside the area of the Deputy Commissioner's jurisdiction, deprived the injunction of any authority (p. 615). The point in issue in the present case was not before their Lordships but their decision lends support to the argument that the provisions of the United Provinces Court of Wards Act can have no effect upon the procedure of the Delhi Courts.

For the appellant it is contended that he is not asking the Court to enforce the law of the United Provinces but to apply

the provisions of the Limitation Act which governs suits throughout British India, that the disqualification attached to Mohammad Ata Elahi Khan by the United Provinces Act is a personal one following him wherever he goes, that therefore he could not be sued in his personal capacity in Delhi, being no longer *sui juris*, and that the notice to the Collector was therefore necessary, and the period of it must be deducted in computing the period of limitation for the suit. In support of his contention Mr. Kishan Dayal has cited 25 All 195,¹ A I R 1930 All 602,² 80 I C 800,⁷ 46 I C 316⁸ and 35 I C 634,³ and with reference to the scope of S. 15 (2), Limitation Act, 60 Cal 1.⁸ In 25 All 195,¹ which was relied upon by the Oudh Judicial Commissioner's Court in 80 I C 800,⁷ it was held by a Division Bench of the Allahabad High Court that the disqualification, imposed as a consequence of proceedings legally taken under the Oudh Land Revenue Act, 1876, which provides that a person whose property is under the superintendence of the Court of Wards shall not be competent to create without the sanction of the Court any charge upon or interest in such property or part thereof, was a personal disqualification, and extended to all dealings of the disqualified proprietor with any property, wheresoever situate, and therefore rendered him incapable of effecting a valid sale of property in Cawnpore which was in the North-Western Provinces and not within the local extent of the Oudh Act.

The learned Judges came to this conclusion upon an extensive review of the English decisions relating to the capacity and incapacity of persons to contract and the opinions of eminent jurists on this subject, finding support for it in the facts that (i) the Court of Wards had been established in the North-Western Provinces for the benefit of disqualified proprietors and that both in the North-Western Provinces and in the Province of Oudh the provisions relating to the incapacity of disqualified proprietors to enter into contracts in respect of property under the superintendence of the Court of Wards are one and the same; (ii) that capacity and incapacity to

contract follow the law of domicile, and (iii) that the Courts of Wards derives its powers from the Sovereign as *parens patriae* and that the Court should, if necessary, extend such powers so as to safeguard the interest of incapable proprietors under its ward, and (iv) that no case to the contrary had been cited. The question of limitation did not arise. Nor did the judgment in A I R 1930 All 602,² relate to a case in which the point of limitation was in issue, and the question of the necessity of impleading in a suit in one Province the Court of Wards or the Collector of another Province was not before the Court. What was decided was simply that where the plaintiff is a Ward of Court under the United Provinces Court of Wards Act, he cannot properly institute a suit in that Province to recover property in his own name, the Collector being the real and therefore a necessary party, whether the Court of Wards has actually assumed superintendence of that property or not.

46 I C 316⁸ is authority for the proposition that when a Court of Wards has taken charge of the person and property of an infant, the Court of Wards is entitled under O. 32, R. 4 (2), Civil P. C., to demand that it should represent the minor. In 35 I C 634³ it was held by a Division Bench of the Calcutta Court that the Court of Wards of the United Provinces had jurisdiction to deal with the property, moveable and immoveable, of a disqualified proprietor under its charge outside the limits of the territories subject to the Lieutenant-Governor of those Provinces, and that the fact that the legislature of those Provinces had no authority to legislate for persons residing outside the limits of the Provinces and to regulate the superintendence of these properties did not cut down the perfectly general words of the United Provinces Act which provides that the whole of the property of a ward shall be deemed to be under the superintendence of the Court of Wards when the latter has assumed superintendence.

None of these judgments relied upon by the appellant's Counsel appears to warrant the view that S. 54, United Provinces Court of Wards Act, prevents the Delhi Court from entertaining a suit where no notice has been given as required by that Act which is not in force in Delhi Province. The United Provinces Court of Wards Act, is a local Act to which S. 4,

7. Hari Kishun Das v. Mohammad Safi Jan, A I R 1924 Oudh 438=28 O C 34=80 I C 800=11 O L J 502.

8. Nagendra Nath Dey v. Suresh Chandra Dey, A I R 1932 P C 165=137 I C 529=59 I A 283=60 Cal 1 (P C).

Civil P. C., gives validity within the area for which the Legislature which enacted it had power to legislate (as is stated in S. 2 of the Act itself), and even if it be assumed, on the authority of these decisions, that the defendant Mohammad Ata Elahi Khan being personally disqualified, wherever he might be, could not be sued in Delhi except through the Collector of Muzaffarnagar, I find in them no authority for the view that the provision of the United Provinces Act, requiring notice to be given to the Collector, controls the procedure for the prosecution of a suit against Mohammad Ata Elahi Khan in a Delhi Court. It is true that if he had been a Ward of Court under the Punjab Court of Wards Act, two months' notice of the suit would have been necessary under S. 19 of that Act, and the suit could have proceeded only against the Deputy Commissioner controlling the estate. But the plaintiff is not a ward for the purpose of the Punjab Act, which defines 'ward' as a 'person whose property has been taken under superintendence by the Court of Wards by that Act constituted'—that is to say—taken under superintendence by the Financial Commissioner of the Punjab. To me it seems clear therefore that in this case the notice given to the Collector of Muzaffarnagar was not required by any 'enactment for the time being in force,' and therefore S. 15 (2), Limitation Act, is inapplicable. The suit was therefore rightly held to be barred by limitation.

The Privy Council ruling in 60 Cal 1⁸ does not touch upon the question here before us. The dispute in that case was over the interpretation of Art. 182, Limitation Act, and their Lordships ruled that the word 'appeal' in that article covered all applications by a party to an appellate Court to set aside or revise a decree or order of a Subordinate Court, there being no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it. The words of S. 15 (2), Limitation Act, exclude cases where notice is not required by any 'enactment for the time being in force' and this judgment has no application to a case where there is no enactment in force requiring notice. I would accordingly dismiss this appeal with costs.

Monroe, J.—(15th May 1936).—This appeal was heard by Jai Lal and Coldstream, JJ. The learned Judges differed

and the appeal now comes before me under Cl. 26, Letters Patent. The suit was brought to recover principal and interest due on a promissory note dated 28th March 1929, and executed by Mohammad Ata Elahi Khan in favour of the plaintiff. On 1st April 1931 Mohammad Ata Elahi Khan, who resided in the Muzaffarnagar District of the United Provinces was made a ward of Court under the provisions of the United Provinces Court of Wards Act. The Act provides that:

No ward shall sue or be sued nor shall any proceedings be taken in a Civil Court otherwise than by and in the name of the Collector in charge of the property or such other persons as the Court of Wards may appoint in this behalf.

The Collector of Muzaffarnagar was named as a defendant in the present suit in addition to Mohammad Ata Elahi Khan. Prior to the institution of the suit and within the period of limitation a notice of intention to institute the suit was given to the Collector: the suit was instituted after the expiry of the period of limitation. The notice purported to be given under S. 54, United Provinces Court of Wards Act, which requires that two months' notice shall be given to the Collector before a suit is instituted. The learned Judges differed on the question whether such notice was necessary for a suit instituted in the Courts of a province other than the United Provinces, in this case the Court of the Senior Subordinate Judge at Delhi. Jai Lal, J. held that such a notice was necessary, and that by virtue of S. 15 (2), Lim. Act, the period of the notice was excluded and the suit was not barred by limitation. Coldstream, J. held that no notice was necessary and that the suit was barred by limitation. In argument before me it was agreed by the learned counsel that the only question to be decided by me was whether the effect of S. 54, United Provinces Court of Wards Act, and S. 15 (2), Lim. Act, was to extend the time for bringing the suit by the period of the notice. It was also agreed by counsel on both sides that though several cases are discussed in the judgments of the learned Judges, the question at issue is not covered by any authority. The main proposition put forward by counsel for the plaintiff, Mr. Ram Kishore, was that the provisions of S. 54 were provisions of substantive law and not of procedure; he finds support in the judgment of Jai Lal, J. who said :

The decision of this case depends upon the effect of the United Provinces Act upon the capacity of the disqualified person to sue and be sued in this province and such a disqualification is a question not of procedure but of substantive law as laid down in 25 All 195.¹

Jai Lal, J. was of opinion that the disqualified person could not be sued in any Court, even in a Court outside the United Provinces, that all suits must be filed in the name of the Collector in charge of the property of the disqualified person, that the Collector could be named as defendant only under S. 55, United Provinces Court of Wards Act, and that under S. 54 of that Act no suit can be brought against him unless the prescribed notice is given.

It is then argued that S. 15 (2), Lim. Act, which binds all the Courts in India includes a notice which is required by the Act of a local Legislature. I am unable to accept this argument: Mr. Ram Kishore's contention that S. 54 contains provisions of substantive law ignores the wording of the section:

No suit . . . shall be instituted in any Civil Court until the expiration of two months, etc.

The wording is similar to that of S. 80, Civil P. C., which requires two months' notice to be given of a suit against the Secretary of State in Council. I find it stated in Chitale and Annaji Rao's Code of Civil Procedure that this section (i. e., S. 80) like S. 79 enacts only a rule of procedure. With this view I agree and after a prolonged search I have been unable to find a suggestion in any case or text-book that an enactment requiring notice of legal proceedings to be given before the institution of such proceedings is a provision of substantive law. S. 54, United Provinces Court of Wards Act, cannot affect the procedure of the Courts in Delhi, for not only has the Legislature of the United Provinces no power to legislate for the Courts in Delhi but S. 2 of the Act expressly disclaims an intention to do so. S. 54 is not an enactment in force in the Province of Delhi and there is therefore no enactment for the time being in force within the meaning of S. 15 (2), Lim. Act. The question of limitation is itself one of procedure and if a consideration of that question involves the consideration of other rules of procedure, the rules of procedure which must be considered are those of the *lex fori*. It seems to me clear that there is no enactment in force in the Province of Delhi which requires the giving of notice to the Collector or other person in charge of a ward under the

United Provinces Court of Wards Act. I hold therefore that the suit is barred by limitation.

S.C./A.L.

Order accordingly.

* * A. I. R. 1937 Lahore 49

COLDSTREAM AND JAI LAL, JJ.

Rattan Singh and others—Plaintiffs—Appellants.

v.

Kishen Das and others—Defendants—Respondents.

Second Appeal No. 1821 of 1932, Decided on 6th June 1935, from decree of Dist. Judge, Hoshiarpur, D/- 27th October 1932.

* (a) Mortgage—Equity of redemption—Clog—Permanent lease to mortgagee, though by separate deed and for consideration not included in mortgage-debt is clog.

A permanent lease by mortgagor in favour of the mortgagee, though by a separate deed and for consideration not included in mortgage-debt is part of the same mortgage transaction and is therefore a clog on equity of redemption: *A I R 1930 P C 142; A I R 1929 Bom 186; 16 Bom 705; A I R 1929 Mad 243; A I R 1920 Pat 144; A I R 1922 Bom 277, Rel. on: Case law discussed.*

[P 52 C 1]

* (b) Mortgage—Equity of redemption—Lease to mortgagee amounting to clog—Acquiescence by mortgagor does not estop his vendee from challenging validity of lease in suit for redemption—Such clog is non-enforceable not only against mortgagor but his assign also.

A provision which fetters redemption is not one of general validity avoided against the mortgagor personally by reason of pressure or undue influence brought to bear upon him, but is one which when forming part of the actual mortgage contract has no validity at all, and is void and not enforceable by the Courts. There is no question of limitation; for, it is only in a suit for redemption by the mortgagor that the question of the validity of the clog (permanent lease) would arise in such a case, since there could be no object in seeking to set aside the clog so long as the mortgage subsisted and the mortgagees were entitled to possession under the lease. Hence the mere acquiescence of the mortgagor for a long time will not estop his vendee in a suit for redemption from contending that a permanent lease is a clog on the equity of redemption.

[P 52 C 1]

A provision clogging redemption has no more binding force against an assign of the mortgagor than it has against the mortgagor himself, the provision being void from its inception and not enforceable at law: *A I R 1930 P C 142; A I R 1922 Bom 277; A I R 1925 All 427 and A I R 1929 Bom 186 Rel. on; 1 P R 1913, Disting.*

[P 52 C 2]

M. C. Mahajan and Tara Singh Narula for Gullu Ram and Nawal Kishore—for Appellants.

Hargopal and Achhru Ram—for Respondents.

Coldstream, J.—On 28th August 1872, Jowahar, son of Gurmukh, a Rajput of Baroh in Hoshiarpur district, executed a mortgage deed in respect of 3152 kanals of land in favour of Chuni Lal, a Brahmin of Chintpurni in the same district, for Rs. 800, with the condition that redemption would be effected in the month of Jeth. The mortgage was with possession, the produce of the land to be taken as interest on the loan. On Jowahar's death the land passed to a collateral of the same name, son of Mangal. On 31st July 1890 Jowahar, son of Mangal, borrowed a further sum of Rs. 1,500 from Chuni Lal on the same security, executing a second deed of mortgage. On the same day he executed a deed leasing 274 kanals 7 marlas of land to Nathu Ram, son of Chuni Lal, giving Nathu Ram the rights similar to those of an occupancy tenant under S. 5, Punjab Tenancy Act, for a consideration of Rs. 375, to be paid by the lessee to a creditor of the mortgagor. The lease virtually effected a permanent alienation, investing the lessee, as it did, with the power to alienate. After Jowahar's death, his son Ghelu Ram, on 4th June 1924, borrowed Rs. 1,810 from the sons of Nathu Ram, the first four defendants, and executed another deed mortgaging the previously incumbered land for this sum in their favour. On 8th April 1931, Ghelu Ram's widow, acting on behalf of Ghelu Ram's minor son Bir Singh, mortgaged the land to the first seven plaintiffs in the present suit and Udham Singh, defendant 5, for Rs. 5,300. Part of the consideration was the liquidation of the mortgage debt of Rs. 4,110, due to the sons of Nathu Ram. Udham Singh sold his rights to Hukam Singh, plaintiff 8, on 18th April 1931.

The mortgagees under the mortgage of 8th April 1931, and Hukam Singh instituted a suit on 12th May 1931 in the Court of the Senior Subordinate Judge, Hoshiarpur, for redemption of the mortgaged land against Udham Singh and the sons of Nathu Ram, alleging that they had offered them Rs. 4,110, to release the land which the latter had refused to do. The sons of Nathu Ram admitted the right of the plaintiffs to redeem the mortgage in the month of Jeth but contested their right to take possession of the 274 kanals 7 marlas leased to them in perpetuity by the deed of 31st July 1890. The plaintiffs pleaded that this lease was a fetter on the equity of redemption and as such not

enforceable against the rights of the mortgagors. The senior Subordinate Judge held that the lease of 31st July 1890 was in fact benami in favour of Nathu Ram, the real lessee being his father Chuni Lal, the mortgagee, that the lease was part of the same transaction as the mortgage of the same date, and being a clog on the right to redeem the mortgage, was not enforceable against the mortgagors' successors-in-interest. He accordingly granted a decree for redemption of the whole area mortgaged on payment of Rs. 4,110, together with Rs. 375, to be paid in the next month of Jeth. On appeal, the District Judge of Hoshiarpur, modified the decree so as to make it exclude the 274 kanals 7 marlas permanently leased to Nathu Ram on 31st July 1890, holding that this lease (which, in agreement with the trial Judge he found to have been in reality in favour of Nathu Ram's father Chuni Lal) was a transaction practically amounting to a sale, and distinct from the mortgage of the same date and therefore not an agreement which could in equity be declared void as a clog on redemption of the mortgage. Against this decision the present further appeal has been preferred by the plaintiffs for whom it is contended that the District Judge erred in reversing the decision of the trial Court that the lease of 31st July 1890 was not binding upon them.

The decision of both the Courts below that the lease was really in favour of Chuni Lal, his son Nathu Ram being merely a benamidar, is final. It is obviously correct. There can also be no doubt whatever in my opinion that though it was recorded in a separate document it was as held by the trial Judge a part of the same transaction as the mortgage effected on the same day. The trial Judge has noticed that the land leased was the whole of the valuable area of the mortgaged land, the remainder being uncultivated (banjar) and of no value. It is obvious that the lease operated to clog the equity of redemption. Indeed, it is difficult to imagine a more sure contrivance to this end, by which, on payment of Rs. 375, the value of the equity of redemption in respect of 3152 kanals of land, mortgaged for Rs. 4,110, was practically destroyed. The principles to be followed by this Court are clearly laid down by the judgment of the Privy Council in 11 Lah 251.¹ That was in a case from

1. Mehrban Khan v. Makhna, AIR 1930 P C 142 =123 I C 554=57 IC 168=11 Lah 251 (P C).

the North-West Frontier Province where, as in this Province, S. 60, T. P. Act, is not in force. We have to decide by equity and good conscience, that is to say by the rules of English law if it is found applicable to society and circumstances. As pointed out by their Lordships, S. 60, T. P. Act, indicates that the rules of English law relating to a mortgagor's right to redeem are applicable, there being no indication to the contrary. The relevant principle of the English law as stated in the authorities cited and followed in that case by their Lordships is that :

Any provision inserted in a mortgage deed to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void (Lord Lindley in (1899) 2 Ch 474,² at p. 475).

Redemption is of the very nature and essence of a mortgage as mortgages are regarded in equity. It is inherent in the thing itself and it is as firmly settled now as it ever was in former times that equity will not permit any devise or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security (Lord Macnaghten in the case of *Noakes & Co. v. Rice*.^{2a})

Their Lordships in 11 Lah 251¹ were dealing with a case in which the provision fettering the equity of redemption was included in the mortgage-deed, and it is contended that their decision cannot be applied here where the lease was by a separate deed and for a consideration not included in the mortgage debt. I find no force in this contention. That the lease was really in favour of the mortgagor Chuni Lal and not of his son has been found by both the lower Courts and this decision, which is manifestly correct, cannot now be questioned. The fact that the lease and the mortgage were effected by different though contemporaneous deeds is immaterial. It is clear that they were, as held by the trial Judge, parts of the one and the same transaction, and the Indian Courts have applied the doctrine now made clear in 11 Lah 251¹ to many cases where the clog was effected by a separately recorded transaction. In 53 Bom 360³ a mortgage

was effected in 1902 and two permanent leases executed in April and June 1907. It was contended that the principle forbidding clogs on redemption was inapplicable to an arrangement made between the mortgagor and the mortgagee at a time subsequent to the time of the mortgage. The contention was overruled, one of the authorities relied upon by the Court being 16 Bom 705,⁴ a decision, which had never been dissented from, in a case where a permanent lease had been effected three years after the mortgage. It is true that in 53 Bom 360,³ it was found that the lease had been unfair, but the ruling upon the contention based on the difference of time between the two transactions was independent of this finding. In 52 Mad 300⁵ the doctrine was applied where the clog was effected by a separate agreement executed six days after the mortgage-deed, to sell the land to the mortgagee at a concession rate. It was held that the two transactions were parts of the same transaction and that the agreement to sell was a clog on the equity of redemption and was void in law whether it was to have effect before or after redemption. In 57 I C 337,⁶ a Full Bench ruling of the Patna High Court disposing of a case in which the clog pleaded had been effected seven years after the lease, Miller, C. J. observed that :

Once the mortgage had been entered into, it was not within the competency of the parties to clog the mortgagor's equity of redemption by entering into a transaction whereby even after redemption the mortgagee would retain an interest in the property as lessee upon payment of a comparatively trifling rent.

In 46 Bom 409⁷ the mortgage-deed was executed in 1859 and on the same day the mortgagor entered into a separate contract to lease the land on a permanent tenure on a fixed annual rent of Rs. 70. The mortgagor sued for redemption in 1916. In deciding that he was entitled to redeem the mortgage it was held that the two documents were parts of the same transaction and the principle of equity was applicable. These authorities, to which others could be added, leave no doubt that

2. *Stantley v. Wilde*, (1899) 2 Ch 474=68 L J Ch 681=15 T L R 528=48 W R 90=81 L J 393.
2a. (1902) A C 24=71 L J Ch 139=66 J P 147=50 W R 305=86 L T 62.
3. *Parashram v. Lakshmi*, A I R 1929 Bom 186=115 I C 405=31 Bom L R 229=53 Bom 360.

4. *Subrao v. Manjapa* (1892) 16 Bom 705.

5. *Tirumala Chetty v. Srinivasa Raghava Charlu*, A I R 1929 Mad 243=121 I C 753=56 M L J 318=52 Mad 300.

6. *Ram Narain v. Surath*, A I R 1920 Pat 144=57 I C 337=1 P L T 575=5 P L J 423 (F B).

7. *Bhim Rao Nagoji Rao v. Sakharam*, A I R 1922 Bom 277=64 I C 612=23 Bom L R 1268=46 Bom 409.

the circumstance that the transaction fettering the right of redemption is recorded separately from the mortgage itself, and for a consideration not included in the consideration for the mortgage, will not by itself preclude the application of the principle that agreements to prevent redemption on payment or performance of the debt or obligation should not be enforced. It is next contended that the plaintiffs cannot set up the equitable doctrine on which they now rely in view of the long silence and consent of the mortgagors, their vendors, which shows that they accepted the lease as binding upon them. Mere lapse of time will not, however, affect the case. It has now been settled by the Privy Council in 11 Lah 251¹ that a provision which fetters redemption is not one of general validity, avoided against the mortgagor personally by reason of pressure or undue influence brought to bear upon him, but is one which when forming part of the actual mortgage contract (as the trial Judge rightly found the lease to be in this case) has under the general law no validity at all, but is void and not enforceable by the Courts. I have already referred to a case, 46 Bom 409,⁷ where the mortgage was effected in 1859 and redemption sought in 1916. In 47 All 582⁸ a period of over 40 years had elapsed between the transaction and the suit. There is no question of limitation for, as observed by Baker, J. in 53 Bom 360,⁹ it is only in a suit for redemption by the mortgagor that the question of the validity of the lease would arise in such a case, since there could be no object in seeking to set aside the lease so long as the mortgage subsisted and the mortgagees were entitled to possession under that. In this connection it is to be noted that in the case before us acquiescence by the mortgagees was not pleaded nor was any issue struck upon this point.

Lastly we are asked to uphold the decision of the lower appellate Court because the plaintiffs are not themselves the mortgagors but their vendees. Reference has been made to 14 P L R 503, i. e., 146 P L R 1913,⁹ a judgment cited by the lower Court. That judgment dealt with a totally different matter, a plea that the terms of a mortgage were oppressive and

extorted by undue influence. The argument is rebutted by the judgment of the Privy Council in 11 Lah 251¹ where it was held that a provision clogging redemption had no more binding force against an assign of the mortgagor than it had against the mortgagor himself, the provision being void from its inception and not enforceable at law. For the reasons given I would accept this appeal, set aside the decision of the District Judge and restore the decree of the trial Court, leaving the parties to bear their own costs in this Court. The cross-objections have not been pressed and they are dismissed.

Jai Lal, J.—I agree but not without hesitation.

D.S./K.S.

Appeal accepted.

A. I. R. 1937 Lahore 52

BHIDE, J.

Bishen Chand — Decree-holder — Appellant.

v.

Bakhshish Singh and another—Judgment-debtors—Respondents.

Second Appeal No. 659 of 1936, Decided on 2nd November 1936, from order of Dist. Judge, Jullundur, D/- 3rd March 1936.

Punjab Debtors' Protection Act (2 of 1936), Ss. 4 and 5—Scope—Ss. 4 and 5 being procedural have retrospective effect, although not so specifically stated—Alienation after Act came into force, of land attached before, is governed by procedure in Ss. 4 and 5 of the Act.

Sections 4 and 5 of the Act relate to procedure and will, therefore apparently govern pending cases also, although there is no specific provision in the Act giving them retrospective effect. Even though the land was attached before the Act came into force, Ss. 4 and 5 should govern the procedure if alienation of land was to be made in satisfaction of decree after it came in force. [P 53 C 1, 2]

Vishnu Datt—for Appellant.

Partap Singh—for Respondents.

Judgment.—The sole point for decision in this second appeal is whether an executing Court has power to reserve a certain portion of the land of a judgment-debtor for maintenance and refuse execution against it, when his land is not sufficient for the purpose.

The Courts below have found that the land of the judgment-debtor, who is a Jat and a member of an agricultural tribe, yields only an annual net income of

8. *Parmanand v. Matu Din*, A I R 1925 All 427 = 87 I C 477 = 23 A L J 307 = 47 All 582.

9. *Attar Singh v. Ganga Singh*, (1913) 1 P R 1913 = 18 I C 594 = 146 P L R 1913.

Rs. 72 and is not sufficient for the maintenance of himself and his family and they have therefore refused to execute the decree against the land. The fact that the land of the judgment-debtor is not sufficient for his maintenance is clear from the statement of the decree-holder himself in the trial Court. But it is contended on behalf of the decree-holder that there is no provision in law entitling the executing Court to refuse to execute a decree on this ground. The learned counsel for the respondent-judgment-debtor concedes that there was no such provision till the Punjab Act 2 of 1936 (the Punjab Debtors' Protection Act 1936) was recently passed; but he contends that the present case will now be governed by that Act and according to the provisions thereof the judgment-debtor is entitled to have sufficient land reserved for his maintenance. This contention appears to me to be correct. Although the present execution case was instituted before Punjab Act 2 of 1936 came into force, the matter will, in my opinion, be now governed by that Act. S. 4 of the Act requires that whenever a Civil Court orders that land be attached and alienated temporarily in the execution of a decree for payment of money, the proceedings shall be transferred to the Collector. S. 5 requires that when the proceedings arise so transferred, the Collector shall exempt sufficient land for the maintenance of the judgment-debtor and members of his family who are dependent on him. These sections relate to procedure and will therefore, apparently govern pending cases also, although there is no specific provision in the Act giving them retrospective effect: (cf. Maxwell on Interpretation of Statutes, pages 195-6, 7th Edition).

The learned counsel for the appellant urged that the land was already attached in this case before Punjab Act 2 of 1936 came into force and hence S. 4 will not apply. I do not think there is any substance in this argument. For the attachment has practically come to an end as the Courts below have refused to proceed against the land. Moreover the section says in unqualified terms that whenever a Court has to attach and alienate land in execution, the proceeding shall be transferred to the Collector and I do not see any good reason why the section should not govern the procedure if an alienation is to be made hereafter in the present

case. It may be pointed out here that Ss. 9 and 11 of the Act do contain reservations, excluding from the scope of those sections certain cases in which debts were incurred before the commencement of the Act, or applications are made for execution of decrees passed before the commencement of the Act. But Ss. 4 and 5 contain no reservations of this description. I am, therefore, of opinion, that Ss. 4 and 5 will govern the procedure, if the decree in the present case is to be satisfied by alienation of the land hereafter.

In the circumstances, I see no good reason to interfere with the order of the Courts below, but in view of the facts I leave the parties to bear their costs in this appeal.

S.C./A.L.

Appeal dismissed.

* A. I. R. 1937 Lahore 53

MONROE, J.

Narsingh Das and another—Appellants.

v.

Official Receiver, Sargodha—Respondent.

Misc. First Appeal No. 1079 of 1935, Decided on 1st June 1936, from order of Dist. Judge, Shahpur, D/- 4th May 1935.

* **Insolvency—Fraudulent transfer—Insolvents' notorious financial position known both to them and their creditors—Insolvents shortly prior to insolvency alienating most of their property for value arbitrarily fixed, to few of innumerable creditors—Request by creditors for payment by letter, telegram, notice or in person, but no legal proceedings taken—There is fraudulent preference in favour of creditors.**

A threat of legal proceedings to a man who is hopelessly insolvent clearly cannot be described as pressure. [P 54 C 2]

Where the insolvents who were in a notorious financial position known both to them and their creditors, agreed shortly before filing insolvency application, to alienate practically the whole of their property for value arbitrarily fixed, to a few of their innumerable creditors, alleging pressure brought by the creditors to pay by letter, telegram, notice or in person, though not in one case were legal proceedings taken against the insolvents :

Held : that there was a conspiracy between the insolvents and the creditors who received the property and that there was fraudulent preference in favour of the creditors. [P 54 C 1, 2]

Badri Das and Vishnu Datt—for Appellants.

J. N. Aggarwal, A. N. Chona and Asa Ram—for Respondent.

Judgment.—These nine appeals are brought by nine transferees of property from the insolvents. In each case the transfer has been set aside by the District Judge of Shahpur on the ground that it amounted to a fraudulent preference. The business of the insolvents had been failing for some time and ceased to be carried on in July 1929. In August 1929, they held a meeting of creditors and apparently the best proposal that they made was a payment of four annas in the rupee. From this their financial position can be readily inferred. This meeting broke up in confusion and without any arrangement having been reached. Between 13th and 26th September they agreed to make a large number of alienations, the total amount of property involved being about Rs. 96,000 which represented practically all the property of the insolvents. The nature of these transactions was that in consideration of amounts due to the transferees the property of the insolvents was assigned to them. No deeds were registered: the transactions were carried out entirely by reports to the patwari and they were all attested before the patwari on the same day, 28th November 1929. The petition for insolvency was presented on 30th October 1929, and the insolvents were adjudicated on 17th March 1932. The learned District Judge has examined each of the cases with great care. In some he has come to the conclusion that there was no consideration proved for the transfers, in others that there was; but in every one of these nine cases he has come to the conclusion that there was fraudulent preference in favour of the creditors.

The facts set out above are in themselves sufficient to show that the insolvents who were in a desperate financial position were endeavouring to benefit certain of their creditors at the expense of the rest. They did not even wait to realise the property. In each case a value was put on the property of the insolvents and for the transaction that value, arbitrarily fixed, was taken to be the value of the property. In view of the earlier meeting and the knowledge of the creditors that the insolvents were able to make an offer of only one quarter of the debts I do not think it would be too strong an inference to draw that there was a conspiracy to defraud between the insolvents and the creditors who received this property. In

addition to this when it is found that many of the creditors are relatives of the insolvents this inference becomes almost irresistible.

For the creditors it has been strenuously argued that the transactions should stand. It has been represented that pressure to pay was put by each of the creditors on the insolvents. That pressure consisted in some cases of notices calling on the insolvents to pay, of telegrams even though the parties lived in the same town and in one case it is suggested that the creditor went to the house of one of the insolvents and "disgraced him." In the circumstances of this case this argument must fail. The insolvents had a very large number of creditors, probably more than a hundred, for actually 125 alienations of property took place in the fortnight between 13th and 26th September. The financial position of the insolvents must have been notorious and it must also have been known both to them and to their creditors that their insolvency was bound to come. It was a question only of time and a short time at that. And to suggest that a request for payment by letter, telegram, notice or in person, however violently expressed, was putting pressure on these insolvents is in my opinion a foolish argument; and it should be noted that in not one single case in which it is alleged that pressure was applied, were legal proceedings of any kind taken. A threat of legal proceedings to a man who is hopelessly insolvent clearly cannot be described as "pressure."

In the circumstances this case leads only to one conclusion: that the insolvents arbitrarily gave preferences to the claims of the nine appellants. I think that the learned Judge was right in his conclusions and I dismiss these appeals with costs.

V.B.B./K.S.

Appeals dismissed.

A. I. R. 1937 Lahore 54

JAI LAL, J.

Mt. Punni and another—Defendants—Appellants.

v.

Mt. Sobhi—Defendant and *others*—Plaintiffs—Respondents.

Second Appeal No. 822 of 1935, Decided on 12th March 1936, from decree of Addl. Dist. Judge, Ferozepore, D/- 1st February 1935.

Hindu Law—Widow—Alienation — Widow making gift of land to her daughter, her next heir—Gift not of entire land—It does not amount to surrender—It amounts to alienation and is invalid.

Where the gift of land by a widow to her daughter, who is the next heir, does not comprise the entire or almost the entire holding of the widow and the widow still retains land and houses in her possession, such a gift cannot be held to amount to surrender of the estate of the widow but must be deemed to be an alienation and is as such invalid : *A I R 1932 Bom 625, Foll.*

[P 55 C 2; P 56 C 1]

Roop Chand for *V. N. Sethi*—for Appellants.

Mehr Chand Mahajan — for Respondents (Plaintiffs).

Judgment.—This second appeal is by the donees, Mt. Punni, wife of Kaka Ram, and Mt. Maro, wife of Nagita Ram. Their mother Mt. Sobhi, widow of Harnam Das, made a gift of land in their favour. The contesting respondents who claimed to be the reversioners of Harnam Das instituted a suit for a declaration that the gift would not affect their reversionary rights. Two important questions arose at the trial whether the parties were governed in matters of succession and alienation by custom, and if so what the custom was with regard to the right of the widow to make a gift of the property inherited by her from her husband and secondly if the parties were governed by their personal law, that is to say Hindu law, whether the gift was valid under that law. It is conceded before me, and this contention is correct, that if the parties are governed by custom with regard to alienation and succession then the gift would be invalid because it is the plaintiffs-reversioners who would then inherit the property after the death of the widow and the latter would not be entitled to make a gift of the property in dispute. It is, however, contended that the parties are not governed by custom but by their personal law. This contention is based on the assertion that Harnam Das who was a Brahman of Giddarbaha in the Muktsar Tahsil of the Ferozepore District did not cultivate land with his own hands but that, though he owned land, he had it cultivated by tenants, that the Brahmins do not form a compact village community in this village and that it has not been proved that they either founded the village or settled in it at the time of the foundation of the village. These no doubt are matters which must raise a strong presumption that the

family of Harnam Das was not governed by custom.

In the riwajiam prepared at the time of the Settlement of 1872-73 (Ex. P/2) it is mentioned with regard to all sub-castes of Brahmins of Tahsil Muktsar that no sonless proprietor or his wife is at all competent to alienate land in favour of a daughter of his descendants without the consent of the collaterals. No instance was given because it was settled that no alienation had so far taken place. It is, however, to be noted that in the subsequent riwajiam which was prepared at the time of the Settlement of 1915 the Brahmins were not questioned at all on this matter. In fact they were not questioned at all in connexion with the preparation of the riwajiam and it appears that it was assumed that only agricultural Brahmins were governed by custom.

The learned counsel for the respondents contends that in the absence of any statement made by the Brahmins at the time of the preparation of the Customary Law prepared in 1915 that the custom mentioned in the riwajiam of 1872-73 has been abrogated that custom must be deemed still to exist. I do not think it is necessary to record any finding on this aspect of the case and I refrain from deciding for the purpose of this appeal whether the parties are governed by custom in the matter of succession and alienation because in my opinion even if they are governed by the Hindu law the gift in suit must be held to be invalid. It is not denied by the appellants' counsel that ordinarily such a gift would be invalid under the Hindu law, but he seeks to support the gift on the ground that it was not really a gift but an acceleration of inheritance, that is to say, it was a surrender of the estate of the widow in favour of the next heir. Assuming that the parties are governed by the Hindu law the daughter would be the heir after the widow, but in the present case the gift does not comprise the entire or almost the entire holding of the widow. As found by the learned Judge she has still retained land and houses in her possession.

It was held in 56 Bom 410¹ that where a widow retained 40 acres of land out of 230 acres and made a gift of the balance in favour of her daughter, under the

1. *Gangadhar Narayan v. Prabudha Vasudeo*, *A I R 1932 Bom 625=140 I C 884=56 Bom 410=34 Bom L R 1223.*

Hindu law such a gift could not be held to amount to a surrender of the estate of the widow but must be deemed to be an alienation. Following this view I hold that in the present case the gift must be deemed to be an ordinary alienation and not a surrender of the estate of the widow and therefore invalid even under the Hindu law. The learned District Judge has, therefore, rightly decreed that the gift shall not affect the reversionary rights of the respondents. I dismiss this appeal with costs.

R.M./V.V.

*Appeal dismissed.***A. I. R. 1937 Lahore 56**

BHIDE, J.

(Haji) Hamid Ullah — Defendant — Appellant.

v.

Hafiz Abdul Khaliq—Plaintiff—Respondent.

Second Appeal No. 37 of 1936, Decided on 18th June 1936, from decree of Dist. Judge, Delhi, D/- 26th November 1935.

Landlord and Tenant—Permanent Tenancy—Permanent tenant or his predecessors-in-title executing leases containing conditions inconsistent with permanent tenancy in favour of landlord—Strong presumption against permanent tenancy arises.

Where a permanent tenant or his predecessors-in-title execute leases containing conditions inconsistent with permanent tenancy, in favour of landlord or his predecessors-in-title, a strong presumption against permanent tenancy arises and it is for them to show that the tenancy is permanent and why they accepted such conditions.

[P 56 C 2]

Achhru Ram, Nawal Kishore and Bhagwat Dayal—for Appellant.

Manohar Lal, Jagan Nath Aggarwal and M. C. Mahajan—for Respondent.

Judgment.—This second appeal arises out of a suit for ejectment of the defendant from a site in Delhi City, the superstructure on which admittedly belongs to the defendant. The defendant pleaded that he had a permanent tenancy and was not liable to ejectment. The trial Court found that the tenancy was permanent initially, but it had been converted into a tenancy at will. The Court, therefore, decreed ejectment but ordered plaintiff to pay Rs. 3,000 to the defendant by way of compensation for the superstructure. On appeal this decision was affirmed by the learned District Judge except as regards compensation. The learned District Judge

disallowed the compensation and instead of it allowed the defendant time to remove the materials of his superstructure. From this decision the present appeal has been preferred.

The learned counsel for the appellant has urged that the learned District Judge has not given any finding on the question whether the tenancy was a permanent one at the outset and when and how it lost its character. But the defendant or his predecessors-in-interest have admittedly executed several leases in favour of the plaintiff or his predecessors-in-interest from the year 1880 onwards, which go to show that even if the tenancy was permanent at first, it ceased to have that character. The leases referred to contain distinct provisions for ejectment, enhancement of rent and even for removal of materials (see Exs. P. 1, P. 2, P. 3, P. 8). In the circumstances the burden lay heavily on the appellant to prove that the tenancy is still a permanent one. The learned counsel for the appellant urged that mere acceptance of conditions inconsistent with a permanent tenancy under some erroneous impression cannot change the nature of the tenancy. But the defendant and his predecessors were presumably well aware of the nature of their tenancy and it was for them to show why they accepted any such conditions at all. They entirely failed to rebut the strong presumption against a permanent tenancy which arises from the leases. In the end it was contended that the learned District Judge should at any rate not have interfered with the order awarding compensation to the defendant. But as pointed out already, some of the leases contained distinct provisions for removal of materials. In these circumstances if the defendant or his predecessor chose to erect any superstructure it was at their risk. It was for the defendant or his predecessors-in-interest to safeguard their position by an agreement for award of compensation in the event of ejectment, even if the tenancy was a permanent one at the outset and was then converted into a temporary one. But they not only did not do so, but inserted in some of the leases provisions for removal of materials. In the circumstances, I see no reason to interfere with the decree of the learned District Judge and dismiss the appeal with costs.

K.B./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 57

AGHA HAIDER, J.

(*Bostan*) *Badar Zaman*—Defendant—Appellant.

v.

(*Bostan*) *Amir Ullah* and others—Plaintiffs and Defendants—Respondents.

Second Appeal No. 9 of 1936, Decided on 23rd March 1936, against decree of Dist. Judge, Attock, D/- 29th August 1935.

Registration—Registered documents have priority over unregistered ones — Documents must be antagonistic for applicability of the rule.

The Registration Act provides that a registered document shall take effect, as regards the property comprised therein, against every unregistered document relating to the same property. This provision can only apply to cases in which the property conveyed by the two documents is the same, or in which the property conveyed by one document includes the property conveyed by the other. In other words, it applies where the two documents are antagonistic, but not where effect can be given to each without infringement of the other : 6 Bom 193 (F B) and 34 All 631, Foll.

(P 58 C 1)

Nand Lal—for Appellant.

M. L. Puri and *Bishen Narain* — for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for possession of certain land detailed in the plaint. Ghulam Haider, defendant 1, is the owner of two khasra numbers: (1) 3365.2 measuring 1 kanal 14½ marlas; and (2) 3253.2 measuring 2 kanals and 11 marlas. For convenience of reference I would call No. (1) *A* and (2) *B*. Defendant 1 mortgaged three-fourths share of *A* to Ayub Khan, defendant 2, on 1st September 1932. He also mortgaged half of *B* in favour of Ghafur Khan, defendant 3, by means of mutation. Both these mortgages were with possession. On 5th December 1932, Ghulam Haider, defendant 1, executed a mortgage in favour of Bostan, son of Badar Zaman, defendant 4. The consideration of this document was Rs. 200 in the shape of a promissory-note. This document is marked Ex. D-3. On 22nd January 1933, Ghulam Haider made an unregistered mortgage in favour of Bostan, defendant 4, for Rs. 99. This document is marked Ex. D-1. The property comprised in this mortgage was *B*. On 13th January 1934, Ghulam Haider executed an unregistered mortgage for Rs. 99 in favour of Bostan, defendant 4. This docu-

ment is marked Ex. D-2. The property comprised in this mortgage was *A*. On 19th March 1934, Ghulam Haider, defendant 1, sold lands *A* and *B* to Bostan, son of Amir Ullah, plaintiff, for a sum of Rs. 1,500 by means of a registered document marked as Ex. P-1. Bostan, son of Amirullah, has now brought the present suit for possession of the land which he has purchased. The mortgage in favour of Ayub Khan, defendant 2, was redeemed by the plaintiff-respondent and the plaintiff admits the claim of Ghafur Khan, the prior mortgagee. Defendant 1 admitted the plaintiff's claim; Bostan, son of Badar Zaman, defendant 4, has alone contested the plaintiff's suit. He has pleaded that the sale in favour of the plaintiff was fictitious and fraudulent and that the mortgage-deeds in his favour namely, Exs. D-1, D-2 and D-3 should have priority over the sale-deed Ex. P-1 in favour of the plaintiff.

The trial Court held that there was no consideration for Ex. D-3 and that in fact Bostan, son of Badar Zaman, had himself stated in the mutation proceedings taken in connexion with Ex. D-3 that there was no mortgage in his favour. It further held that Ex. D-2 was for consideration and valid and that the plaintiff was bound by this mortgage. As regards D-1 the trial Court held that it was not for consideration. It accordingly held that Ex. D-2 alone was for consideration and that the plaintiff could obtain possession of the land subject to the mortgage Ex. D-2 in favour of defendant 4. Both parties went up in appeal. The lower appellate Court has affirmed the finding of the trial Court as regards D-3 and D-2 but has reversed the finding of the trial Court as regards Ex. D-1 holding that it was for consideration and, therefore, valid. In the end it held that, in view of the provisions of S. 50, Registration Act, the plaintiff was entitled to have priority over Exs. D-1 and D-2 and his suit should therefore be decreed. The contesting defendant Bostan, son of Badar Zaman has come up to this Court in second appeal. In my opinion there is no substance in this appeal. The sale-deed Ex. P-1 in favour of the plaintiff was not in regard to the equity of redemption but was a transfer of the land out and out. This being so, the provisions of S. 50, Registration Act, apply with full force. The matter had been considered long ago by a Full Bench of the Bombay

High Court in 6 Bom 193.¹ The following passage is worth quoting in extenso on account of the lucidity with which the law is enunciated therein :

The Registration Act provides that a registered document shall take effect, as regards the property comprised therein, against every unregistered document relating to the same property. It seems clear that this provision can only apply to cases in which the property conveyed by the two documents is the same, or in which the property conveyed by one document includes the property conveyed by the other. In other words, it applies where the two documents are antagonistic but not where effect can be given to each without infringement of the other. Thus, if A mortgage his estate to B, and afterwards sell the same estate to C, C may, by registering his conveyance, get rid of the unregistered mortgage; but he cannot do so if his conveyance is, in terms, only a conveyance of the equity of redemption; for then the estate given to B and the estate given to C are separate and distinct and can exist together.

This view of law was quoted with approval by a Division Bench of the Allahabad High Court in 34 All 631² at p. 635. The two transfers, therefore, covered by Ex. P-1 on the one side and Exs. D-1 and D-2 on the other are of an antagonistic character and not separate and distinct which can exist together without impugning upon one another. In my opinion the lower appellate Court has arrived at the right conclusion though the judgment is somewhat confused. I affirm the decree of the lower appellate Court and dismiss the appeal with costs.

B.D./D.S.

Appeal dismissed.

1. Sobhagchand Gulabchand v. Bhai Chand (1881) 6 Bom 193 (F B).
2. Ishri Prasad v. Gopi Nath, (1912) 34 All 631 = 17 I C 19 = 10 A L J 222.

A. I. R. 1937 Lahore 58

SKEMP, J.

Hakumat Rai—Plaintiff—Petitioner.

v.

Fateh Ali—Defendant—Opposite Party.

Civil Revn. No. 260 of 1936, Decided on 1st October 1936, from decree of Senior Sub-Judge, Gujrat, D/- 23rd March 1936.

(a) **Negotiable Instruments Act (1881), Ss. 74 and 76 (d)**—Suit on promissory note—Executant pleading payment—Drawer cannot suffer damage from want of presentation of note—No presentation being necessary under S. 76 (d).

Where in a suit on a promissory note, the executant pleads that payment has been made, the drawer cannot suffer damage from want of presentation of the note as required by S. 74 and therefore no presentation for payment is necessary under S. 76 (d). [P 58 C 2]

(b) **Punjab Regulation of Accounts Act (1 of 1930), Ss. 3 and 4 (b)**—Suit on promissory note—Plaintiff not complying with S. 3—Suit dismissed and plaintiff going in revision is not entitled to costs although he succeeds owing to operation of Act 1 of 1930—Ordinary rule as to costs does not apply.

According to Act 1 of 1930, the Court cannot grant costs in any proceeding arising from a suit in which costs could not be granted. Where therefore a plaintiff bringing a suit on a promissory note does not comply with the provisions of S. 3, Act 1 of 1930, he is not entitled to any costs in revision from a decree dismissing his suit, although he succeeds, notwithstanding the objections of the respondent. The ordinary rule as to costs does not apply. [P 58 C 2]

Harbhajan Das—for Petitioner.

Brij Lal—for Opposite Party.

Order.—One Hakumat Rai claimed Rs. 144, the principal amount of a promissory note. The defendant admitted execution of the promissory note but pleaded that the amount had been paid. He also pleaded that the promissory note had not been presented as required by S. 74, Negotiable Instruments Act, and that the suit was not maintainable. The learned Judge of the Small Cause Court found that the promissory note was executed for cash consideration and that it has not been repaid. He also found that the presentation of the note was not proved. On these findings he dismissed the suit.

The plaintiff has come here on the obvious point that as payment was pleaded the drawer could not suffer damage from the want of such a presentment and therefore under S. 76 (d), Negotiable Instruments Act, no presentment for payment was necessary. I accept this contention and as payment has been held to be proved, grant the petitioner a decree for payment of the amount claimed, Rs. 144. This was the principal amount without interest. The next point arises as to costs. Admittedly the plaintiff did not comply with the provisions of S. 3, Punjab Regulation of Accounts Act (1 of 1930), and therefore by virtue of S. 4 (b) "the Court shall disallow costs." Admittedly this governs the grant of costs, but it is urged that here the ordinary rule should apply. The petitioner has succeeded although the respondent objected. It seems to me that owing to the operation of Act 1 of 1930, I cannot grant costs in any proceeding arising from the suit in which costs could not be granted. The parties are therefore left to bear their own costs throughout.

R.M./V.V.

Order accordingly.

A. I. R. 1937 Lahore 59

JAI LAL, J.

Nihal Chand—Objector—Appellant.

v.

(*Firm*) *Kharak Singh-Sundar Singh*—
Decree-holder—Respondent.

Exn. Misc. First Appeal No. 1407 of 1935, Decided on 7th May 1936, from decree of Senior Sub-Judge, Lyallpur, D/- 27th May 1935.

Decree—Decree against limited company—Liability of share-holders—Order under O. 21, R. 50, Civil P. C., cannot be passed against share-holders—Order if passed is nullity and can be ignored.

No order under O. 21, R. 50, Civil P. C., can be passed making the share-holders liable when the decree is against a limited company. But when such an order is passed the order being passed without jurisdiction must be deemed to be a nullity and can be ignored, and need not be set aside by appeal, review or revision : *A I R 1933 P C 61, Rel. on.* [P 60 C 1]

Jagan Nath Aggarwal—for Appellant.

Nihal Singh and *M. L. Puri*—for Respondent.

Judgment.—A money decree was passed against Kapur & Co. Ltd., in favour of firm Kharak Singh-Sundar Singh by a Subordinate Judge of Lyallpur. An application for the execution of this decree was made by the decree-holder and in that application, which was made in 1931, it was alleged that Harnam Singh, Nihal Chand and Manohar Lal were partners of the judgment-debtor's firm and their liability as partners to satisfy the decree be determined under O. 21, R. 50, Civil P. C., and then the decree be executed against them. Notices of this application were sent to the three persons against whom the decree was sought to be executed. It appears that the notices were not served on Harnam Singh in spite of a note to the contrary on the record of the Subordinate Judge. Nihal Chand was served but the case was postponed as the presiding officer had not attended the Court. A note was made that fresh notice be sent to Nihal Chand who was not present on that day, but it appears that no fresh notice was sent to Nihal Chand and at the subsequent date the Judge merely recorded that notice had been served upon Nihal Chand and proceeded ex parte against him. Notice on Manohar Lal was served and he was actually present at the first hearing but he absented subsequently and proceedings were taken ex parte against him. Finally

on ex parte evidence the Court decided that Harnam Singh, Nihal Chand and Manohar Lal were partners in the judgment-debtor firm and the decree could be executed against them. In consequence of this order a certificate of non-satisfaction was granted to the decree-holders to enable them to execute the decree in the Court at Jammu in the Kashmir State territory.

When an attempt was made to execute the decree there, an objection was raised on behalf of the three persons concerned that the decree could not be executed against them as they could not be made personally liable. They pointed out to the Court that the decree was not against a firm but against a limited liability company and that the provisions of O. 21, R. 50, had no application to a limited liability Company, and therefore the order of the Subordinate Judge of Lyallpur, holding them liable as partners, was not only illegal and without jurisdiction but was a nullity. The executing Court at Jammu however held against these three persons, who then preferred an appeal to a superior Court in the Kashmir State where the proceedings were stayed to enable them to move the Court at Lyallpur to withdraw the certificate of non-satisfaction. It was apparently recognized that the order was illegal, but the Court felt unable to go behind the certificate of non-satisfaction.

An application was then made in 1934 in the Court of the Subordinate Judge at Lyallpur asking that Judge to withdraw the proceedings on the ground that they were being taken in pursuance of an order which was a nullity. For some reason or other the hearing of this application was stayed and a year later an application was made under S. 151, Civil P. C., praying that the application made in 1934, to withdraw the proceedings, be heard and disposed of on the merits. The Subordinate Judge has held that he has no jurisdiction, acting under S. 151, Civil P. C., to set aside the order which was made in 1931. He has consequently dismissed the application. The two appellants before me are Nihal Chand and Harnam Singh. Manohar Lal has not appealed. In reply to a preliminary objection that no appeal lies against an order under S. 151, Civil P. C., the learned counsel for the appellant contends that he is not appealing against the order passed on the application made in 1935, but he is appealing against the order

dismissing his application made in 1934, and that application was made under S. 47, Civil P. C. In my opinion this contention of the appellant is well founded and I overrule the preliminary objection.

On the merits it is conceded by the learned counsel for the respondents that no order could be made by the Subordinate Judge of Lyallpur making the appellants personally liable as partners for the decree passed against Kapur & Co., Limited. His sole contention has been that the order having been made after notices to the appellants in 1931, the only remedy which was open to them was to have that order vacated by appeal, review or revision and therefore it is not open to them after the lapse of three or four years to contest the validity of that order by an application made to the executing Court. The reply to this contention is that the order passed in 1931 was a nullity and therefore must be ignored by the executing Court before whom it is sought to be enforced, and therefore it is not an order which need be set aside by appeal, review or by a petition for revision. The counsel for the respondents concedes the proposition that if the order be held to be a nullity, then it need not be set aside and that it can be ignored, but he contends that the order is not a nullity. But applying the principle underlying the Privy Council judgment in 60 Cal 670,¹ which affirms the judgment of the Calcutta High Court in 58 Cal 1018,² I must hold that the order in question is a nullity. No order under O. 21, R. 50, could be passed making the share-holders liable when the decree was against a limited liability company. The Court therefore assumed jurisdiction which did not vest in it and on a subject on which the Court could not adjudicate. There is therefore inherent want of jurisdiction in the Court over the subject-matter of the dispute. Under such circumstances the order must be deemed to be a nullity and must be ignored by the Court.

I am therefore constrained to accept this appeal in spite of the fact that I feel satisfied that Nihal Chand and Manohar Lal in any case had direct knowledge of the application and I cannot believe that

Harnam Singh was ignorant of the proceedings which were going on in the Court of the Subordinate Judge against him. I accept this appeal and set aside the order appealed against and direct that no proceedings in execution be taken against Harnam Singh and Nihal Chand personally in pursuance of the order under O. 21, R. 50. Manohar Lal has not appealed, therefore there will be no order about him. In the circumstances I decline to pass any order of costs in this case.

B.D./D.S.

Appeal allowed

A. I. R. 1937 Lahore 60

JAI LAL, J.

Jhutha Ram—Plaintiff—Appellant.

v.

Ram Sarup and others — Defendants and another, Plaintiff, Respondents.

Second Appeal No. 334 of 1936, Decided on 19th October 1936, from decree of Dist. Judge, Hissar, D/- 13th December 1935.

Appeal—Dismissal — Mere mistake in description of respondents does not entail dismissal of appeal, when defect is formal one—It should be allowed to be corrected when brought to notice of Court.

The fact that there is a mistake in the description of the respondents does not entail the dismissal of the appeal, when the defect is a formal one. The appellate Court should allow it to be corrected when brought to its notice; more so when the appellant applies at the hearing of the appeal to amend the mistake and the respondents are prepared to go on with the appeal on merits: *A I R 1926 Lah 186, Rel. on.* [P 61 C 1]

Shamair Chand and Qabul Chand — for Appellant.

Nawal Kishore—for Respondents (Defendants).

Judgment. — A suit was instituted against several defendants of whom Nos. 3, 7 and 8 were minors. The minor defendants were first represented by their relations as their respective guardians but as these relations refused to act as guardians a Court official was appointed as the guardian of all the three defendants. Finally the suit was dismissed and the plaintiff preferred an appeal in the Court of the District Judge of Hissar. It appears that the three minor defendant-respondents were shown as being represented by the original guardians, their relations, and not by the Court official. When the appeal came up for hearing before the learned District Judge he dismissed it merely on the ground that the appeal was not pro-

1. *Jnanendra Mohan v. Rabindra Nath*, A I R 1933 P C 61=142 I C 324=60 I A 71=60 Cal 670 (P C).

2. *Rabindra Nath v. Jnanendra Mohan*, A I R 1932 Cal 9=136 I C 466 = 58 Cal 1018 = 35 C W N 537.

perly presented as against the minors and could not therefore proceed and as it could not proceed against these minors, it abated in its entirety.

This order is obviously wrong. There is no question of abatement in the case and the fact that there was a mistake in the description of the respondents did not entail the dismissal of the appeal. 7 Lah 102¹ is an authority on this question. The defect was a formal one and should have been corrected when it was brought to the notice of the Court. I am informed that the plaintiff applied at the hearing of the appeal to be allowed to amend the description of the respondents, the minors, and the defendants were prepared to go on with the appeal on the merits. I accept this appeal, set aside the order of the District Judge and send the case back to him with direction to proceed with the appeal on the merits after the description of the minor defendant-respondents has been corrected and service effected on the Court official as their guardian. The court-fee on the memorandum of appeal shall be refunded to the appellant. The other costs will abide the result. The parties have been directed to appear before the District Judge on 19th November 1936.

R.M./R.K.

Appeal allowed.

1. Ralla Singh v. Bishna, A I R 1926 Lah 186=
93 I C 355=7 Lah 102=27 P L R 106.

A. I. R. 1937 Lahore 61

DIN MOHAMMAD, J.

Kesar Singh—Defendant—Appellant.

v.

Joint Official Liquidators of Radhesham Beopar Co., Ltd., Okara—Petitioners—Respondents.

Appeal No. 107 of 1936, Decided on 1st October 1936, from order of Dist. Judge, Montgomery, D/- 16th March 1936.

Companies Act (1913), S. 240—Entries in books of company are prima facie evidence of transaction to which they relate—Contributory denying transaction—Burden is on him to disprove transaction by disproving entries relating to it—Mere repudiation of transaction is not sufficient.

Entries in the books of a company are prima facie evidence of the transaction to which they relate and it is for the contributory denying the transaction to rebut that evidence and disprove the entries recorded in books of the company and rebut the presumption arising against him. The proof of the entries by the manager and the accountant of the company is sufficient to shift the onus to the contributory to disprove the transaction, and the mere fact that the contributory

states on solemn affirmation that he did not enter into the transaction and has repudiated the transaction will not save him from his liability.

[P 61 C 2; P 62 C 1]

Mehr Chand Diwan—for Appellant.

Anant Ram Khosla—for Respondents.

Judgment.—Under S. 186, Companies Act, the District Judge of Lahore has made an order on Kesar Singh to pay Rs. 1,323-4-0 due from him to the Radhesham Beopar Co. Ltd., Okara. Kesar Singh has appealed. The only point raised on behalf of the appellant is that the books of the company have not been legally proved and as there is no other evidence on the record to prove the debt, this order is unsustainable. The liquidator has, on the other hand, urged that entries in the books of a company in liquidation are prima facie evidence of the transaction to which they relate and that it was for the appellant to rebut that evidence. In support of his contention he has relied on S. 240, Companies Act.

It is true that the actual writer of the entries in the day-book, register *saudajat* and the ledger relating to the transaction in question has not been produced to prove those entries nor has any other witness been tendered to speak from his personal knowledge that the appellant had made the transaction in question with the company; but in view of the clear wording of S. 240, Companies Act, I have no hesitation in holding that the proof of these items by the manager and the accountant was enough in this case to shift the onus to the appellant to disprove the transaction. S. 240, Companies Act, reads as follows:

Where any company is being wound up, all documents of the company and of the liquidators shall, as between the contributories of the company, be prima facie evidence of the truth of all matters purporting to be therein recorded.

It is not denied that the appellant is a contributory and as the onus clearly lay on him to disprove the entries recorded in the books produced, the only question that falls to be determined is whether he has succeeded in rebutting the presumption thus arising against him. Counsel for the appellant has urged that as the appellant has stated on solemn affirmation that he did not enter into the transaction in question, and as there is no evidence on the other side to prove the falsity of this statement, it should be considered enough in this case. I, however, do not agree. The liquidator has produced the manager and

the accountant of the company, who have stated that the books relied on were kept in the regular course of business and have further averred that all the entries relating to the appellant in his account on p. 11 of the ledger were made by the servants of the company. The appellant has further admitted that the manager of the company had handed to him a bill or invoice in which this transaction was entered. The mere fact, therefore, that the appellant has repudiated this transaction, will not save him from his liability. It is significant that the appellant has not denied the genuineness of the other five transactions which are also covered by these entries. I accordingly uphold the order of the District Judge and dismiss this appeal. There will be no order as to costs.

R.M./V.V. *Appeal dismissed.*

A. I. R. 1937 Lahore 62

BHIDE, J.

Punjab Electric Power Co., Ltd.—
Defendant—Petitioner.

v.

Suraj Kishan — Plaintiff — Opposite Party.

Civil Revn. No. 106 of 1936, Decided on 5th May 1936, from decree of Sub-Judge, First Class, Small Cause Court, Lahore, D/- 3rd January 1936.

(a) Court-fee — Adjustment — Court-fee need not be paid on adjustment claimed.

Plaintiff brought a suit against the defendant for a certain amount. Defendant inter alia pleaded that the plaintiff owed to him another amount which was adjusted with the claim in suit and only a little balance had remained due to him. Plaintiff contended that the defendant cannot claim the adjustment unless he pays court-fee on it:

Held: it was an adjustment that was claimed and not a set-off; hence no court-fee was necessary: 85 P R 1908, *Rel. on.* [P 62 C 2]

(b) Company — Director's fees—Company's dues from director—No adjustment without consent.

Where a company owed to its Director his fees and the Director owed to company interest on his share calls:

Held: that the company could not adjust fees of director with interest due from him without his consent: *Johnson v. Little's Iron Agency, Ltd.*, (1877) 5 Ch D 687, *Approv.* [P 63 C 1]

(c) Company — Lien on shares and dividends—No lien on Director's fees.

The company has usually a lien on shares or dividends due on them for realization of money due on them but has no lien on fees due to a director for money due to company [P 63 C 2]

M. C. Mahajan and Rattan Lal Chawala—for Petitioner.

Achhru Ram, Durga Das Jaini and Mohammad Aslam—for Opposite Party.

Order.—This is a petition for revision of the order of the Judge, Small Cause Court, Lahore, decreeing a suit for recovery of Rs. 149. The plaintiffs sued for recovery of this sum on account of fees due to him as a director of the defendant company. The defendant company pleaded that a sum of Rs. 147-14-3 was due to the company from the plaintiff on account of interest due on calls on plaintiff's shares which had not been paid in time and that this sum had been adjusted in the accounts and as a consequence a sum of Rs. 3-14-3 was due to the defendant company. The plaintiff denied that any interest was due from him and also pleaded that the defendant company was not entitled to raise the plea of set-off without paying court-fee on the sum of Rs. 147-14-3 claimed by them. The learned Judge upheld the plaintiff's contention and decreed the suit. The defendant has filed a petition for revision of this order.

It is urged on behalf of the defendant that the learned Judge was in error in holding that court-fee was payable on the sum of Rs. 147-14-3 which was claimed as a set-off. This question of 'set-off' does not appear to me to arise in the case, as the plea of the defendant really was that the claims had already been adjusted and balance of Rs. 3-14-3 was due to the defendant. The defendant was therefore claiming only the latter sum and not Rs. 147-14-3. The case seems to be analogous to that reported in 85 P R 1908.¹ The learned counsel for the defendant is not pressing the claim for Rs. 3-14-3. I am therefore of opinion that no court-fee was necessary on the written statement. The next point for consideration is whether the sum of Rs. 147-14-3 was due to the defendant company on account of interest and whether the defendant company was entitled to adjust it in the accounts as alleged by them. With regard to this point the learned counsel for the plaintiff-respondent invited my attention to the law on the subject as set out in Leake on Contracts at p. 779. It is stated there:

By common law there is no right of set-off between parties mutually indebted, in the absence

1. *Bhagat Singh v. Devi Dial*, (1908) 85 P R 1908=80 P W R 1908=130 P L R 1908.

of agreement to that effect. And the rule of equity follows the law, unless there are special circumstances connecting the debts, besides the mere fact of mutuality, on which the relief can be founded.

It is not suggested that the law is different in India in this respect. In the present case it is not alleged that there was any agreement between the parties that the claims were to be adjusted as they are alleged to have been. The only point therefore which requires consideration is whether there are any special circumstances connecting the debts which would justify the adjustment. The learned counsel for the petitioner urged that the plaintiff being a director of the company and the interest being due on account of late payment of calls, the adjustment was justified. No authority directly in point has been cited but in (1877) 5 Ch D 687,² it was held (by Jessel M. R.) that a share-holder was not entitled to apply a set-off to prevent a forfeiture of shares for non-payment of calls even if he is a creditor of the company. In that case the plaintiff having failed to pay the calls of his shares, a notice was given to him that the shares would be liable to forfeiture. The plaintiff's solicitor wrote to the company stating that the plaintiff claimed to set-off against the calls the costs due to him from the company as their solicitor and also expenses incurred by him as a director. The company however took no notice of the claim and instituted a suit for recovery of money due on account of unpaid calls with interest. The plaintiff then delivered to the company a bill of costs and also moved the Court for an injunction restraining the defendant company from proceeding with the resolution for forfeiture of shares. The Court however held that the plaintiff had no right to the set-off.

The present case seems to me to be analogous and I am therefore of opinion, that the adjustment could not legally be made in the manner alleged by the defendant company without the consent of the plaintiff. It was next urged that the plaintiff had in fact consented to the adjustment. But of this there appears to be no satisfactory proof. It was alleged that the plaintiff was present at the meeting of the directors, which adopted the annual balance sheet of 1933-1934 which included the disputed 'adjustment.' The

plaintiff did not admit his presence at the said meeting and it is not proved by any other evidence. But apart from this it is not alleged that the balance sheet showed distinctly the disputed adjustment and the mere adoption of the balance sheet can hardly be considered to be any notice of the adjustment in question, much less of his consent to the same. Exs. P-1 and P-2 indicate that no order about the adjustment had been passed even in March or June 1934. The company has usually a lien on shares or dividends due on them for realization of money due on them but there appears to be no authority for holding that it has any lien on fees due to a director as in the present case. I therefore uphold the order of the learned Judge of the Court below and dismiss the petition, but in view of all the circumstances, leave the parties to bear their own costs.

B.D./V.V.

Petition dismissed.

A. I. R. 1937 Lahore 63

BHIDE, J.

Mt. Gulab Bano and others—Petitioners.

v.

Anjuman Imdad Bahmi Qarza—Opposite Party.

Civil Revn. No. 246 of 1936, Decided on 19th June 1936, from order of Dist. Judge, Campbellpore, D/- 16th December 1935.

(a) **Co-operative Societies Act (2 of 1912), S. 43 (1)—Award—Execution.**

An award granted under Co-operative Societies Act is to be executed in the same manner as a decree of civil Court. [P 64 C 2]

(b) **Co-operative Societies Act (1912), S. 43 (1) — Death of defendant before institution of proceedings relating to award—Award against him is nullity.**

Where the defendant dies long before institution of proceedings relating to award under Co-operative Societies Act, the award passed against him is a nullity and therefore cannot be executed: *A I R 1925 Lah 494* and *A I R 1935 Lah 439, Ref.* [P 64 C 2]

(c) **Revision—Executing Court dismissing application for execution of award as being nullity—District Judge ordering execution to proceed—Revision lies.**

Where executing Court dismissed the application for execution of an award as being nullity and District Judge on appeal directed that execution should proceed, it was contended that District Judge erred on point of law and no revision lay:

2. *Johnson v. Little's Iron Agency, Ltd.*, (1877) 5 Ch D 687=46 L J Ch 786=36 L T 528=25 W R 548.

Held: the question went to the root of the jurisdiction. If decree was nullity no Court had jurisdiction to execute it and hence revision lay.
[P 64 C 2]

Barkat Ali—for Petitioner.

Sayad Mohsin Shah—for Opposite Party.

Order.—This is a petition for revision arising out of execution proceedings relating to an award for Rs. 427-7-0 obtained by the Co-operative Credit Society of the village Surag in the Attock District against one Mt. Sunahran Begam. When the award was sought to be executed against Nawab Khan as the legal representative of Mt. Sunahran Begam, an objection was raised that the award was a nullity, inasmuch as Mt. Sunahran Begam had died long before the date on which the award was given. The executing Court upheld this objection and dismissed the application for execution. On appeal however the learned District Judge held that it had not been shown that Mt. Sunahran Begam had not died between the conclusion of the proceedings relating to the award and the announcement of the award, and that therefore it could not be held that the award was a nullity. In taking this view the learned Judge relied on the provisions of O. 22, R. 6, Civil P. C., and the remarks in the Commentary on the Civil Procedure Code by Mulla at p. 168, Edn. 10. He accordingly accepted the appeal and directed that the execution should proceed according to law.

The present petition has been filed for revision of this order and it is contended on behalf of the petitioner that there could be no question of Mt. Sunahran Begam having died between the conclusion of the hearing and the announcement of the award as she had died long before the institution of the proceedings relating to the award, namely, on 19th January 1928. It is also pointed out that no such plea had been taken by the Society either in the execution Court or even in the grounds of appeal before the learned District Judge and that therefore the learned District Judge was not justified in deciding the case merely on the assumption that Mt. Sunahran Begam may have died between the conclusion of the hearing and the announcement of the award. This contention appears to me to be sound. There was no evidence before the learned District Judge to justify the assumption on which

he based his decision. The question was one of fact and it had not been even pleaded. Further, the award shows that it included interest upto 27th February 1929 and it seems therefore clear that the proceedings relating to the award must have been instituted long after the date on which Mt. Sunahran Begam died. An award granted under the Co-operative Societies Act, is to be executed in the same manner as a decree of a civil Court and consequently as Mt. Sunahran Begam died on the date mentioned above the award must be treated as a nullity, vide 6 Lah 313¹ and 17 Lah 32.² The learned counsel for the respondent contended that no petition for revision lay as the learned District Judge could at the most be held to have erred on a point of law. But the question in this case goes to the root of the jurisdiction of the executing Court. If the award was a nullity, no Court has jurisdiction to execute it and the learned District Judge was therefore not justified in ordering the execution to proceed.

In the end it was contended that the objection as to jurisdiction of the executing Court to execute the award was not taken at the earlier stages of the proceedings and must therefore be held to have been waived. This contention also does not appear to me to be borne out by the record. It is true that there were three applications for execution before the present one; but it does not appear that the petitioner was served in the proceedings on the first two applications. In the third application he succeeded on another ground and there was therefore no necessity to raise the objection which is now relied on. I accept the petition for revision and setting aside the order of the learned District Judge, restore that of the execution Court. The petitioner will get his costs in this Court.

P.R./D.S.

Petition accepted.

1. Anwarul Haq v. Nazar Abbas, A I R 1925 Lah 494=88 I C 865=6 Lah 313=26 P L R 474.
2. Radhakishen Sahanlal v. Biharilal Asanand, A I R 1935 Lah 489=159 I C 212=17 Lah 32=37 P L R 501.

A. I. R. 1937 Lahore 65

TEK CHAND, J.

Narindar Nath—Plaintiff—Appellant.

v.

Jai Nath and *others*—Defendants—Respondents.

Second Appeal No. 333 of 1936, Decided on 26th May 1936, from decree of Senior Sub-Judge, Gurdaspur, D/- 21st December 1935.

Co-sharer — Adverse possession — Suit by one for declaration that certain portion of joint property is exclusively his—No hostile overt act on his part before suit—Decree rejecting his claim but directing that property could not be partitioned until contribution by other co-sharers to certain expenditure incurred by him—No mention of time-limit—Exclusive possession by him for twelve years after decree—Possession held could not be adverse.

A co-sharer, having incurred some expenditure on certain portion of the joint property, sued for a declaration that that portion was exclusively his and not liable to partition. Decree rejected his claim but directed that the property could not be partitioned until contribution by other co-sharers to the expenditure incurred by him. No time-limit was mentioned and he remained in exclusive possession of the portion for twelve years after the decree :

Held : that as no time-limit was mentioned for contribution in the decree and admittedly there being no hostile overt act openly denying the title of other co-sharers before the decree, his exclusive possession for twelve years after the decree could not be adverse : *A I R 1914 Lah 284; 63 I C 881* and *A I R 1930 Lah 297, Disting.* [P 67 C 1]

Achhru Ram—for Appellant.*Shamair Chand*—for Respondents.

Judgment.—This second appeal arises out of a suit instituted by Narindar Nath, plaintiff-appellant, against Jai Nath and others, defendants-respondents, for a declaration that the plaintiff is the exclusive owner of 11 kanals 2 marlas of land situate in khasra Nos. 1575 and 1580 within the municipal limits of Gurdaspur, and that the defendants have no right to get it partitioned. The suit was decreed by the trial Court but has been dismissed on appeal. The ancestors of the parties were joint owners of a large area of shamilat land, including khasra Nos. 1575 and 1580 and were recorded as such in the revenue papers. There used to be a big pond in the khasra numbers in dispute. In 1897 the Municipal Committee, finding the pond to be in a highly insanitary condition, issued a notice to the recorded owners to fill it. The ancestors of the de-

fendants took no action, and on being reminded by the Committee stated that they were willing to relinquish their rights in favour of the Committee, if the latter agreed to have the pond filled at its own expense. The Committee did not agree to do so. In the meantime one of the co-sharers, Ishar Nath, grandfather of the plaintiff, filled up the pond at his own cost, having made the land level with adjoining fields, brought it under cultivation and began to enjoy the produce thereof. In 1914 Shankar Nath, defendant 8 and Basheshar Nath, father of defendant 9, applied to the revenue authorities for partition of the shamilat land, including the two khasra numbers above mentioned, Kirpa Nath, father of the plaintiff, objected to the partition of the land comprised in these khasra numbers, alleging that it was his exclusive property. The Revenue Officer directed Kirpa Nath to have his title established in the Civil Court.

Accordingly, on 1st June 1914, Kirpa Nath instituted a suit in the Court of Qazi Ala-ud-Din, Munsif, against Basheshar Nath, Shankar Nath, Jai Nath and the other recorded co-sharers for a declaration that he was the exclusive owner of the land in these two khasra numbers and that the defendants had no right to have it partitioned. In the plaint it was averred that the plaintiff had become the exclusive owner of the fields in 1897, when the defendants relinquished their rights in favour of his father and he had filled the pond at considerable expense. The Munsiff held that the alleged relinquishment by the defendants in favour of the plaintiff had not been established, that the plaintiff Kirpa Nath alone had filled up the pond at a cost of Rs. 872 and had been in exclusive possession since 1897, but that these facts did not confer any exclusive title on him or make his possession adverse. He accordingly passed a decree declaring that the plaintiff was not the sole owner of the khasra numbers in dispute, which was the joint property of himself and the defendants, but that the latter were not entitled to have it partitioned until and unless they had paid him a pro-rata share of Rs. 872, which he had spent on filling the pond. The date of this decision is 27th July 1915. Kirpa Nath appealed to the District Judge, but he dismissed the appeal on 5th February 1916. It is common ground between the parties that

Kirpa Nath, and after his death his son Narindar Nath, plaintiff, have since been in exclusive possession and have been appropriating the entire produce.

In 1934 Jai Nath, defendant, applied again to the revenue authorities for partition of the land comprised in these two khasra numbers. Narindar Nath objected claiming that he had acquired title by prescription. The Revenue Officer stayed further proceedings pending determination of the question of title by the civil Court. On 6th February 1935, Narindar Nath instituted the present suit for a declaration that he had become exclusive owner by adverse possession and that the land was not liable to partition at the instance of the defendants. The trial Judge held that by their failure to pay their pro-rata share of Rs. 872 within twelve years from the decree passed by Qazi Ala-ud-Din or otherwise interfere with the plaintiff's exclusive possession, the defendants had lost their rights and the plaintiff had become exclusive owner. He accordingly granted the plaintiff the declaration asked for. On appeal by the defendants the learned Senior Subordinate Judge has come to a contrary conclusion. He has held that, as decided in the previous suit, the plaintiff's possession was that of a co-sharer, which he was allowed to hold until payment by defendants of their proportionate share of Rs. 872, and as no time-limit for payment of the amount had been fixed, the omission of the defendants to pay within twelve years of the decree could not destroy their proprietary rights. He has accordingly accepted the appeal and dismissed the suit.

Before me Mr. Achhru Ram for the plaintiff-appellant conceded that there was no overt act by the ancestors of the plaintiff before the institution of the former suit on 1st June 1914, from which time could have run against the defendants. He urged, however, that in the plaint of that suit the plaintiff's father had clearly and unequivocally asserted that he was the sole owner of the land and that this assertion followed by undisturbed and continuous possession for 12 years, has in law conferred an indefeasible right on him, even though the claim made in the plaint was negated by the Munsiff in the decree passed by him dismissing that suit. In support of this contention the learned counsel referred me to 45

P R 1914,¹ 63 I C 881,² and A I R 1930 Lah 297.³ The last mentioned two cases merely adopted the reasoning of the first case, in which the following propositions were laid down:

(1) That possession of one co-sharer is ordinarily possession of all the co-sharers; (2) but the co-sharer in possession can convert his possession into adverse possession by an overt act showing unequivocally to the co-sharers that in future he intends to hold for himself alone; (3) that adverse possession so begun cannot be stopped by the other co-sharers, merely by affirmation that they are co-sharers, or by mere application for partition. It is necessary for those co-sharers, within limitation, actually and effectually to assert their rights and to break up the usurper's exclusive possession; (4) that the mere retention by the Revenue authorities of the names of those co-sharers as such, after the aforesaid overt act has been done, does not prevent limitation from running against them, (5) nor does even a decree in their favour, not accompanied by actual effective assertion of rights and taking of possession of those rights, help them.

The first four of these propositions, if I may say so with all respect, express the law correctly. The fifth proposition, however, cannot be taken to be of universal application irrespective of the nature of the overt act and the form of the decree. In 45 P R 1914,¹ as also in the other two cases cited, it had been found that before the institution of the former suit, the plaintiff had openly and unequivocally denied the title of the defendants, and had then instituted a suit claiming a declaration that twelve years had elapsed from that denial. The Court had found that as a fact there had been an anterior denial of the defendant's right but that the period of 12 years necessary under the law to give him a prescriptive title had not since elapsed and, therefore, the plaintiff was not entitled to the declaration asked for. After this decree however the plaintiff had continued in undisturbed possession, and had completed the requisite period of 12 years from their original hostile act. It was held that his possession had become adverse, notwithstanding

1. Akbar v. Tabu, A I R 1914 Lah 284=22 I C 805=45 P R 1914=105 P L R 1914.

2. Hans Raj v. Maulu, (1921) 63 I C 881.

3. Muhomed Ibrahim v. Shaidu Muhomed, A I R 1930 Lah 297=120 I C 486=11 L L J 553.

the decree which was merely declaratory of the position of the parties on the date of the institution of the suit in which it was passed. In the case before us, the facts are quite different. Here, admittedly, there was no hostile overt act by the plaintiff's ancestors before the institution of the suit on the 1st June 1914.

No doubt in the plaint of that suit, the plaintiff's father had asserted that he had become exclusive owner by reason of the prior relinquishment by defendants of the rights in his favour and his having filled up the pond at his own expense, but the alleged relinquishment was held to be unproved and it was ruled judicially that the fact that the plaintiff alone had spent money on filling the pond did not legally confer any exclusive title on him; it merely entitled him to contribution from the co-sharers. It was accordingly declared that his possession was that of a co-sharer, and that the other co-sharers could claim partition on payment of the proportionate share of the amount which was found to have been spent by him in filling up the pond. As already stated, in the decree no time limit was fixed for the payment of the money, and it is admitted by Mr. Achhru Ram that there has been no other act between 1915 and 1934 which would have made the plaintiff's possession adverse. In these circumstances it must be held that the plaintiff has not established his exclusive title in the land and his suit was rightly dismissed by the Senior Subordinate Judge. The appeal fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1937 Lahore 67

JAI LAL, J.

Allahabad Bank Ltd., Lahore—Defendant—Appellant.

v.

Raja Ram and others, Defendants and *others*, Plaintiffs—Respondents.

First Appeal No. 198 of 1936, Decided on 8th October 1936, from decree of Senior Sub-Judge, Ferozepore, D/- 18th February 1936.

(a) Practice—Parties—Misjoinder of—Parties improperly impleaded—Proper order is to strike out their names and not to discharge them—Such defendants can be awarded costs.

Where parties are added as defendants at the instance of a co-defendant, and no cause of action is found against them, the proper order to pass is to strike off the names of those defendants under O. 1, R. 10 (2), C. P. C. and not to discharge them. When such defendants are struck off under O. 1, R. 10 (2) as being improperly added, Court can impose such terms as it considers proper and can order the party to pay costs to such defendants. This power of the Court is analogous to its power of adjourning proceedings in which case the Court is empowered to make the defaulting party to pay costs to other party and there is no limitation as to the amount which can be awarded under such circumstances. [P 67 C 2; P 68 C 1]

(b) Civil P. C. (1908), O. 1, R. 10 (2)—No appeal lies from order awarding costs under.

No appeal lies from an order awarding costs under O. 1, R. 10 (2), Civil P. C. [P 68 C 2]

Partap Singh—for Appellant.

Daulat Ram and Ved Kumar Ranade—for Respondents Nos. 4 and 5.

Judgment.—A declaratory suit was instituted against the Allahabad Bank, Ltd., Lahore, by a person who claimed to be the owner of the property which the Bank attempted to sell in execution of its decree. At the hearing of the suit, an objection was raised on behalf of the Bank that two persons, the respondents before me, should be impleaded as defendants in the suit. The plaintiff stated that these persons were not necessary parties, but he had no objection to add them if the defendant insisted. The two persons were consequently added as defendants and appeared in pursuance of summons issued to them. At the first hearing of the suit in their presence they raised an objection that there was no cause of action against them. The plaintiff said that he did not claim any relief against them, and that was the reason why there was no cause of action against them disclosed in the plaint. The defendant at whose instance they have been impleaded as defendants then stated that it had no objection to their names being struck off from the list of the defendants.

The Court thereupon proceeded to pass an order 'discharging' the two defendants. It considered the question whether the plaint should be rejected as against these defendants but came to the conclusion that the proper order to pass was to "discharge" them. In fact, the proper order to pass was to strike off the names of these two defendants under O. 1, R. 10 (2), Civil P. C. I must, therefore, construe the order of the trial Court as an order passed under that rule, though it is described to be an order discharging the

defendants which is not an order contemplated by the Civil Procedure Code. It may, however, be mentioned that subsequently on the application of the original defendant a decree was drawn up by the trial Court. This also was illegal. After striking off the names of the two defendants, the Court should have proceeded with the suit against the original defendant, and this it did, but after framing a decree with regard to the two "discharged" defendants. At the time of passing this order the Court allowed one of the defendants Rs. 175, as fee of the counsel and Rs. 36 to the other defendant. Rs. 175 was fixed because that was the fee paid to the two counsel who appeared for the defendant. A certificate to that effect was filed in Court.

This appeal by the original defendant, the Allahabad Bank Ltd., is against the order awarding costs to the defendants whose names had been struck off and it is contended that no fee could have been awarded on account of the appearance of the counsel to the two defendants because the fee-certificate was filed in one case after the conclusion of the arguments, and in the other case no certificate was filed at all. Reliance in support of this contention is placed on a rule framed by this Court, that is to say, R. 19, Ch. 16-B, Vol. 1, of the Rules and Orders of this Court. This rule provides that :

Notwithstanding anything contained in these rules and notwithstanding any order of the Presiding Officer, no fee to any legal practitioner appearing in original suits of which the jurisdictional value is over Rs. 5,000 (five thousand), pending in the Courts of Subordinate Judges shall, except as in these rules hereinafter provided, be allowed on taxation between party and party, or shall be included in any decree or order, unless the party claiming to have such fee allowed shall, before the commencement of the argument at the conclusion of the evidence, file in the Court a certificate signed by the legal practitioner certifying the amount of the fee or fees actually paid by or on behalf of his client to him or to any other legal practitioner in whose place he may have appeared.

In my opinion this rule does not apply to this case. This rule is intended to apply to cases in which the trial has concluded after the evidence of the parties has been recorded and a final judgment on the merits of the dispute has been given by the Court. This is clear from the words "before the commencement of the argument at the conclusion of the evidence." Nor is the present case covered by R. 10 of the same chapter which

applies to miscellaneous proceedings or any matter other than that of appearing, acting or pleading in a suit prior to decree. This was an appearance in a suit prior to the decree and therefore it was not a matter covered by R. 10, nor was it a miscellaneous proceeding. The costs in this case have been awarded under O. 1, R. 10, sub-r. (2) which empowers a Court at any stage of the proceedings on such terms as may appear to the Court to be just to order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out. It was under this rule that the Court passed the order and in passing the order the Court was empowered to impose such terms as it considered proper. This power of the Court is analogous to its power of adjourning proceedings in which case the Court is empowered to make the defaulting party pay costs to the other party and there is no limitation as to the amount which can be awarded under such circumstances.

It is true that in this case the amount awarded by the Court was fixed on the basis of a fee-certificate filed by the defendant, but the certificate was used by the Court as a guide in determining what costs should be awarded to the defendant. The order passed by the Court below was, therefore, perfectly legal and I am not prepared to say that the fees awarded are excessive having regard to the value of the suit which is Rs. 3,17,863. This appeal is further incompetent on the ground that the order passed by one Court, if construed to have been passed under O. 1, R. 10 (2), is not appealable and there is no force in the contention of the appellant's counsel that an appeal lies against an order of costs when a question of principle is involved. The order of costs was, in this case, merely ancillary to the main order which was to strike off the names of the two defendants. This order is not appealable. I dismiss this appeal with costs.

K.B./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 68

JAI LAL, J.

Allah Bakhsh and others—Defendants—Appellants.

v.

Sant Ram—Plaintiff—Respondent.

Second Appeal No. 449 of 1936, Decided on 7th October 1936, from decree of Senior Sub-Judge, Gurdaspur, D/- 24-1-1936.

Jurisdiction—Civil Court—Tenant repudiating relationship of landlord and tenant and thus becoming trespasser—Suit for ejectment—Civil Court has jurisdiction to entertain such suit.

A executed a mortgage with possession of certain land in favour of B. B obtained possession and again leased it to A. As A did not pay the rent to B, B assigned his rights to collect rent to C. C sued A for rent. But A repudiated his tenancy and the mortgage. Hence a suit was brought in a civil Court to eject A as a trespasser:

Held: that civil Court had jurisdiction to entertain the suit: 41 P R 1894, *Rel. on*; 46 P R 1894, *Disting.* [P 69 C 1]

Mohammad Monir—for Appellants.

Lal Chand Malhotra—for Respondent.

Judgment.—The only question in this second appeal is as to the jurisdiction of civil Courts to entertain the suit. The plaintiff alleged that he was given a mortgage with possession by the defendant and that possession of the mortgaged land was given to him. He also alleged that subsequently the mortgagor took the land on lease, but as he did not pay the rent to him the right to recover the same was assigned by the plaintiff to a third person who instituted a suit for the recovery thereof but the defendant denied the existence of relationship of landlord and tenant; he even denied the existence of the mortgage, that is to say, he repudiated his tenancy and also the mortgage and thus became a trespasser. The suit was therefore for ejectment of a trespasser.

The appellant relies upon 46 P R 1894,¹ a judgment of a Full Bench of the Chief Court of the Punjab, but another judgment of the Chief Court of the Punjab, 41 P R 1894,² is applicable to the facts of the present case. In the Full Bench judgment there was no repudiation of the relationship of landlord and tenant. In 41 P R 1894² there was such a repudiation and it was held that the suit was cognizable by the civil Court. This judgment fully covers the present case and I agree with the view taken therein. I hold therefore that the suit as framed was cognizable by the civil Court and as that is the only point raised before me I dismiss the appeal with costs.

K.B./D.S.

Appeal dismissed.

1. Buta v. Kalu, (1894) 46 P R 1894.

2. Khushab v. Arjan, (1894) 41 P R 1894 (F B).

A. I. R. 1937 Lahore 69

AGHA HAIDAR, J.

Mt. Tulsan—Defendant—Appellant.

v.

Pyare Lal — Applicant — Respondent.

First Appeal No. 69 of 1936, Decided on 8th June 1936, from order of Dist. Judge, Ludhiana, D/- 11th January 1936.

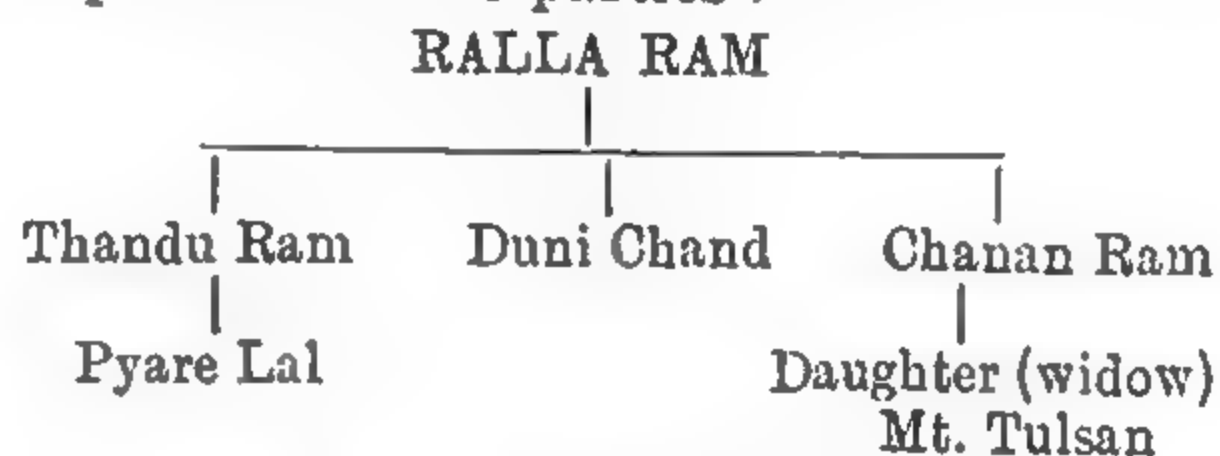
Will — Proof of — Application for letters of administration—Court cannot take notice of will unless it is duly and formally proved—Absence of denial of execution of will is no ground for dispensing with formal proof.

A will is a formal document and before a Court of justice can take notice of it, e. g., for purposes of granting letters of administration, it must be duly and formally proved and the mere fact that there is no categorical denial by the opposite party of the execution of the will by the alleged testator is not a sufficient ground for dispensing with the formal proof of the will required by law: 1 C L R 362, *Foll.* [P 70 C 1]

J. R. Agnihotri for N. C. Pandit—for Appellant.

Mela Ram Aggarwal—for Respondent.

Judgment. — The following pedigree table is sub-joined in order to understand the position of the parties :



On 2nd January 1923, Chanan Ram is alleged to have executed a will in favour of his nephew Pyare Lal. This will was duly registered. Chanan Ram had, in his life-time, brought a suit on the foot of a mortgage. He however died on 18th February 1935, and the question arose as to who was his legal representative among the two claimants, namely, Mt. Tulsan and Pyare Lal. The trial Court ordered Pyare Lal to get letters of administration with a copy of the will annexed, and directed Mt. Tulsan to obtain a succession certificate. Pyare Lal's father, in the first instance, applied for the grant of letters of administration with a copy of the will annexed, to his son Pyare Lal, who according to the will, was the sole legatee. This application was rejected on 11th October 1935. Thereupon, on 12th October 1935, Pyare Lal himself made an application for the grant of letters of administration with a copy of the will annexed. Among others, Mt. Tulsan appeared in Court to contest the application. The principal defence raised on behalf of

Mt. Tulsan was that Chanan Ram at the time of the alleged execution of the will was not of a sound and disposing mind and that Pyare Lal being of unsound mind no letters of administration could be granted to him under the law. The learned District Judge accepted the plea that Pyare Lal was mentally deficient. He accordingly granted letters of administration with a copy of the will annexed to Thandu Ram, the father of Pyare Lal on behalf of Pyare Lal with a provision under S. 246, Succession Act, that Thandu Ram was to act for the benefit of Pyare Lal. The question of the validity of the will on the ground of want of disposing mind on the part of the alleged testator was properly left open. The applicant did not formally prove the will and the learned Judge has dispensed with the proof of the will on the ground that as the document was a registered one, no formal proof was necessary.

I do not think that the learned Judge was correct in the procedure which he adopted. A will is a formal document and before a Court of justice can take notice of it, it must be duly and formally proved. This was not done in the present case, and the mere fact that in the pleas taken by Mt. Tulsan there was no categorical denial of the execution of the will by the alleged testator, is no sufficient ground for dispensing with the formal proof of the will as required by law. This view is supported by the case in 1 C L R 362.¹ This case is good law and I follow it with all respect. I therefore allow the appeal, set aside the order of the Court below and remand the case to the learned District Judge for taking formal proof of the will and disposing of the case according to law. Costs here and hereinafter shall abide the event. Counsel have been informed that their respective clients should appear before the learned District Judge on 22nd June, when the day of the hearing of the evidence shall be intimated to them.

R.M./A.L.

Appeal allowed.

1. Obhoy Churn Mustafi v. Uma Churn Mustafi, (1878) 1 C L R 362.

A. I. R. 1937 Lahore 70

JAI LAL, J.

Mir Mohammad Khan and another —
Plaintiffs—Appellants.

v.

Jamadar Adalat Khan— Defendant —
Respondent.

Second Appeal No. 500 of 1936, Decided on 1st October 1936, from decree of Dist. Judge, Jhelum, D/- 19th February 1936.

(a) Civil P. C. (1908), S. 11, Explan. 6 — Expression "claimed in common for themselves and others" cannot be used in connexion with public right and does not govern claim in respect to such right — Litigation bona fide in respect of public right—Decision is res judicata against others claiming same right.

The expression "claimed in common for themselves and others" in Explan. 6 to S. 11 does not also govern a claim in respect of a public right. A public right always implies that it is enjoyed by the plaintiff in common with others and the expression 'claimed in common for themselves and others' cannot be used in connexion with a public right. With regard to such public right if the litigation is bona fide on the part of the plaintiff the decision would be res judicata against others who claim to be entitled to the right: *A I R 1933 P C 183, Disting.* [P 71 C 2]

(b) Civil P. C. (1908), S. 11, Explan. 6—Suit by certain persons for injunction restraining defendant from obstructing their right of way over public thoroughfare—Right of way described as shara-i-am — Suit is one to establish right to use public thoroughfare and not one claiming right of way acquired by easement — Explan. 6 to S. 11 applies to such suit.

There can be no other meaning of the expression shara-i-am except a public thoroughfare. Where certain persons bring a suit for an injunction restraining the defendant from obstructing their right of way over a public thoroughfare describing it in the plaint as a shara-i-am, the suit is one to establish a right to use a public thoroughfare and is not one claiming a right of way acquired by easement by the plaintiff along with others. Explan. 6 to S. 11 applies to such a suit and the decision in such suit operates as res judicata in a subsequent suit by others claiming to be entitled to the right. [P 71 C 2]

*Ghulam Rasul Khan—*for Appellants.

*Indar Dev for Achhru Ram and Achhru Ram—*for Respondent.

Judgment.—This appeal raises an interesting question of law but after hearing learned counsel of both sides I have no doubt that the conclusion of the learned District Judge is correct. Previously by Suit No. 141 of 1935 certain persons instituted a suit against the respondent for an injunction restraining him from obstructing their right of way over a public thoroughfare. They described it at the

heading of the plaint as a shara-i-am. In that plaint no further mention was made of the existence of the shara-i-am except in the paragraph relating to the relief. There again it was prayed that the defendant be restrained from obstructing the plaintiff's right to use the shara-i-am. The suit was ultimately dismissed on the ground that there was no public thoroughfare. The present appellants then instituted the suit out of which this second appeal has arisen against the same defendant claiming an injunction restraining him from obstructing their right to use the public thoroughfare. The expression shara-i-am is repeated as the description of the road in question in several places in the plaint including the paragraph relating to the relief. It is to be observed that in neither plaint, except that the plaintiffs had been using the road for many years, has it been stated that they had been using it openly and as of right. The learned District Judge has held, agreeing with the conclusion of the trial Court, that the suit is barred by res judicata by virtue of Explan. 6 to S. 11, Civil P. C. The explanation is :

Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Two contentions are put forward on behalf of the appellant. One is that this explanation has no application to the present case because it is controlled by O. 1, R. 8, Civil P. C., and in support of this contention reliance is placed on a judgment of the Judicial Committee of the Privy Council, 56 Mad 657.¹ That case, however, related to a private right which was claimed by the plaintiff in common with others and from the observations made by their Lordships it appears that they are of opinion that in order to apply Explan. 6 to S. 11, Civil P. C., it would be necessary, in a case of the description which was before them, that action should have been taken under O. 1, R. 8, Civil P. C., to notify the institution of the suit to others who were interested in the right. It is not within my province to express any opinion on the correctness or otherwise of this view, but the case cited must be deemed to lay down the law for the

circumstances found proved in that case. But counsel claims that the expression "claimed in common for themselves and others" used in the explanation also governs a claim in respect of a public right. I cannot accept this contention as correct. In my opinion, a public right always implies that it is enjoyed by the plaintiff in common with others and the use of the expression "in common for themselves and others" would be a superfluity if it is used in connexion with a public right. With regard to such right if the litigation is bona fide on the part of the plaintiffs, the decision would be res judicata against others who claim to be entitled to the right.

The other contention of the learned counsel is that neither in the previous suit nor in the present was a public right claimed but that an easement was claimed in both the cases. I am unable to agree with this contention either. There can be no other meaning of the expression shara-i-am except a public thoroughfare, but the learned counsel says that this expression was used in both the cases to convey a different meaning, that is to say, not a public thoroughfare but a right of way acquired by easement by the plaintiff along with others. As I have stated, the manner of acquisition of the right is not described in the plaint and there is no material on the record to show that the expression shara-i-am was used in a sense different to the invariably accepted meaning thereof, assuming that it is permissible to look for material to interpret the expression in a different manner. I consider therefore that both the suits are of the same description and are really to establish a right to use a public thoroughfare. I therefore dismiss this appeal leaving the parties to bear their own costs in this Court.

R.M./V.V.

Appeal dismissed.

A. I. R. 1937 Lahore 71

SKEMP, J.

Karam Din—Plaintiff—Petitioner.

v.

Mohammad Din and *others*—Defendants—Respondents.

Civil Revn. No. 568 of 1935, Decided on 22nd January 1936, from order of Sm. C. C. Judge, Lahore, D/- 8th August 1935.

1. Kumara Velu Chettiar v. Ramaswami Ayyar, A I R 1933 P C 183=143 I C 665=60 I A 278=56 Mad 657 (P C).

Arbitration—Reference — Revocation of—
One party applying before any proceedings
are taken, to revoke reference on ground that
arbitrator is connected with opposite party
—Court should cancel reference.

Where, after a suit has been referred to arbitration one of the parties applies before any proceedings are taken by the arbitrator, to revoke the reference on the ground that it has subsequently come to his notice that the arbitrator is connected with the opposite party, the Court should cancel the reference. [P 72 C 1]

R. L. Anand 1—for Petitioner.

Order.—This is a revision from an order passed by the Judge, Small Cause Court at Lahore. Karam Din sued Mohammad Din as principal debtor and two other persons as sureties for Rs. 275, the price of a sewing machine. On 1st August 1935 by the consent of all parties the matter was referred to the arbitration of Khan Hidayat Ullah Khan. Six days later, on 7th August 1935, Karam Din applied to revoke the reference to arbitration on the ground that Mohammad Din was working at the shop of Haji Rab Nawaz Khan, a kuram of the arbitrator, a fact which had subsequently come to his notice. The learned Judge, Small Cause Court, summarily rejected the application the following day on the ground that the matter was referred on the joint application of parties. In view of the allegations made by Karam Din before any proceedings had been taken, I think that the reference to arbitration of Khan Hidayat Ullah Khan should have been cancelled and I now order that it be cancelled. The case will proceed from the point at which that order was made. Costs of this application are to be costs in the cause.

R.M./R.K. *Order accordingly.*

A. I. R. 1937 Lahore 72

JAI LAL, J.

Ram Parkash—Appellant.

v.

People's Bank of Northern India Ltd., Jhelum Branch and another — Respondents.

Second Appeal No. 428 of 1936, Decided on 2nd October 1936, from order of Dist. Judge, Jhelum, D/- 18th March 1936.

Civil P. C. (1908), S. 151—Scope—Minor (auction-purchaser) subsequently applying for setting aside sale on ground of his minority — Application dismissed by trial Court for want of any such provision in law—Held it was doubtful whether second appeal lay—

Appeal treated as revision application—Sale set aside under S. 151 as its confirmation would give rise to complications.

Where a minor himself bid at an auction-sale but subsequently applied for not confirming the sale on the ground that he was a minor, and the Court after finding that he was a minor declined to set aside the sale on the ground that there was no such provision in law, and the appellate Court also dismissed the appeal:

Held: it was doubtful whether second appeal lay; confirmation of sale would give rise to complications as the sale was in favour of a minor and would ultimately have to be set aside as a void transaction. In the absence of any other provision of law for setting aside the sale, the appeal was treated as an application for revision and sale was set aside under S. 151. [P 72 C 2]

Bishan Nath—for Appellant.

Bhagwat Dayal—for Respondents.

Judgment.—A house was sold in execution of a decree obtained by the People's Bank of Northern India, Ltd., in liquidation, against Sardar Gian Singh and was purchased by Ram Parkash, appellant. It is conceded that it was Ram Parkash himself who made the bid and deposited the purchase price in Court. Before the confirmation of the sale he made an application to the Court stating that he was a minor and for that reason the sale should not be confirmed and the money deposited by him should be returned to him. The Court found that he was a minor but declined to set aside the sale on the ground that there was no provision of law under which the sale could be set aside. An appeal by Ram Parkash was dismissed by the learned District Judge of Jhelum and the former has consequently preferred an appeal to this Court.

I am not certain that an appeal lies to this Court, but in my opinion it is obvious that unless the sale is set aside now, complications will arise because the sale in favour of the minor cannot be upheld and will have ultimately to be set aside as a void transaction. Therefore the executing Court should have refused to confirm the sale when it was pointed out to it that the purchaser was a minor. In the absence of any other provision of law this was a suitable case for action under S. 151, Civil P.C. The matter is now before me and I take up the case in exercise of the revisional jurisdiction of this Court and set aside the sale in favour of Ram Parkash. The money deposited by him shall be returned to him and the house shall be resold in accordance with law. As the minor Ram Parkash was initially responsible for the

illegal proceedings, I decline to grant him costs of these proceedings which would be borne by the parties.

S.C./A.L.

Sale set aside.

A. I. R. 1937 Lahore 73

BHIDE AND DIN MOHAMMAD, JJ.

(Firm) *Bashehsar Nath Khanna & Sons*
—Defendants—Appellants.

v.

Messrs. Grindlay & Co., Ltd., Lahore,
Plaintiffs and *others*, Defendants — Respondents.

First Appeal No. 1650 of 1933, Decided on 2nd July 1936, from decree of Sub-Judge, 1st Class, Lahore, D/. 31st July 1933.

(a) Commission—Examination of witnesses in England—Rules of Lahore High Court—Issue of commission involving delay—Court is justified in getting itself satisfied as to relevancy of such evidence—Commission must be issued, if delay is justified.

Proper procedure for examination of witnesses in England would appear to be the issue of a commission in accordance with the provisions of Statute 22 Vict., Ch. 20, as laid down in Para. 1, Part. E, Ch. 10 of the Rules and Orders of the Lahore High Court Vol. I (1930). Of course the issue of a commission for examination of a witness in a distant country is bound to cause delay and a Court will be fully justified in satisfying itself that the evidence is really relevant and necessary for the purposes of the case before issuing process. But a party cannot obviously be deprived of the opportunity of producing his evidence merely on the ground that it may involve some delay. Such a procedure would be nothing short of denial of justice. [P 74 C 2]

(b) Set-off, equitable — Court-fee — Claim for damages by defendant—Plaintiff's claim and damages arising out of same contract—No separate court-fee is necessary.

In a suit when the defendant claims an equitable set-off by claiming damages arising out of the same contract on which the plaintiff bases his claim, no separate court-fee is necessary: *A I R 1930 All 875*; *A I R 1934 All 115* and *85 P R 1908, Rel. on.* [P 75 C 1]

(c) Practice — Summoning of witnesses — New issues framed — Additional witnesses should be allowed.

Where upon the framing of the issues a party files his list of witnesses on the issues as framed but new issues are later on framed, a party should be allowed to summon fresh witnesses on those new issues. [P 76 C 1]

(d) Practice—Examination of witnesses—Party submitting interrogatories containing reference to documents unrelied—Reference by itself no justification to refuse examination of witness.

When interrogatories were submitted to examine witnesses on commission but some of those interro-

gatories contained references to documents not relied on by the party, such references are by themselves no justification to refuse to examine those witnesses. [P 75 C 1]

Achhru Ram—for Appellants.

Edmunds, Mehr Chand (Dewan), M. I. Puri, Qabul Chand for *Shamair Chand, Parkash Chandra* and *Bhagat Singh*—for Respondents.

Bhide, J.—Messrs. Grindlay & Co., the plaintiffs in this case sued for recovery of Rs. 1,21,389-13-0 from Messrs. Basheshar Nath Khanna & Sons, defendant 1 by sale of certain properties at Lahore and Amritsar which were alleged to be mortgaged with them by deposit of title deeds. The other defendants were joined as parties as they claimed interest in the properties by sale or mortgage. The suit has been decreed and from this decision defendant 1, defendants 2 to 4 and defendant 6 have preferred separate appeals (C. A. 1650, 1799 and 1757 of 1933). The plaintiffs' case briefly was that defendant 1 was given certain banking facilities by them in connection with his business in the shape of over-draft on his account to the extent of Rs. 75,000, discounting of his demand drafts on the Cotton Trading Co., of Bombay to the extent of Rs. 60,000 and the establishment of credit in London for purchase of the sterling drafts of his agents. The plaintiffs claimed Rs. 62,808-10-0 on the over-draft account and Rs. 58,581-3-0 on account of discounted bills amounting to Rs. 1,21,389-13-0 in all, inclusive of interest. Defendant 1 resisted the claim on various grounds but it is unnecessary to go into them in detail for the purposes of this order. One of the main contentions of defendant 1 was that the trial had been vitiated by the fact that the learned Subordinate Judge who tried the case had refused without any justification to give him reasonable opportunity to examine certain witnesses in England and in India on whom he relied and had refused to examine even Mr. Basheshar Nath as a witness when he offered to go into the witness box. After carefully considering the arguments of the learned counsel for both the parties we have come to the conclusion that the appeals must succeed on this ground and the case must be remanded to enable defendant 1 to produce the aforesaid evidence. The material facts bearing on this point are as follows:

The issues arising in this case were framed on 15th March 1932. On 24th March 1932 defendant 1 submitted an application that certain additional issues were necessary in view of the pleas which had been raised by him in his written statement. This application was considered by the learned Subordinate Judge on 27th June 1932 and some additional issues were framed on that date. One of the additional issues was issue 5 (a) which runs as follows :

Whether the plaintiff refused to discount the demand drafts of defendant 1 and to purchase his agent's sterling drafts in London. If so, did he suffer any loss; if so, what? and can he recover the same from the plaintiff?

This issue arose in connexion with the plea raised by defendant 1 that the plaintiffs had failed to make the necessary arrangements for establishing credit in London to purchase the sterling drafts of his agents. After framing the additional issues on 27th June, the learned Subordinate Judge did not pass any orders as regards the production of evidence relating to these issues. He had originally fixed 25th August for the evidence of the witnesses for defendant 1, but by that date even the plaintiff's evidence was not finished and it was not expected to be finished till the end of that month. Consequently on 27th August 1932 the learned Subordinate Judge passed an order to the effect that the defendant need not bind down their witnesses for any date in August and that a fresh date for defendants' witnesses would be fixed later. On 31st August after the plaintiffs' witnesses had been examined the learned Subordinate Judge passed an order fixing 6th to 8th March 1933 as the dates for the recording of the evidence of the witnesses of defendant 1. In his order the learned Subordinate Judge noted that interrogatories should be filed by 8th October 1932 for witnesses at more than 200 miles from Lahore. The Court was closed during the month of September and on 1st October 1932, defendant 1 submitted an application for summoning his witnesses, including two witnesses, Mr. Clayton and Col. Hemelyx who were in England and for whose examination interrogatories were attached. Notice was issued to the plaintiffs in connexion with the request for examination of the witnesses in England and the plaintiffs objected to the same on grounds stated in their application dated 17th October 1932. On the same date

the learned Subordinate Judge passed an order which runs as follows :

Issues were framed on 15th March 1932 and they were amended on 27th June 1932. The defendant Bashesar Nath filed the list of witnesses on 24th March 1932. The names of Mr. Clayton and Mr. Hemelyx (etc. ?) were not mentioned in that list and a request was made only on 1st October 1932.

In para. 3, Chap. 10-F, Vol. 1 of the High Court Rules and Orders, 1930 Edition, it has been laid down that letters of request to countries outside British India to Foreign Courts should be allowed only in exceptional circumstances. I refuse to issue the letters of request in this case as they are calculated only to cause an inordinate delay.

This order seems to be clearly based on a misapprehension of facts and the rules on the subject. The learned Subordinate Judge remarks that the names of Mr. Clayton and Mr. Hemelyx were not included in the original list of witnesses filed by defendant 1 on 24th March 1932. But this was due to the fact that the necessity for the evidence of these witnesses arose in connexion with issue 5 (a), and that issue was not framed till 27th June 1932.

The learned Subordinate Judge also relied in support of his order on the instructions in para. 3, Chap. 10-F of the High Court Rules and Orders (1930). The instructions, however, appear to relate to 'Letters of request' for execution by Foreign Court (*vide* heading of the chapter) and are strictly speaking not relevant. The proper procedure for examination of witnesses in England would appear to be the issue of a commission in accordance with the provisions of Statute 22 Victoria, Chap. 20, as laid down in para. 1, Part. E, Chap. 10 of the aforesaid Rules and Orders. Of course the issue of a commission for examination of a witness in a distant country is bound to cause delay and a Court will be fully justified in satisfying itself that the evidence is really relevant and necessary for the purposes of the case before issuing process. But a party cannot obviously be deprived of the opportunity of producing his evidence merely on the ground that it may involve some delay. Such a procedure would be nothing short of denial of justice and this is practically what has happened in the present case. The learned Subordinate Judge did not consider the question of the necessity of the evidence of the witnesses on merits at all. Mr. Clayton and Col. Hemelyx are alleged to have been the agents of defendant 1 in London and it was not suggested before us that their evidence could not be

relevant or material for the purposes of Issue 5 (a). The learned counsel for the plaintiffs contended that defendant 1 had not claimed any specific amount by way of damages and had not paid any court-fee. No such objection was raised when Issue 5 (a) was framed, and when the issue stood, relevant evidence could not be properly shut out. Moreover, defendant 1 was apparently claiming damages only by way of an equitable set-off, arising out of the very contract on which the plaintiffs based their claim. No court-fee would appear to be necessary in the case of such a set-off : see 85 P R 1908,¹ A I R 1930 All 875² and A I R 1934 All 115.³

Another objection raised by the learned counsel for the plaintiffs to the issue of the interrogatories was that some of the documents referred to therein had not been originally relied on by defendant 1. The learned Subordinate Judge has not referred to this objection in his order; but apart from this, this objection by itself would not obviously be any justification for refusing to examine the witnesses at all. The last objection taken was that defendant 1 was adopting dilatory tactics, that the issue of a commission for examination of witnesses in London was only a dodge intended to protract the case and that such dilatory tactics are frequently resorted to by litigants in the subordinate Courts. I have already noted above that the evidence of the witnesses in London seems *prima facie* necessary. As regards the dilatory tactics the learned counsel for the plaintiff was not able to point out any instances of adoption of such tactics by defendant 1 beyond the fact that defendant 1 had applied for the issue of a commission for examination of witnesses at Peshawar but had failed to pay the necessary fees. But it appears from the record that the learned Subordinate Judge had fixed very heavy fees for the commissioner appointed by him who was to go from Lahore, and defendant 1 had therefore requested the Court to appoint some local man for examination of his witnesses at Peshawar. This request was refused. Defendant 1 did not deposit the fee and consequently lost the opportunity

of producing his witnesses at Peshawar; but it does not appear that this caused any delay in the case.

The only objection which the plaintiffs could reasonably take was that defendant 1 had not applied for the issue of interrogatories immediately after the additional issues were framed on 27th June 1932. But as pointed out already the Court had not passed any specific order at the time, and later on the Court itself found it necessary to change the dates originally fixed for the evidence of defendants' witnesses. On 31st August 1932, a date in March 1933 was fixed for defendants' evidence and interrogatories were ordered to be filed by 8th October 1932. Defendant 1 filed an application for summoning his witnesses on 1st October 1932, with interrogatories for witnesses in England and thus complied with this order. As the case was being adjourned for nearly six months there was sufficient time for the examination of witnesses in England. I fail to see any justification in the circumstances for the refusal of the learned Subordinate Judge to issue the interrogatories for the examination of the aforesaid two witnesses in England. As regards witnesses in India, defendant 1 eventually relied on only five witnesses out of those originally summoned (*vide* *fard talbana* printed at p. 141 of Vol. 12 of the printed record). These witnesses did not appear after two attempts to serve them. Defendant 1 stated that he had sent his men to help the process-server but the witnesses could not be found. No enquiry appears to have been made as to whether defendant 1 had really made reasonable efforts to serve the witnesses as stated and defendant 1's case was peremptorily declared as closed on 1st April 1933. Bashashar Nath applied for being permitted to go into the witness-box to support his case, but even this request was refused on the ground that the case had been already closed.

The learned counsel for the appellant has assured us that defendant 1 had never any intention to delay the case and told us that if his client were allowed about eight months he was prepared to take full responsibility for taking all necessary steps according to law to get his two witnesses in England as also those in India examined within that period, and that if he failed to do so he should not be given any further time. It seems unfortunate that

1. Bhagat Singh v. Devi Dial, (1908) 85 P R 1908=130 P L R 1908=80 P W R 1908.

2. Ram Das v. Dwarka Das, A I R 1930 All 875=128 I C 763.

3. Madan Garg v. Bohra Ram Lal, A I R 1934 All 115=153 I C 432=1934 A L J 421.

it should be necessary to remand this case at this stage; but the procedure adopted by the learned Subordinate Judge seems to be wholly unjustifiable in the circumstances and leaves no option in the matter. As the liability of defendants 2 to 6 depends upon the liability of defendant 1 all the three appeals must be accepted. I would accordingly set aside the decree of the learned Subordinate Judge and remand the case to the Senior Sub-Judge, Lahore, for re-decision after recording the evidence of the following witnesses of defendant 1, viz.: 1. Mr. Clayton and Col. Hemelyx who are in England to be examined by issue of a commission, on the interrogatories submitted by defendant 1 along with his application for examination of these witnesses on 1st October 1932. 2. Atma Ram, Ram Narain, Wazir Chand, Dr. Bhise and Kishan Lal mentioned in fard talbana dated 9th March 1933 (printed at p. 141, Vol. 12 of the printed record). 3. Defendant 1 may also be examined if he offers to go into the witness-box. Defendant 1 will be responsible for taking all necessary steps according to law and get the above two witnesses in England examined before 31st March 1937. If he fails to get the replies on or before that date he will be given no further opportunity for the purpose. The witnesses in India referred to above will also be examined on a suitable date or dates before 31st March 1937, to be fixed by the learned Subordinate Judge. Defendant 1 has undertaken to produce these five witnesses on such dates as may be fixed by the learned Subordinate Judge. Process may be issued to the witnesses if desired by defendant 1, but responsibility for production of the witnesses will be his, and he will not be given a fresh date if he fails to produce the witnesses on the dates fixed. The burden of proof of issue 5 (a) was on defendant 1. It will be therefore open to the plaintiffs to produce evidence in rebuttal on this issue if they wish to do so. If they desire to examine any witnesses in England they should send their interrogatories for the purpose at the same time as those of defendant 1. Costs would follow final decision. Counsel for the parties have been directed to appear in the Court of the Senior Subordinate Judge for a date on 20th July 1936.

Din Mohammad, J.—I agree.

B.D./D.S.

Case remanded.

A. I. R. 1937 Lahore 76

ADDISON AND ABDUL RASHID, JJ.

Narinjan Singh—Defendant — Appellant.

v.

Gurmukh Singh, Plaintiff and others, Defendants—Respondents.

First Appeal No. 1363 of 1935, Decided on 27th May 1936, from decree of Sub-Judge, 1st Class, Lahore, D/- 12th June 1935.

Hindu Law—Maintenance—Suit by aged father for maintenance — Son is under legal obligation to maintain his aged parents, irrespective of possession of property by him.

Under Hindu Law, a Hindu is under legal obligation to maintain his wife, unmarried daughters and aged parents, whether he possesses any property or not. There is, however, no obligation to maintain one's minor step-brothers. [P 77 C 2]

In a suit by aged father for maintenance against his sons, he could not prove that any of his property had passed into the hands of his sons. Maintenance was awarded to him only in proportion to the income of his sons: *A I R 1935 Mad 701* and *A I R 1935 Lah 543, Disting.*

[P 78 C 1]

M. L. Puri—for Appellant.

Labh Singh—for Respondents.

Judgment.—This appeal arises out of an action brought by Gurmukh Singh in forma pauperis against his sons Narinjan Singh, Narain Singh and Indar Singh, for a declaration to the effect that the plaintiff was entitled to receive Rs. 150 per mensem as maintenance allowance from the defendants for his life-time, and also for recovery of the maintenance allowance at that rate. The allegations in the plaint were that the plaintiff was 61 years of age and was unable to earn his living, that he had given a considerable amount of immoveable property to Indar Singh, defendant 3, for management, and had given Rs. 21,000 to Narinjan Singh, defendant 1, for carrying on a brick-kiln, that the defendants had refused to return either the property or to maintain the plaintiff, and that under the provisions of Hindu Law, the plaintiff was entitled to claim maintenance at the rate of Rs. 150 per mensem from his sons. Narinjan Singh, defendant 1, pleaded that the plaintiff had got three other sons besides the defendants, namely, Mangal Singh, Rajindar Singh and Mohindar Singh, and that the suit was not maintainable without impleading these three sons as defendants. It was further pleaded by him that the plaintiff had never treated him as his son, and that he

had instituted this suit at the instance of his other children from his third wife. Narinjan Singh denied having received Rs. 21,000 from his father for the purposes of the brick-kiln, and stated that, on the other hand, he had given his father ornaments worth Rs. 1,000 in order to enable him to meet the losses he had sustained in gambling. Narain Singh defendant 2, denied the plaintiff's claim for maintenance, and pleaded that he was turned out by his father several years ago and that as the plaintiff had given property and thousands of rupees to defendants 1 and 3 he was entitled to get maintenance from them or from his other sons who had not been made defendants in the case. It was further stated by Narain Singh that in spite of the maltreatment to which he was subjected by his father he had been paying small sums of money to him but that he was unable to do so any longer as his salary was barely sufficient for his own maintenance and the maintenance of his wife and 5 children. Indar Singh, defendant 3, also denied the plaintiff's claim and stated that his income was even insufficient for his own needs.

The trial Court held that it had not been established that the plaintiff gave any property to Indar Singh, defendant 3, or that he advanced the sum of Rs. 21,000 to Narinjan Singh, defendant 1, for the brick-kiln. It has, however, held that under Hindu Law a son is under a personal obligation to maintain his aged father. The plaintiff was consequently granted maintenance at the rate of Rs. 45 per mensem, Rs. 20 a month being payable by Narinjan Singh, Rs. 20 by Narain Singh and Rs. 5 by Indar Singh. Against this decision Narinjan Singh and Narain Singh have preferred two separate appeals to this Court, while Gurmukh Singh, plaintiff, has preferred cross-objections in forma pauperis praying that the amount of maintenance should be raised to Rs. 100, per mensem. The plaintiff has three other sons besides the defendants. One of these three sons, namely, Mangal Singh was a minor at the time of the institution of the suit. He, however, attained majority last year, and is now stated to be about 19 years of age. Rajindar Singh is a stenographer, while Mohindar Singh is carrying on timber business at Gujranwala.

A statement of the plaintiff was recorded on 12th December 1934, before the

framing of issues. In this statement the plaintiff deposed that he had three sons but that as they were unable to pay any maintenance, he did not desire to make them defendants in the case. He further stated that he was not prepared to live with any of the defendants as they were living with their father-in-law and it was below his dignity to live with them. He had to admit, however, that Narain Singh was not living with his father-in-law, but in spite of it he did not want to live with him even. The refusal of the plaintiff to implead Rajindar Singh and Mohindar Singh as defendants, and his refusal to live with Narinjan Singh, Narain Singh or Indar Singh must be taken into consideration in fixing the amount of maintenance. Narinjan Singh, defendant 1, stated as a witness that he was drawing Rs. 230, per mensem as pay together with Rs. 2-8-0, as daily allowance when on tour. He had six children and a wife to maintain. He had to spend Rs. 40, per mensem on the education of his children, and Rs. 15, per mensem on account of his contributions to the General Provident Fund.

He added that he was always in debt as he had a large family, and found it difficult to meet all his expenses. Narain Singh was drawing Rs. 170 per mensem and had five children and a wife to maintain besides himself. It was urged by the learned counsel for the appellants that if the plaintiff consented to live with either of the appellants his upkeep would not cost them more than Rs. 10 a month, and that as he refused to live with the appellants his maintenance should not be fixed at more than Rs. 10, a month. It was further urged by the learned counsel for the appellants that the trial Court had fixed Rs. 45 as the maintenance of the plaintiff and of his minor son. Under Hindu Law a Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters, and his aged parents whether he possesses any property or not. There is no obligation to maintain one's minor step-brothers.

The only point urged by the learned counsel for the respondent was that Gurmukh Singh had been an S. D. O. in the Military Works, and that he was entitled to a decent amount for his maintenance according to his status in life, and the mode of living to which he was accustomed. A number of rulings were referred to by

the learned counsel in support of his contention. All these rulings, however deal with the maintenance to which a Hindu widow is entitled out of the estate of her husband. In the present case, the plaintiff has failed to establish that any of his property has passed into the hands of his sons; A I R 1935 Mad 701¹ and A I R 1935 Lah 543,² relied upon by the learned counsel for the respondent, have therefore, no applicability to the facts of the present case. After a consideration of the entire evidence on the record we are of opinion, that the plaintiff is entitled to receive a sum of Rs. 20, per mensem from the defendants for his maintenance. Out of this sum, Rs. 5 per mensem are payable by Indar Singh, defendant 3, in accordance with the decree of the trial Court. The sum of Rs. 15 will be paid by Narinjan Singh and Narain Singh each paying Rs. 7-8-0, per mensem.

For the reasons given above we accept these appeals in part and modify the decree of the trial Court on the lines indicated above. We dismiss the cross-objections preferred by the plaintiff. The present suit was instituted by the plaintiff in forma pauperis. The trial Court ordered that one-half of the amount of the court-fee prescribed for the suit shall be paid by the plaintiff and one-half by defendants, 1 to 3. As the appeal has been partly accepted, we order that the plaintiff shall pay three-fourths of the amount of court-fee on the plaint and the defendants will pay one-fourth. As the cross-objections have been dismissed, the plaintiff shall pay the court-fee leviable on the cross-objections. The amount of court-fee shall remain a first charge on the subject matter of this suit. As far as other costs are concerned we order that the parties shall bear their own costs throughout.

P.R./A.L. *Appeals partly accepted.*

1. Venkatachala Padayachi v. Velayudha Padayachi, A I R 1935 Mad 701=1935 M W N 871.
2. Mt. Bhagwanti v. Maniram Shah, A I R 1935 Lah 543=157 I C 768=37 P L R 78.

A. I. R. 1937 Lahore 78

JAI LAL AND ABDUL RASHID, JJ.

Ghulam Mohammad and another — Defendants—Appellants.

v.

Allah Bakhsh and others—Plaintiffs—Respondents.

Second Appeal No. 371 of 1936, Decided on 19th June 1936.

(a) Punjab Colonization of Government Lands Act (5 of 1912), S. 36 — Jurisdiction—Civil Court—Collector granting rights—Civil Court has no jurisdiction to determine whether Collector observed necessary rules duly or not.

Where the proprietary rights are granted by the Collector, it is not the function of the civil Courts to determine whether in granting the proprietary rights, the rules framed by the financial Commissioner were or were not duly observed by the Collector. It is open to the party prejudiced by any order of the Collector to seek relief in accordance with the provisions of the Punjab Colonization of Government Lands Act, if so advised.

[P 79 C 1]

(b) Punjab Colonization of Government Lands Act (5 of 1912), S. 30—Widow acquiring proprietary rights out of income of land under the Act—Widow becomes owner of that property.

If proprietary rights are acquired by a widow under the Punjab Colonization of Government Lands Act, even out of the income of the land, the widow must be regarded as the owner of the property wherein she has acquired the proprietary rights.

[P 79 C 1]

Ghulam Mohi-ud-Din and Abdul Aziz —for Appellants.

Khalifa Shuja-ud-Din — for Respondents.

Abdul Rashid, J.—The material facts of the case, for the purposes of this appeal, may be shortly stated. In August 1903, one square of land was allotted to Rahmat Ullah on abadkari tenure. Rahmat Ullah died in 1908, and the land was mutated in the name of his widow Mt. Umri, defendant 1. In 1914, Mt. Umri acquired the occupancy rights in this land. In the year 1933, she paid nazrana, and was granted proprietary rights in the land in dispute by Government. On 3rd October 1934, she gifted the land in dispute in favour of her sister's son, Ghulam Mohammad, defendant 2, by means of a registered deed. On 19th December 1934, the present suit was instituted by the plaintiffs for a declaration to the effect that the gift made by Mt. Umri in favour of Ghulam Mohammad shall not affect their reversionary rights. The basis of their claim was that they were the reversioners of Rahmat Ullah, the husband of Mt. Umri, and that as the grant of proprietary rights to Mt. Umri was an accretion to the estate of Rahmat Ullah they were entitled to inherit it after the death or re-marriage of Mt. Umri. The trial Court decreed the plaintiff's claim, holding that occupancy rights were acquired by Mt. Umri as a representative of her deceased husband, and that the proprietary rights were merely

an accretion to the estate of Rahmat Ullah. The defendants preferred an appeal to the learned Additional District Judge. The learned Judge affirmed the decision of the trial Court on the ground that, in view of the Rules framed under Act 5 of 1912 by the Financial Commissioner, the proprietary rights ought not to have been granted to Mt. Umri by the Collector. Against this decision the defendants have preferred a second appeal to this Court.

I may say at once that the decision of the learned Additional District Judge is unsustainable, in view of S. 36, Colonization of Government Lands Act. That section lays down that a civil Court shall not have jurisdiction in any matter of which the Collector is empowered by the Act to dispose, and shall not take cognizance of the manner in which the Local Government or the Collector or any other Revenue Officer exercises any power vested in it or in him by or under the Act. The proprietary rights were granted by the Collector to Mt. Umri, and it is not the function of the civil Courts to determine whether in granting the proprietary rights the rules framed by the Financial Commissioner were or were not duly observed by the Collector. If the plaintiffs were prejudiced by any order of the Collector it was open to them to seek relief in accordance with the provisions of the Colonization of Government Lands Act, if so advised.

It has been repeatedly held by this Court that if proprietary rights are acquired by a widow under the Colonization of Government Lands Act, even out of the income of the land, the widow must be regarded as the owner of the property wherein she has acquired the proprietary rights. The learned counsel for the respondents was not able to give any sound reasons in support of the judgment of the learned Additional District Judge. I am, therefore, of the opinion that, in the present case, it must be held that the land in dispute became the property of Mt. Umri when she was granted proprietary rights in 1933. She was, therefore, fully entitled to give this property to Ghulam Mohammad, her sister's son, in October 1934. For the reasons given above, I would accept this appeal, set aside the judgments and the decrees of Courts below and dismiss the plaintiffs' suit with costs throughout.

Jai Lal, J.—I agree.

V.B.B./K.S.

Appeal accepted.

*** A. I. R. 1937 Lahore 79**

ADDISON AND ABDUL RASHID, JJ.

Phumman Mal — Defendant — Appellant.

v.

Chiranji Lal—Plaintiff—Respondent.

Second Appeal No. 1904 of 1935, Decided on 8th June 1936, from decree of Dist. Judge, Hissar, D/- 27th May 1935.

*** Mortgage — Interest — Right to recover principal amount from mortgagor personally barred by time — Personal claim for interest for six years preceding suit is also barred.**

Where the right of the mortgagee to recover the principal amount of the mortgage from the mortgagor personally is barred by time, a claim to recover interest for six years prior to the institution of the suit personally from the mortgagor is also barred: *A I R 1928 Lah 653* and *A I R 1930 Lah 737, Expl. and Disting.*; *A I R 1936 Lah 387, Rel. on.* [P 80 C 1]

V. N. Sethi—for Appellant.

Nawal Kishore—for Respondent.

Judgment. — (On reference by Jai Lal, J.) The sole question involved in this second appeal is whether when the right of the mortgagee to recover the principal amount of the mortgage from the mortgagor personally has been extinguished on account of its being barred by time, he has still a right to recover interest for six years prior to the institution of the suit personally from the mortgagor; in other words, whether if the right to recover the principal personally from the mortgagor is extinguished, the right to recover interest personally against the mortgagor should be held also to be extinguished. What has happened in the Courts below is that the mortgaged property was held liable while the mortgagor has been held personally liable to pay interest for six years prior to the institution of the suit, although the personal remedy to repay the principal is barred by time against the mortgagor.

This question was considered by a Division Bench of this Court in *A I R 1928 Lah 653*.¹ That was a suit brought to recover money secured under a mortgage from the mortgaged property as well as from the mortgagor personally, and the defendants confessed judgment. It was held that they could not, after the sale proceeds were found insufficient and the mortgagee applied for the personal remedy, be allowed to raise the issue of

1. *Ralia Ram v. Hira Lal*, *A I R 1928 Lah 653* = 111 I C 808.

limitation. This was sufficient to decide the suit but the Bench went on also to hold, though obiter, that even when the mortgagee's claim for the principal amount was barred, the mortgagee was not debarred from recovering from the mortgagors personally the interest which accrued due during the six years immediately preceding the institution of the suit. This obiter dictum was followed by a learned Single Judge in A I R 1930 Lah 737.²

This question came before another Division Bench in A I R 1936 Lah 387³ which found that interest could not be held to accrue to principal which was not legally recoverable, interest itself being essentially not an inherent right but a right which was given by law; hence where in a suit under O. 34, R. 6, Civil P. C., a claim for a personal decree for a principal amount was barred by time, a claim for interest during the six years preceding the institution of the suit was also barred. The learned Judges who decided this case, explained and distinguished A I R 1928 Lah 653.¹ They were of opinion that it could not be laid down broadly that interest which accrued due during the six years immediately preceding the institution of the suit was recoverable personally from the mortgagor. The learned Judges considered that A I R 1928 Lah 653,¹ was decided on its own special facts, the judgment mentioning that the personal liability for the payment of interest under the covenant contained in the instrument of mortgage arose each year until the expiry of the period for the recovery of the debt from the mortgaged property, i. e., the period of 12 years. Apart therefore from the decision being obiter dictum, it cannot be held to lay down the broad principle that in all cases interest for six years immediately preceding the suit can be recovered personally from the mortgagor. We are in agreement, with great respect, with the decision of the learned Judges who decided A I R 1936 Lah 387.³ It was held by their Lordships of the Privy Council in A I R 1929 P C 240⁴ in a case from the Straits Settlements that where there was a special contract to pay interest at a specified rate, the principle

that where interest was a mere accessory to the principal and a claim to the latter was barred by statute, the interest thereon could not be recovered, did not apply.

In the case before us two options were given to the mortgagee under the mortgage-deed and the one he chose was to add the interest to the principal and calculate compound interest thereon. This meant that the interest each year became added to the principal and interest was payable thereon in the subsequent years. For all purposes therefore it became part of the principal amount. The personal remedy for the principal being barred by time, it follows that the decision of the Court below, allowing interest for six years immediately preceding the suit to be realised personally from the mortgagor, was wrong. We accordingly accept the appeal and set aside this portion of the lower appellate Court's order. The result will be that the decretal amount will be realisable only from the mortgaged property. The appellant will have his costs in this Court.

B.D./D.S.

Appeal allowed.

A. I. R. 1937 Lahore 80

COLDSTREAM, J.

Abdul Karim Shorash and others —
Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1281 of 1935, Decided on 20th November 1935, from order of Sess. Judge, Lahore, D/- 2nd September 1935.

Criminal P. C. (1898), S. 144 (1), (3)—S. 144 (3) has nothing to do with nature of order—It is merely one of four sub-sections referring to manner of promulgation of order and its duration—District Magistrate has jurisdiction throughout his district—District of Lahore is "particular place" within meaning of S. 144 (3)—Mere fact that order relates to such large district does not make it illegal, although it may be difficult to enforce it.

The District Magistrate has jurisdiction throughout his district and is empowered to direct any person to abstain from a certain act if he considers that such direction is likely to operate in any of the ways mentioned in sub-s. (1), S. 144. Sub-s. (3), S. 144 has nothing to do with the nature of the order but is one of the four sub-sections which refer to the manner of promulgation and to the duration of the order under sub-s. (1). When because of the number of persons to be directed, it is impracticable for the Magistrate to issue notice to each individual he can issue an

2. Munshi Ram v. Puran Chand, A I R 1930 Lah 737=126 I C 433.

3. Dost Muhammad v. Mian Miraj Din, A I R 1936 Lah 387=163 I C 100=38 P L R 74.

4. Cheang Thye Phin v. Lam Kin Sang, A I R 1929 P C 240=119 I O 623 (P C).

order to the public generally, including, besides residents, persons who may frequent or visit a particular place and such order will be effective against each individual to whose knowledge it has come. [P 81 C 2]

The District of Lahore is a particular place within the meaning of S. 144 (3) and the mere fact that the order relates to such large place as Lahore District does not make it illegal although that might make the order difficult to enforce for one reason or other: *A I R 1915 Oudh 188, Rel. on.* [P 81 C 2]

M. M. Aslam Khan—for Petitioners.

Malik Mohammad Amin for Government Advocate—for the Crown.

Order.—This judgment will dispose of the three revision petitions Nos. 1281, 1322 and 1367 of 1935. On 14th July 1935 the District Magistrate of Lahore promulgated an order under the provisions of S. 144, Criminal P. C., directing people to abstain from holding public meetings within the Lahore District in order to discuss any matter in connexion with the demolition of the Shahidganj mosque. For disobeying that order the petitioners were convicted under Ss. 143 and 188, I. P. C., and sentenced separately under each section. On appeal the Sessions Judge, Lahore, upheld the convictions but set aside the separate punishment imposed under S. 143 and sentenced the petitioners to three months' rigorous imprisonment under S. 188. The petitioners, who have by this time served their sentences, ask for revision of this judgment. The only contention urged before me by the petitioners' counsel is that the order of the District Magistrate passed under S. 144, Criminal P. C., was illegal because the Lahore District is not a 'particular place' within the meaning of S. 144 (3) of the Code.

There is no ground for interfering on the merits of the case. The Lahore District is in fact a particular place; if some one had inadvertently disobeyed the order owing to his ignorance of the boundaries of the district, it would have been open to him to plead that the order was so vague as to excuse his error. No such excuse was pleaded here. The meetings for holding which the petitioners were convicted took place in Lahore City. It is not denied before me that the petitioners had knowledge of the order and disobeyed it deliberately. The argument now advanced is in my opinion based on a mistaken interpretation of sub-s. (3), S. 144, the correct meaning of which has been pointed

out in 27 I C 670.¹ The District Magistrate has jurisdiction throughout his district and is empowered to direct any person to abstain from a certain act if he considers that such direction is likely to operate in any of the ways mentioned in sub-s. (1) of the section. As remarked by the Judges who decided 27 I C 670¹ sub-s. (3) has nothing to do with the nature of the order but is one of four sub-sections which refer to the manner of promulgation and to the duration of an order under sub-s. (1). When, because of the number of persons to be directed, it is impracticable for the Magistrate to issue notice to each individual he can issue an order to the public generally, including, besides residents, persons who may frequent or visit a particular place and such order will be effective against each individual to whose knowledge it has come.

The rulings on which the learned counsel for petitioners relies appear to me to interpolate in the section restrictions and conditions not indicated by its words. The fact that the order in this case forbade meetings in so large a place as the Lahore District did not make the order 'illegal' although it might have made the order difficult to enforce for one reason or another. I dismiss the petitions.

R.M./V.V.

Petitions dismissed.

1. Abdul Ghafur v. Emperor, *A I R 1915 Oudh 188=27 I C 670=16 Cr L J 190=18 O C 70.*

* A. I. R. 1937 Lahore 81

JAI LAL AND ABDUL RASHID, JJ.

Gurcharan Das and another—Defendants—Appellants.

v.

Ram Rakha Mal, Plaintiff and others, Defendants—Respondents.

Letters Patent Appeal No. 60 of 1936, Decided on 26th June 1936, from judgment of Agha Haidar, J., D/- 17th February 1936, reported in *A. I. R. 1936 Lah 587.*

* Limitation Act (1908), Arts. 60 and 59—Loan and deposit—Difference—Sum deposited with condition not to withdraw it within certain period and after it to withdraw it jointly, interest in the meantime to be paid regularly at specified rate—It is not loan but deposit payable on demand—Art. 60 applies.

The distinction between a loan and a deposit is that in the case of a loan it is ordinarily the duty of the debtor to seek out the creditor and to

repay the money according to the agreement. In the case of a deposit it is the duty of the depositor to go for the money to the banker or the depositee and to make a demand for it. [P 82 C 2]

Where a certain sum is deposited with stipulations that money will not be withdrawn for three years, and after that period, depositors to withdraw it jointly and in the meantime interest to be paid periodically, such a transaction is not a loan but amounts to a deposit with the person deposited on the stipulation that it shall carry interest at a specified rate and shall be payable to the depositors on demand and with a further stipulation that such a demand shall not be made within three years. To such a transaction Art. 60 applies: *A I R 1936 Lah 587, Affirmed.* [P 82 C 1, 2]

Chiranjiva Lal Aggarwal—for Appellants.

Ram Lal Anand 1 and Roop Chand—for Respondent (Plaintiff).

Jai Lal, J.—Kartara, a minor, was left apparently without a natural guardian. His property consisted of Rs. 800, which was collected by six persons who acted in his interests. They deposited Rs. 800 with the appellant in their joint names on behalf of the minor. It was stipulated in the document evidencing the deposit that the money would not be withdrawn for three years and that after three years it could be withdrawn by the six persons jointly, that interest would be paid periodically in the meantime and that if an amount up to Rs. 100 be required for the minor it would be withdrawn by these specified depositors. After attaining majority and long after the expiry of three years from the date of the deposit, Kartara assigned the deposit to the respondent who instituted a suit for recovery thereof. The only question with which we are concerned in this appeal is whether the suit is barred by time. The District Judge held that the suit was barred by time, but on second appeal to this Court a learned Judge in Chambers held that the suit was not barred by time and remanded the case for decision on the other points involved in it.

On this Letters Patent Appeal it is contended on behalf of the appellant that Art. 60, Lim. Act, which has been applied by the learned Judge of this Court to the suit, is not applicable but that Art. 59 or in the alternative Art. 120 governs the case. Having regard to the nature of the transaction it is obvious that it has been rightly interpreted to amount to a deposit with the appellant on the stipulation that it shall carry interest at a specified rate

and shall be payable to the depositors on demand and with a further stipulation that a demand shall not be made within three years. To such a transaction, in my opinion, Art. 60 clearly applies. It provides a period of three years for a suit for money deposited under an agreement that it shall be payable on demand. The agreement need not be expressed; it may be implied. Art. 59 does not cover the present case because the transaction does not amount to a loan by the six persons concerned to the appellant. On the other hand the appellant was considered to be a reliable banker and therefore the money was deposited with him. He acted as the banker of the depositors. The distinction apparently is that in the case of a loan it is ordinarily the duty of the debtor to seek out the creditor and to repay the money according to the agreement. In the case of a deposit it is the duty of the depositor to go for the money to the banker or the depositee and to make a demand for it. Art. 60 being applicable to the present case, no question of the applicability of Art. 120 arises. Some cases were cited on behalf of the appellant, but in all of them it has been held that the transaction between the parties amounted to a loan. That being so, any observations made in those cases have no applicability to the facts of the present case. I would therefore dismiss this appeal with costs. Parties shall appear before the District Judge on 27th July 1936.

Abdul Rashid, J.—I agree.

V.B.B./K.S.

Appeal dismissed.

A. I. R. 1937 Lahore 82

DIN MOHAMMAD, J.

People's Bank of Northern India, Ltd., In the matter of.

Uma Shankar Malhotra—Petitioner.

Civil Misc. Appln. No. 100 of 1936,
Decided on 16th July 1936.

(a) **Companies Act (1913), S. 241—Scope — Order of inspection discretionary with Court — Discretion once exercised in favour of creditor or contributory—Inspection not given on the ground that information will be used by him in the interest of directors yet to be examined—This ground does not justify interference with discretion once exercised — It cannot be even a bar to the exercise of right.**

Section 241 places the matter of ordering inspection of documents in the discretion of

the Court and when once this discretion has been exercised in favour of contributory or creditor, it will not be interfered with by the Court, merely on the ground that he is likely to use the information obtained on inspection, in the interest of directors yet to be examined. This ground, will not be a bar to the exercise of the right by the persons authorized under law to inspect documents and other records which the law prevents. [P 84 C 1]

(b) Review—Company law — Company law does not affect power of review especially when by S. 141, Civil P. C., provisions of Code are to be followed in proceedings under the Company law (*Obiter*).

Obiter. — The Company law does not affect the power of review which is otherwise vested in the Judge especially when by S. 141, Civil P. C., the provisions of that Code are to be followed in all proceedings in any Court of civil jurisdiction. [P 83 C 2]

Jagan Nath Aggarwal—for Petitioner.

Ram Lal for Official Liquidator—for Respondent.

Order. — This is an application by Mr. Jagan Nath Aggarwal on behalf of Uma Shanker Malhotra, who was allowed inspection of certain documents lying in the custody of the Official Liquidator by the Hon'ble the Chief Justice on 11th June 1936. The petitioner prays that notice be issued to the Official Liquidator and he be directed to comply with the order of the learned Chief Justice granting permission to the petitioner to inspect the documents mentioned in his petition. Considering that the Official Liquidator could not disregard the orders of this Court, I issued notice to him to appear before me and explain the matter. He has submitted a reply in writing urging that the previous order was passed behind his back, that he never refused inspection but merely postponed it till after the examination of the Cawnpore Directors, that the conduct of the petitioner was extremely suspicious, that the real object of the petitioner was not to help the Official Liquidator in his examination of Lala Harkishen Lal, as alleged by him, but to pick out information which may be of use to the Cawnpore Directors and that the order of the learned Chief Justice be recalled or modified. The first question that arises for determination is whether sitting as a successor-in-office of the learned Chief Justice in liquidation work, I can interfere with his order in any manner. The Official Liquidator has relied on S. 202, Company Law, but in my view that is clearly inapplicable to the case. S. 202 merely provides for the re-hearings of, and appeals from, any

order or decision made or given in the matter of the winding up of a company by the Court in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction. I have not been referred to any provision of the Company law which would justify me in recalling or modifying the order of the learned Chief Justice on the grounds urged by the Official Liquidator.

It appears to me however that the Company law does not affect the power of review which is otherwise vested in a Judge of this Court, especially as by S. 141, Civil P. C., the provisions of that Code are to be followed in all proceedings in any Court of civil jurisdiction. No such application however has been made to me and even if it were made, I am doubtful whether I would have taken any action on that application under O. 47, Civil P. C. Coming now to the merits of the objection raised by the Official Liquidator, Mr. Ram Lal Anand has admitted that he was present at the time when the order was made by the learned Chief Justice and that he had even consented to it. He however adds that his consent was based on the consideration that Lala Harkishen Lal's statement was to be recorded on the 12th and that his consent became ineffective as soon as it was decided to postpone the examination of Lala Harkishen Lal to the 17th. The Official Liquidator has urged that certain Cawnpore Directors are now to be examined before Lala Harkishen Lal's examination takes place and that his unwillingness to place the record at the disposal of the petitioner is based on the ground that the petitioner would very likely use the information gained by him against the Official Liquidator and would forewarn the Cawnpore Directors who are yet to be examined.

It may or may not be so, but the position today is just the same as it was when the learned Chief Justice made the order, inasmuch as if Lala Harkishen Lal's examination had started on the 12th, the petitioner would have inspected the record and used the information so gained in any manner that he liked and without restraint. Moreover R. 81 of the Rules and Orders of the High Court (Vol. 2, Ch. 1), is quite explicit on the matter and independently of any considerations that may arise, invests every contributory with a

right to inspect all the documents which are in the custody of the Official Liquidator. The Official Liquidator has finally urged that the order of the learned Chief Justice did not set any time limit but considering that the inspection had to take place before the examination of Lala Harkishen Lal commenced, I am of opinion that the spirit of the order of the learned Chief Justice was quite clear and that the inspection could not be delayed or postponed by the Official Liquidator to suit his own convenience. I further think that it could not be the intention of the legislature to take those Directors or officers by surprise who are singled out for public examination under S. 196 and therefore even if the information gained by persons who inspect the records may be used in the interests of the Directors to be examined under S. 196, Companies Act, that circumstance would not be a bar to the exercise of the right by persons authorized under the law to inspect the documents and other records which the law permits. In this case there are more than a dozen persons who are yet to be examined and their examination might take more than a month.

If once it is conceded that it is open to the Official Liquidator to refuse the inspection of the records on the ground that the information thus obtained may not be used in favour of the Directors to be examined, no contributory or creditor would be permitted to exercise his right under the law until the whole show is over. This evidently could not be the intention of the legislature. S. 241, Companies Act, places this matter entirely in the discretion of the Court and if this discretion has once been exercised in favour of a contributory or creditor it cannot be interfered with especially on the grounds which are now being urged by the Official Liquidator. I accordingly direct that the Official Liquidator must comply with the orders passed by the learned Chief Justice and must place all the documents mentioned in the petition at the disposal of the petitioner for inspection in accordance with law. Before I close, I may remark that the Official Liquidator was not authorized to sit in judgment on the order of the learned Chief Justice and that if he or his counsel was in any manner under the impression that the order of the learned Chief Justice was either improper or inexpedient or irregular or illegal, instead of judging the

order himself or finding flaws in the said order, he should have moved this Court in due course of law. The Official Liquidator is present and my order has been announced to him.

P.R./A.L.

Order accordingly.

A. I. R. 1937 Lahore 84

JAI LAL, J.

Anant Ram—Plaintiff—Appellant.

v.

Small Town Committee, Pundri — Defendant—Respondent.

Second Appeal No. 586 of 1936, Decided on 19th October 1936, from decree of Addl. Dist. Judge, Karnal, D/- 26th February 1936.

Punjab Municipal Act (3 of 1911), Ss. 172 and 232—Committee allowing person to retain projection of certain width in front of his shops—Deputy Commissioner advising Committee to order entire demolition thereof—Projections being desirable in front of plaintiff's shops and street being wide injury by their removal is much more to plaintiff than to Committee—Committee having once sanctioned projections is not entitled to order their demolition even though action of Deputy Commissioner was tantamount to revocation of sanction given by Committee.

Where the Municipal Committee sanctioned projections of certain dimensions, in front of the plaintiff's shops opening on the street, and the Deputy Commissioner afterwards advised the Committee to issue order for their complete demolition and the Committee ordered accordingly:

Held: that the projections were desirable in front of plaintiff's shops and the street being wide, injury by their removal would be much more to plaintiff than to the Committee and the Committee, having once sanctioned projections, was not entitled to order their demolition even though the action of the Deputy Commissioner might be tantamount to revocation of the sanction of the Committee: *A I R 1936 Lah 689, Rel. on.*

[P 85 C 2]

Shamair Chand—for Appellant.

Khalifa Shuja-ud-din—for Respondent.

Judgment.—This second appeal is by the plaintiff. He instituted a suit against the Small Town Committee of Pundri in the Karnal district praying for an order against the defendant to rebuild the projections in front of his shops which according to him had been illegally demolished by the defendant and an injunction to restrain the defendant from demolishing the same again and for recovery of Rs. 100 as damages. The trial Court decreed the

suit so far as an injunction with regard to the projections is concerned, but only to the extent of a width of 2' and 3". The remaining suit including the suit for damages was dismissed. On appeal, the learned Additional District Judge has held that the proper order to pass was one for damages in lieu of an injunction and awarded a decree for Rs. 50 as damages against the defendant to the plaintiff.

The facts are these: The plaintiff-appellant is the owner of three shops A, B and C in Pundri as shown on the map Ex. P-1. He is also the owner of a haveli in the same town and there was a dispute between the parties about the projection in front of that haveli also, but there is no dispute about it before me now. The only dispute is about the three shops. It appears that the appellant constructed some projections in front of his three shops and a notice was issued to him by the Small Town Committee of Pundri to demolish these projections. The appellant stated in reply that he had merely rebuilt the existing projections. Upon this an enquiry was held by a member of the Committee at the instance of the Committee and the appellant was allowed to retain a projection 2' and 3" wide along the frontage of the shops. He was directed to demolish the projection so far as it exceeded that width. In the meantime the Deputy Commissioner wrote to the Small Town Committee pointing out to them that they had shown great weakness in allowing the plaintiff to retain the projections which he had constructed without permission of the Committee. It is contended on behalf of the respondent before me that the Deputy Commissioner did not suspend or cancel the notice of the Committee but merely advised the Committee to enforce its original notice. The appellant's counsel is prepared to accept this position. The fact remains that on receipt of this communication from the Deputy Commissioner the Committee ordered the appellant to demolish the entire projection and on his failure to comply with this notice, had the projection demolished. It is contended on behalf of the appellant that this action of the Committee was illegal.

It is urged in the first instance that the projection to the extent of a width of 2' and 3" was an old projection and the appellant merely reconstructed it and that the Committee was not entitled to direct

him to demolish the same without first tendering compensation to him. An examination of the plan shows that this allegation of the plaintiff is correct. All the shops in the vicinity have a projection of 2' and 3" and it is unbelievable that the plaintiff's three shops did not have a similar projection and that there was a gap in front thereof. The learned District Judge has also found that the Committee sanctioned this projection and was not competent afterwards to revoke the sanction. But the learned District Judge has held that an injunction should not be granted against the Committee and that the proper order to pass is one of damages in lieu of an injunction. In view of all the circumstances, I do not agree with this conclusion. As I have already stated the position of the projections is such that it is desirable that the plaintiff should get permission to retain them. The projections will be in line with the projections in front of the adjoining shops. The street in front of the shops is comparatively wide and there can be no injury to the Committee if the projections are retained. On the other hand, the injury to the plaintiff-appellant will be considerable if the projections are demolished. Moreover the Committee having sanctioned them was not entitled to require their demolition. Even if the action of the Deputy Commissioner be held to be tantamount to revocation of the sanction of the Committee the projections could not be removed. This was the view taken by Coldstream, J. in (S. A. No. 2326 of 1935), 38 P L R 897.¹ In my opinion therefore the conclusion of the learned trial Judge is correct.

I accept this appeal, set aside the decree of the learned District Judge and restore the decree of the trial Judge but leave the parties to bear their own costs throughout. The cross-objections were not pressed and are dismissed. No order as to costs.

P.R./A.L.

Appeal allowed.

1. Misri Muhammad Hussain v. Municipal Committee Sialkot, A I R 1936 Lah 689=38 P L R 897.

A. I. R. 1937 Lahore 85

DIN MOHAMMAD, J.

Husain Bakhsh—Petitioner.

v.

Khuda Bakhsh—Opposite Party.

Criminal Revn. No. 953 of 1936,
Decided on 21st September 1936.

Criminal P. C. (1898), S. 181 (2)—Promissory note executed at L in favour of K residing at A by I residing at L—On demand of loan by K, I pleading payment and producing promissory note with endorsement of payment in handwriting of H, resident of A—Courts at A held to have jurisdiction to try H for offence under S. 403, Penal Code.

K residing at A had a promissory note executed in his favour by one I, a resident of district L. Subsequently on K demanding the loan from I, the latter pleaded a discharge and produced the original promissory note with an endorsement on its back in the handwriting of one H who was also a resident of A. K demanded the money from H and on evasion of payment by him lodged a complaint against him under S. 403 at A :

Held: that the Courts at A had jurisdiction to try the case. Even though the money was received by the accused H on account of the promissory note at L, money was retained by him at A to which he admittedly belonged and the retention of the money which the accused knew did not belong to him conferred jurisdiction on the Courts at A. [P 86 C 2; P 87 C 1]

Zahur-ud-Din Naqshbandi—for Petitioner.

Indar Dev for S. D. *Kitchlew*—for Opposite Party.

Order.—The facts of the case giving rise to this reference are these: Khuda Bakhsh, who admittedly resides in the town of Amritsar, had a promissory note executed in his favour by one Ibrahim, a resident of Baghbanpura in the district of Lahore. This promissory note was executed on 9th April 1935. In October 1935 Khuda Bakhsh went to Baghbanpura and demanded the loan from Ibrahim. Ibrahim pleaded discharge and produced the original promissory note with an endorsement on its back in the handwriting of Hussain Bakhsh who is also a resident of Amritsar town. Khuda Bakhsh demanded this money from Hussain Bakhsh but he put him off on various excuses and eventually Khuda Bakhsh lodged a complaint under S. 379 read with S. 403, I. P. C., against Hussain Bakhsh in the Court of a Magistrate, First Class, at Amritsar. After recording preliminary evidence in this case the Magistrate came to the conclusion that an offence under S. 403, I. P. C., only was established against the accused and he consequently forwarded the case to the Additional District Magistrate for transferring it to a Second Class Magistrate. The Additional District Magistrate sent the case to a Bench of Honorary Magistrates for disposal. The Magistrates framed a charge against the accused on 13th May 1935.

This charge may be rendered in English as follows :

That you, on or about 4th September 1935, at Amritsar, dishonestly misappropriated and converted to your own use the money received on account of the promissory note, dated 9th April 1935, executed by Ibrahim in favour of Khuda Bakhsh.

The District Magistrate is of opinion that as no offence has been committed in the district of Amritsar, the case is not triable by any Court there and has therefore recommended that the charge be quashed and the proceedings be transferred to a Magistrate with jurisdiction in the Lahore District. After hearing counsel on both sides I consider that the opinion of the District Magistrate is legally erroneous and that the Amritsar Courts have jurisdiction to try this case. Under S. 181, sub-s. (2) :

The offence of criminal misappropriation can be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property, which is subject of the offence was received or retained by the accused person or the offence was committed.

In this case, as I have stated above, both the complainant and the accused belonged to Amritsar town and it will consequently be fair to presume that the promissory note came into the possession of the accused at Amritsar and that after receiving the amount of the promissory note from Ibrahim, he retained the money so obtained at Amritsar. Counsel for the complainant urges that a promissory note is "moveable property" within the meaning of S. 403, I. P. C., and that as the accused came into the possession of the promissory note at Amritsar before he received any money on its account from Ibrahim, the dishonest misappropriation of the promissory note itself amounts to an offence under S. 403, I. P. C., and consequently the Amritsar Courts have jurisdiction on this ground alone. Counsel for the petitioner replies that misappropriation is complete only when anything is wrongly used and as a promissory note cannot be said to have been used unless money is received on its account, it will not amount to misappropriation if the promissory note alone is retained. I do not consider however that in this case it is necessary to enter into this discussion, as even though the money was received on account of the promissory note at Lahore, I am inclined to think that it was retained at Amritsar to which place the accused admittedly belongs, and this

retention of the money which the accused knew did not belong to him will confer jurisdiction on the Amritsar Courts. It may be remarked here that the accused himself has observed complete silence on this matter and when examined under S. 342, Criminal P. C., he refused to make any reply. I accordingly decline to accept the recommendation of the District Magistrate and direct the trial to proceed in the Court of the Honorary Magistrates who are seised of the case.

R.M./V.V. *Order accordingly.*

A. I. R. 1937 Lahore 87

JAI LAL, J.

Kanshi Ram — Debtor-Insolvent — Appellant.

v.

Hari Ram and others — Creditors — Respondents.

Misc. First Appeal No. 144 of 1936, Decided on 27th October 1936, from order of Dist. Judge, Shahpur, D/- 31st March 1936.

(a) Provincial Insolvency Act (1920), S. 75 (3)—Leave to appeal—Appeal to High Court — Presentation of application for leave to appeal made with memorandum of appeal — Admission of appeal by Motion Bench amounts to grant of leave.

Where, with the memorandum of appeal an application for leave to appeal was presented and the appeal was admitted by a Motion Bench :

Held : that the admission of the appeal by Motion Bench amounted to grant of leave to appeal. [P 88 C 1]

(b) Provincial Insolvency Act (1920), Ss. 28 (4) and 44 (2)—Scope—Order of discharge gives release from debts due before adjudication—Property inherited by insolvent some months before order of discharge—Report by Official Receiver made under misapprehension, that assets of insolvent were completely disposed of — Order of discharge passed — S. 44 (2) does not take away right of Official Receiver to deal with property which vested in him at the time of order of discharge even after order of discharge.

So far as the debts due from the insolvent at the time of the order of adjudication are concerned he is released from them on an order of discharge. But the power of the Official Receiver to deal with the property which vests in him at the time of order of discharge does not cease with the passing of the order of discharge. [P 88 C 1, 2]

Where, under misapprehension, the Official Receiver made a report to the District Judge that the insolvent's assets were completely disposed of and the order of discharge was passed, but in fact certain property had devolved on the insolvent some months before order of discharge :

Held : that the report of the Official Receiver did not affect the question as the assets inherited by the insolvent before order of discharge vested in the Official Receiver and S. 44 (2) did not take away his power to deal with the property inherited by the insolvent, and which vested in him at the time of order of discharge, even after the order of discharge : *A I R 1929 Rang 168, Rel. on.*

[P 88 C 2]

Nand Lal—for Appellant.

Tek Chand—for Respondents.

Judgment. — Kanshi Ram, appellant, was adjudicated insolvent and his estate vested in the Official Receiver. He made an application for discharge and in spite of the objection of one of the creditors the application was granted and he was granted an absolute discharge. This application was granted after consideration of the report of the Official Receiver who had stated that :

The assets of the insolvent have been completely disposed of and the creditors who had their debts scheduled have been paid off at the rate of annas 2 odd per rupee.

It appears, however, that before the order of discharge was passed, in fact a few months before it, an uncle of the insolvent had died leaving some property and that property had devolved by inheritance upon Kanshi Ram, insolvent. It seems that the Official Receiver and the creditors were not aware of this fact and in any case they were not aware that the property of the uncle which devolved upon Kanshi Ram vested in the Official Receiver under S. 28 (4), Provincial Insolvency Act, which is that :

All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or Receiver, and the provisions of sub-s. (2) shall apply in respect thereof.

Subsequently, however, after the order of discharge had been passed, it was discovered that the property inherited by Kanshi Ram from his uncle should have been disposed of by the Official Receiver in the insolvency proceedings. Consequently, one of the creditors made an application that the property in dispute should be disposed of by the Official Receiver in satisfaction of the scheduled debts. In spite of the objection of Kanshi Ram, the learned District Judge has directed that the property vests in the Official Receiver and should be disposed of by him in the insolvency proceedings. Against this order, this appeal has been preferred by Kanshi Ram. A preliminary objection is taken by the respondents' learned counsel that this appeal is not competent because no per-

mission was obtained by the appellant either from the District Judge or from this Court under S. 75, sub-s. (3), Provincial Insolvency Act. It appears, however, that with the memorandum of appeal an application for leave to appeal was presented in this Court by the appellant and at the end of the grounds of appeal it was stated that if this Court did not grant that application, the memorandum of appeal be deemed to be a petition for revision. The appeal was admitted by a Motion Bench. It must, therefore, be assumed that leave to appeal was granted to the appellant by this Court. The preliminary objection is overruled.

On the merits, no decided case applicable to the facts of this case has been cited by either party. The question, therefore, turns on the interpretation to be placed on Ss. 28 (4) and 44 (2), Provincial Insolvency Act, and the effect of both on the property in dispute. I have already stated what S. 28 (4) is. S. 44 (2) provides that except as otherwise provided by sub-s. (1) an order of discharge shall release the insolvent from all debts provable under this Act. Sub-s. (1) gives a list of debts from which an order of discharge should not be deemed to release the insolvent. None of the debts in question fall under sub-s. (1). The only question, therefore, is whether sub-s. (2), S. 44 has the effect of divesting the Official Receiver of the property which vests in him under S. 28 (4), or whether the object of the section is merely to protect the debtor after an order of discharge with regard to property which he may acquire after the order of discharge and his person. There can be no doubt that so far as the debts due from the insolvent at the time of the order of adjudication are concerned, he is released from them. But the question is whether the power of the Official Receiver to deal with the property which vests in him also ceases. There is no provision of law which supports the contention of the appellant in this respect. On the other hand, there are cases in which, in spite of the order of discharge, the Official Receiver must continue to deal with the property which vests in him and to distribute the proceeds thereof among the creditors. Such a case is illustrated by the case reported in 7 Rang 126.¹

1. K. P. S. P. P. L. Firm v. O. A. P. C. Firm, A I R 1929 Rang 168=117 I O 582=7 Rang 126.

Another instance is where within the time fixed for the application for discharge the whole of the property of the insolvent has not been sold by the Official Receiver but the insolvent has placed the whole of his estate at his disposal and the Court grants him an absolute discharge. In such a case it cannot be contended reasonably that the Official Receiver is not entitled to deal with the property.

The only difficulty in this case is the report of the Official Receiver on which the District Judge granted the order of discharge. The report was that the insolvent's assets had been completely disposed of. This shows that the Official Receiver did not consider that any more assets of the insolvent remained vested in him and were to be disposed of by him. This report was obviously made under a misapprehension and does not alter the fact that the assets of the insolvent which devolved upon him on the death of his uncle vested in the Official Receiver and were saleable by him in the insolvency proceedings. In my opinion, therefore, the report of the Official Receiver does not affect the question and S. 44 (2) does not in any way take away the right of the Official Receiver to deal with the assets which vested in him at the time of the order of discharge. The order of the learned District Judge is therefore correct on the merits and I dismiss this appeal; but the Official Receiver was apparently negligent in the matter and I decline to make any order of costs of this appeal in his favour.

P.R./A.L.

Appeal dismissed.

* A. I. R. 1937 Lahore 88

ADDISON AND DIN MOHAMMAD, JJ.

Harnam Das—Plaintiff—Appellant.

v.

Mangal Singh and another—Defendants—Respondents.

Second Appeal No. 370 of 1936, Decided on 29th October 1936, from decree of Dist. Judge, Gujranwala, D/- 14th February 1936.

* Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 33 and 34 — Hereditary office-holder is technical term under Act—Person declared not to be of such character by tribunal and High Court under Ss. 33 and 34 can establish his claim in ordinary civil Court on ground of his being office-holder though not hereditary.

The term "hereditary office-holder" is a technical term under the Sikh Gurdwaras Act and merely because a person is not found to come within the definition of that term, he does not lose all the rights of which he is possessed otherwise. [P 89 C 2]

An institution was declared to be a Sikh Gurdwara by a tribunal under S. 32 of the Act, but the person was declared not to be a hereditary office-holder under S. 33. On appeal under S. 34 of the Act the High Court reversed the finding of the tribunal with regard to the character of the institution but affirmed the decision with regard to the status of the person. Thereupon he brought a suit in ordinary Court to establish his claim:

Held: that though the person was not found to be hereditary office-holder it merely disentitled him to any further relief at the hands of the tribunal but it did not deprive him of his right to establish his claim in the ordinary civil Court on the score of his being an office-holder of the institution, even though not hereditary. [P 89 C 2]

M. L. Puri and Bishan Narain — for Appellant.

Prakash Chandra—for Respondents.

Din Mohammad, J. — The appellant instituted a suit in the Court of the Senior Subordinate Judge, Gujrat, for recovery of possession of some land of which he had been forcibly deprived by the Singh Sabha. The suit was decreed in his favour but on appeal the District Judge set aside the decree of the Senior Subordinate Judge and remanded the case to him for disposal in accordance with Ss. 31 and 32, Sikh Gurdwaras Act. Thereupon, the trial Court acting under S. 32, sub-s. (1), Sikh Gurdwaras Act, framed an issue: "Whether the Dera or Gurdwara in question is a Sikh Gurdwara" and forwarded the record of the case to the Sikh Gurdwaras Tribunal. This happened on 23rd April 1932. Prior to this, the appellant had made an application under S. 8, Sikh Gurdwaras Act, claiming that the Gurdwara was not a Sikh Gurdwara and that the possession of the property in suit be restored to him. A similar application had also been made by the requisite number of worshippers. The Sikh Gurdwara Tribunal, however, held that the institution was a Sikh Gurdwara and that the appellant was not a hereditary office-holder. On appeal this Court set aside the judgment of the Sikh Gurdwara Tribunal so far as the character of the institution was concerned but affirmed the decision of the Tribunal relating to the status of the appellant. Thereupon, the appellant made an application to revive his original suit, but it was resisted by certain Sikhs on the ground that the appellant had no locus standi to sue nor

could the suit proceed in face of the judgments of the Tribunal and the High Court declaring that he was not a hereditary office-holder. The Subordinate Judge agreed with the defendants and dismissed the appellant's suit. The appellant then preferred an appeal in the Court of the District Judge, but he, too, agreed with the Subordinate Judge. Hence this appeal.

After giving due weight to the arguments advanced by the respondents' counsel, we have come to the conclusion that the decision of both the Courts below was legally erroneous. It is true that both the Tribunal and the High Court had declared that the appellant was not a hereditary office-holder but that declaration does not debar him from seeking redress in the ordinary Courts. The term "hereditary office-holder" is a technical term under the Sikh Gurdwaras Act and merely because a person is not found to come within the definition of that term, he does not lose all the rights of which he is possessed otherwise. In fact, as soon as a declaration is made that an institution is not a Sikh Gurdwara, the Tribunal under sub-s. (3), S. 16, Sikh Gurdwaras Act, ceases to have jurisdiction in all matters concerning such Gurdwara, except for the limited purpose mentioned in the sub-section itself. That exception invests the Tribunal with a further jurisdiction to restore to his previous position, an office-holder, who has ceased to be an office-holder on or after the first day of January 1920, if the Tribunal finds that he is a hereditary office-holder. Had the appellant been found to be a hereditary office-holder, the Tribunal could have restored him to the office and consequently he would have regained the building as well as the property attached to the institution. His not being found to be such merely disentitled him to any further relief at the hands of the Tribunal but it did not deprive him of his right to establish his claim in the ordinary civil Courts on the score of his being an office-holder of the institution, even though not hereditary. Counsel for the respondents has relied on sub-s. (1), S. 31 and S. 37, Sikh Gurdwaras Act, but neither of these sections helps him in any way. The civil Court in entertaining his suit, which now evidently relates to an institution which is not a Sikh Gurdwara, will not pass any order or grant any decree the effect of which will be inconsistent with any decision of the Tribunal or any order passed on appeal

therefrom. We accordingly allow this appeal, set aside the orders of the Courts below and remand the case to the trial Court for disposal in accordance with law. As the question of law involved in this case was not free from difficulty, we make no order as to costs before us.

K.B. D.S.

*Case remanded.***A. I. R. 1937 Lahore 90**

TEK CHAND AND DALIP SINGH, JJ.

Gurdit Singh—Plaintiff—Appellant.

v.

Mt. Man Kaur and another—Defendants—Respondents.

First Appeal No. 309 of 1933, Decided on 13th March 1936, from decree of Senior Sub-Judge, Sheikhpura, D/- 31st January 1933.

Custom (Punjab) — Succession — Self-acquired property—Kahlon Jats of Gurdaspur—Daughter is preferential heir in presence of near collaterals.

Amongst the Khalon Jats of Gurdaspur District a daughter is a preferential heir to the self-acquired property of her father in the presence of even near collaterals such as the brother of the deceased father: *Case law reviewed.*

[P 90 C 1, 2; P 91 C 1]

Naval Kishore and Mohammad Amin (Syed)—for Appellant.

S. L. Puri and Yashpal Gandhi—for Respondents.

Dalip Singh, J.—One Nihal Singh, a Kahlon Jat of Gurdaspur District, got a grant of a Square No. 79 in Chak No. 44, Rakh Branch, Kotla Kahlwan, District Sheikhpura, from the Government and also acquired the occupancy rights therein before he died sonless leaving a widow Mt. Man Kaur and a daughter Mt. Bua Ditt. The square that he owned was mutated in favour of his widow after his death. The widow made a gift to her daughter, Mt. Bua Ditt, which was sanctioned by the Commissioner on 5th March 1927 and the appeal therefrom was rejected on 30th April 1927 by the Financial Commissioner. A suit was then brought by Gurdit Singh, brother of the said Nihal Singh, on 26th May 1927 for a declaration that the gift would not affect his reversionary rights.

The sole question that arises for decision in the appeal from the order of the Court below dismissing the suit is whether among Kahlon Jats of District Gurdas-

pur the daughter is a preferential heir to self-acquired property in the presence of near collaterals such as the brother of her deceased father. The learned counsel for the appellant concedes that on the evidence recorded in this case the defendants have proved four instances wherein a daughter was held a preferential heir to near collaterals. The first instance is proved by D. W. 1 and relates to a case wherein the self-acquired property of a Kahlon Jat was inherited by his daughter Mt. Prito in the presence of fourth degree collaterals. The witness himself had tried to prove a nearer degree of propinquity, but the mutation order which is printed at p. 60, Vol. 2 of the printed paper book shows that the collaterals were related in the fourth degree.

The second instance proved is that of one Nikka whose widow succeeded to his property, which was self-acquired, and gifted the same to her daughter and grand-daughters, the daughters of a pre-deceased daughter. The real nephews of the deceased, Nikka, contested the mutation but failed. The third instance proved is one wherein a gift was made by the widow of a deceased male owner, one Mt. Nihal Kaur, in favour of her daughter Mt. Banto. The real nephews failed to oust the daughter in a contested mutation. The last instance proved is that of one Kapur Singh whose daughter, Mt. Mahindro, succeeded to his self-acquired property in the presence of a real uncle of Kapur Singh, deceased. The only instance relied on by the learned counsel on behalf of the plaintiff was one mentioned by P. W. 1, Kishan Singh. He stated that the daughter of a deceased male owner had succeeded to his self-acquired property only until marriage. No mutation to this effect was produced in spite of a warning given at a previous hearing before another Bench of this Court when the case was remanded that oral evidence of succession without the mutations supporting them would not be considered of much value. I do not think that the oral testimony of Kishan Singh really establishes anything at all.

The learned counsel for the appellant has however relied on the answers to questions 16 and 17 in the *riwajiam* of the Gurdaspur District prepared in 1913. In the answer to question 16 it is stated that collaterals of however remote a degree excluded the daughter. In the answer to question 17 it is stated that there is no

distinction between the rights of daughters to inherit immoveable and ancestral, moveable or self-acquired property of their father. He has relied on two rulings reported as A I R 1936 Lah 68¹ and A I R 1935 Lah 453.² These two rulings however appear to relate to ancestral property and have little value in the present case. In A I R 1935 Lah 453² the learned Judges merely pointed out that the *riwajiam* laid the initial onus on the daughter and as no instances were proved to the contrary the initial onus had not been discharged. In A I R 1936 Lah 68¹ it was held that the answer to question 16 in the *riwajiam* of 1913 was dictated by self-interest and was probably not correct. But the learned Judges proceeded to hold that the true answer was given in the *riwajiam* of 1893 wherein it was stated that the collaterals within the fifth degree would exclude daughters. This limitation is however only introduced in a note recorded by the Settlement Officer preparing the *riwajiam* and is based on a reported ruling, 60 P R 1889,³ wherein it was held that among the Sabswari Sayyads of Dinpanah of Shakargarh no custom was proved by which distant collaterals excluded a daughter. The Settlement Officer added that this decision was in accordance with the general practice. However this may be as to ancestral property, the rulings throw no light on the question of inheritance of self-acquired property. On the other hand, the following rulings have been cited before us, namely, 60 P R 1889,³ 37 P L R 203,⁴ 5 Lah 364,⁵ 16 Lah 985⁶ and 16 Lah 998.⁷

These rulings certainly support the contention of the defendants-respondents. In 37 P L R 203⁴ a good deal of the previous case-law is discussed and a careful analysis made of the evidence led in that case itself. After considering the instances there proved and the previous case-law, a Division Bench of this Court were of opinion that the *riwajiam* was incorrect on the

question of the daughters' inheritance to self-acquired property of her father. Another ruling to which my learned brother was a party is reported as A I R 1935 Lah 696⁸ and is a case of Bal Jats of Mauza Bal, Tahsil and District Gurdaspur, wherein again after analysing the instances proved in that case it was held that the plaintiffs have been unable to prove a single clear instance in which the daughters had been excluded by collaterals of any degree whatsoever in succession to self-acquired property of their father. In view of the instances proved in this case and the various judicial decisions already referred to, in which other instances were considered proved, I would hold that the decision of the lower Court is correct and that the daughter is not excluded by collaterals however near from succession to the self-acquired property of her father. The appeal therefore fails and I would dismiss it with costs.

Tek Chand, J.—I agree.

V.B.B./K.S.

Appeal dismissed.

8. Kesar Singh v. Gurnam Singh, A I R 1935 Lah 696=160 I C 414.

* A. I. R. 1937 Lahore 91

JAI LAL, J.

Niaz Ali and another — Plaintiffs—Appellants.

v.

Mt. Begam Bibi—Defendant—Respondent.

Second Appeal No. 27 of 1936, Decided on 24th March 1936, from decree of Senior Sub-Judge, Gujrat, D/- 4th November 1935.

(a) **Compromise decree—Binding effect—Decree passed in presence of pleader authorised by one party to appear on her behalf — Decree not appealed against — No allegation of fraud with regard to compromise—Decree is binding on party, even if pleader was not authorised to enter into compromise.**

Where a decree on the basis of a compromise is passed in the presence of a pleader authorised by a party to the suit to appear on her behalf, such decree when not appealed against and when there is no allegation that the compromise was the result of exercise of any fraud, is final and binding on the party, even if the pleader was not authorised to enter into a compromise on behalf of the party for whom he was appearing. [P 92 C 2]

* (b) **Compromise decree—Binding effect—Decree assented to by pleader appearing on behalf of party—No statement on record that**

1. Kesar Singh v. Achhar Singh, A I R 1936 Lah 68=161 I C 692=38 P L R 502=17 Lah 107.

2. Mt. Massan v. Sawan Mal, A I R 1935 Lah 453=157 I C 479.

3. Ramzan Shah v. Sohna, (1889) 60 P R 1889.

4. Jagat Singh v. Jiwan, A I R 1935 Lah 617=156 I C 215=37 P L R 203.

5. Gurdit Singh v. Malan, A I R 1925 Lah 35=84 I C 171=5 Lah 364.

6. Mahi v. Mt. Barkate, A I R 1936 Lah 339=161 I C 24=16 Lah 985=38 P L R 509.

7. Bawa Sing v. Partop Kuar, A I R 1935 Lah 288=159 I C 347=37 P L R 266=16 Lah 998.

pleader was not authorised to enter into compromise — It must be assumed, unless contrary is established, that pleader had authority to compromise and that Court passing decree had satisfied itself that he had such authority.

Where a decree is passed by a Court on basis of a compromise assented to by a pleader appearing on behalf of a party and there is no statement on record that, by his power-of-attorney the pleader was not authorised to compromise the case, it must be assumed, unless the contrary is established, that the pleader had authority to compromise the case and that the Court which passed the decree had satisfied itself that the pleader was authorised to effect a compromise on behalf of his client. If the party alleges that the pleader had no authority to enter into compromise, it must prove so: *AIR 1929 Oudh 211, Rel. on.* [P 92 C 2]

Qabul Chand—for Appellants.

Abdul Aziz Khan and Ghulam Mohy-ud-Din Khan—for Respondent.

Judgment.—Bahawal Bakhsh made a gift of some of his land in favour of his daughter Mt. Begam Bibi in the year 1928. The appellants Niaz Ali and another claiming to be the collaterals of Bahawal Bakhsh instituted a suit for a declaration that the gift was void and would be ineffectual against their reversionary interests after the death of Bahawal Bakhsh. Both Bahawal Bakhsh and Mt. Begam Bibi were impleaded as defendants in this suit. On 9th January 1930, the suit was compromised. The written compromise however is signed by Bahawal Bakhsh and the plaintiffs. It is not signed by or on behalf of Mt. Begam Bibi. When however the case came up for hearing before the Subordinate Judge, Bakhshi Harbans Lal Pleader, appeared for Mt. Begam Bibi and assented to the compromise. The compromise was that after the death of Bahawal Bakhsh half the land in suit would go to the plaintiffs and the other half would remain with Mt. Begam Bibi. The parties were examined, Mt. Begam Bibi being examined through her counsel Bakhshi Harbans Lal, Pleader, and a decree in accordance with the compromise was passed.

Bahawal Bakhsh is now dead and this second appeal has arisen out of a suit brought by Niaz Ali and other collaterals for possession of half the land which was the subject matter of the previous suit and which had been decreed in the plaintiffs' favour in the previous suit. This suit has been resisted by Mt. Begam Bibi on the ground that the compromise is not binding on her as she did not sign it and was not a party to it. The learned Senior Subordi-

nate Judge on appeal has accepted this plea of Mt. Begam Bibi holding that she was not a party to the compromise and that it has not been shown that Bakhshi Harbans Lal was expressly authorised by his power-of-attorney or otherwise to effect a compromise in the previous suit. This appeal is by the plaintiffs. In my opinion, it must succeed on the short ground that even if it be assumed that Bakhshi Harbans Lal was not authorised to enter into a compromise on behalf of Mt. Begam Bibi he was authorised to appear on her behalf and in his presence a decree was passed by the Court the result of which was that after the death of Bahawal Bakhsh half the land in dispute was to go to the plaintiffs and the other half was to remain with Mt. Begam Bibi, and no appeal was preferred against that decree. It is not pleaded that the compromise was the result of exercise of any fraud. The only manner therefore in which the decree could be got rid of by Mt. Begam Bibi was by an appeal. The decree therefore has become final and binding on her and cannot be ignored in this case.

Apart from this I am not satisfied that the conclusion of the learned Senior Subordinate Judge is correct that it was for the plaintiffs to establish that Bakhshi Harbans Lal was authorised to effect a compromise on behalf of Mt. Begam Bibi. It is not denied that he was engaged on behalf of Mt. Begam Bibi but it is alleged that he was not told to compromise the case. There is no statement on the record that by his power-of-attorney he was not authorised to compromise the case. I must assume, relying upon 121 I C 283,¹ that Bakhshi Harbans Lal had authority to effect a compromise unless the contrary is established in this case. It must be assumed that the Court which passed the decree in January 1930 satisfied itself that Bakhshi Harbans Lal was authorized to effect a compromise on behalf of his client. In view of the above it is not necessary to give a finding whether apart from express authority a Pleader is entitled to compromise a suit on behalf of his client in support of which proposition the appellants' counsel relies upon a Privy Council decision in 57 Cal 1311.² Accordingly I

1. *Puran Kuer v. Mannilal*, AIR 1929 Oudh 211=121 I C 283.

2. *Surendra Nath Mitra v. Taru Bala Dasi*, AIR 1930 P C 158=123 I C 545=57 I O 133=57 Cal 1311 (P C).

accept this appeal, set aside the decree of the Senior Sub-Judge and decree the plaintiffs' suit with costs throughout.

R.M./R.K.

Appeal allowed.

A. I. R. 1937 Lahore 93

JAI LAL, J.

P. Wylie — Defendant — Appellant.

v.

Board of Foreign Mission of Presbyterian Church, U. S. A., Plaintiff and another, Defendant — Respondents.

Second Appeal No. 183 of 1936, Decided on 5th November 1936, from decree of Dist. Judge, Ludhiana, D/- 3rd January 1936.

Execution—Rights of decree-holder—Land held by judgment-debtor as lessee subject to conditions restricting his rights to sale — Decree-holder attaching same is bound by conditions and cannot ignore restrictions placed on lessee's rights of transfer.

Where the judgment-debtor is only a lessee of the land sought to be attached and sold, and the lease is held by him subject to certain conditions, under which his right to sell the property is restricted, the decree-holder is also bound by those conditions and it is not open to him to ignore the restrictions on the judgment-debtor's rights of transfer and to assume that he has an unrestricted alienable interest in the property attached. [P 93 C 2 ; P 94 C 1]

Nawal Kishore—for Appellant.

Jhanda Singh—for Respondent (Plaintiff).

Judgment. — The Board of Foreign Mission of the Presbyterian Church at Ludhiana granted a lease of a vacant site to one Lehna Singh, a native Christian, on payment of a nominal rent. It was a permanent heritable tenancy, but one of the conditions was that the lessee was not entitled to sell his rights under the lease except to a 'good Christian' and that also after giving notice to the lessor to purchase the building constructed by him at a reasonable price. Lehna Singh having died, the respondent, Mrs. Edna Thompson, succeeded to a part of the land which had been leased to him. There is a house on this part of the land which belongs to Mrs. Edna Thompson. It is not clear whether it has been constructed by her or by her father, but this is immaterial for the purposes of this case. The appellant, Mr. Wylie, having obtained a money decree against Mrs. Edna Thompson, attached the house in dispute and an objection was

successfully raised by the Board of Foreign Mission to the attachment and sale of the house on the ground that the judgment-debtor was not entitled to sell the same without first giving an option to the Board of Foreign Mission to purchase the house at a reasonable price.

As a result of this objection, a suit was instituted and it was dismissed on the ground that the house could not be sold till notice had been given to the Board of Foreign Mission at Ludhiana. Subsequent to the decision of this suit the decree-holder gave a notice to the Mission inviting it to purchase the house for Rs. 1,300 which apparently he considered to be a reasonable price thereof. In reply the Mission offered Rs. 30 and there the matter stood. Thereupon the decree-holder again applied for the attachment and sale of the house averring that a notice inviting the Mission to purchase the house at a reasonable price had been given by him and therefore the conditions of the lease had been complied with and consequently the house had become saleable in execution of the decree. The learned District Judge has now held that the notice given by the decree-holder is not sufficient compliance with the conditions of the lease and therefore the house is not saleable. There are other grounds of decision of the dispute by the learned District Judge, but it is not necessary to mention them because they have not been repeated before me or attacked.

In my opinion the option to sell and the right to give notice to the lessor has been given to the lessee and a stranger, such as the decree-holder, is not entitled to give a notice to the lessor and the conclusion of the District Judge so far is correct. But the learned counsel for the appellant has raised another point before me that a decree-holder is not bound by the condition of notice mentioned above and that such a condition only comes into operation if there is a voluntary sale by the lessee. I have given my anxious consideration to this contention and am of opinion that in a case like the present a decree-holder is also bound by the conditions on which the judgment-debtor has taken a lease of the property sought to be attached and sold. According to the conditions of the lease the right of the judgment-debtor to sell the property is restricted and it is not open to the decree-holder to ignore such restriction and to assume that the judg-

ment-debtor has an unrestricted alienable interest in the property attached. I ought to make it quite clear that there is no objection to the sale of the materials of the house. The counsel for the Mission has expressly stated so before me. The only objection is to the sale of the right to occupy the site by a person other than the lessee unless such other person has purchased the right from the lessee after due compliance with the conditions of the lease. The conclusion of the learned District Judge, in my opinion, is correct and I dismiss this appeal with costs.

R.M./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 94

MONROE, J.

Mehr Chand and others—Plaintiffs—Appellants.

v.

Sain Gaman and another—Defendants—Respondents.

Second Appeal No. 1743 of 1935, Decided on 15th October 1936, from decree of Dist. Judge, Rawalpindi, D/- 31st May 1935.

(a) Limitation Act (1908), Art. 120 and S. 23—Lessee from Municipal Committee erecting building on public street on ground leased to him, and thus preventing plaintiff's access to highway from his property—Suit by plaintiff for injunction ordering lessee and Municipal Committee to demolish building is not governed by Art. 120—Wrong to plaintiff being continuing wrong, suit brought more than six years after erection is not barred by limitation.

Where a building is erected by the lessee from a Municipal Committee on the ground leased to him by the Committee, on a public street at the boundary of the plaintiff's property abutting on the street, thus causing him special damage by preventing his access to the highway from his property and vice versa (over and above the public nuisance), a suit by the plaintiff for an injunction ordering the lessee and the Committee to demolish the building is not governed by Art. 120 and is not barred by limitation although brought more than six years after erection of the building. The wrong to the plaintiff is a continuing wrong, his access to the highway from his property and from the highway to his property being prevented during every moment of the time during which the erection stands. [P 94 C 2]

(b) Punjab Municipal Act (3 of 1911), S. 169—S. 169 does not authorize unlawful infringement by Committee of person's right of access to his property—Committee putting S. 169 in operation must exercise its powers without injuring adjacent owners—It is not

empowered to make new street through land of private owner without his consent.

Section 169 does not authorize what would otherwise be an unlawful infringement by the Municipal Committee of a person's right of access to his property. In putting S. 169 into operation, the Committee must exercise its powers without injuring adjacent owners. The section is limited in its operation and the Committee, before laying out and making a new public street, must acquire the necessary land or possess it already. It is not given a power to make a new street through the land of a private owner without his consent. [P 95 C 1]

Dev Raj Sawhney—for Appellants.

Narotam Singh—for Respondents.

Judgment.—This suit was brought for an injunction ordering Sain Gaman and the Municipal Committee of Rawalpindi to demolish certain structures alleged to have been erected on the public street by Sain Gaman the lessee from the Committee of the ground on which the structures were erected. Sain Gaman did not defend the suit, but throughout, the suit has been contested by the Committee and before me in second appeal with great vigour. On all questions relating to the merits of the case there are concurrent findings of fact both by the trial Judge and the District Judge in favour of the plaintiff and the suit has been dismissed on the ground that it is barred by time, Art. 120, Lim. Act being held to apply, and S. 23 of the Act, being held not to apply. It has been found that the building erected by Sain Gaman on the plot leased to him by the Committee was erected on the public street at the boundary of the plaintiff's property which abutted on the street, that the erection was a public nuisance and that the plaintiff suffered special damage from the erection. Against the plaintiff it has been found that the building was erected more than six years before the institution of the suit. In my opinion the lower Courts were wrong in holding that the suit was barred by limitation: the wrong to the plaintiff is a continuing wrong: his access to the highway from his property and from the highway to his property is prevented during every moment of the time while the erection stands. I hold, therefore, that the suit was within time.

It has also been urged before me on behalf of the Municipal Committee that their action is protected by S. 169, Punjab Municipal Act, 1911, which authorizes the Municipal Committee to lease, sell or

otherwise dispose of any land vesting in and used by the Committee for a public street and no longer required therefor. No attempt has been made to show that the land in question is no longer required for a public street: so far as the record shows, this question has never been examined and *prima facie* no ground appears why this portion of the public street should be described as no longer required for a public street. In my opinion this section, even if properly applied, would not authorize what would otherwise be an unlawful infringement of the plaintiff's right of access to his property. In putting the section into operation, the Committee must exercise its powers without injuring adjacent owners. That the section is limited in its operation is clear, e.g. from the first provision that it contains: "The Committee may lay out and make a new public street"; it is obvious that before doing so, the Committee must acquire the necessary land or possess it already; they are not given power to make a new street through the land of a private owner without his consent. The contesting of this case by the Municipal Committee was, in my opinion, wholly unwarranted. Their treatment of the plaintiff has been high-handed and arbitrary.

I allow the appeal and grant an injunction to the plaintiff as sought. The Municipal Committee will pay the costs of the suit and both appeals.

R.M./R.K.

Appeal allowed.

A. I. R. 1937 Lahore 95

ADDISON AND ABDUL RASHID, JJ.

Punjab National Bank, Ltd., Lahore—
Plaintiff—Petitioner.

v.

Mt. Jiwan and others — Defendants —
Opposite Parties.

Civil Misc. No. 827 of 1935, Decided on 16th October 1936, for leave to appeal to His Majesty in Privy Council, against decree of Addison, Ag. C. J. and Din Mohammad, J., D/- 23rd July 1935, reported in *A. I. R. 1935 Lah 889*.

Civil P. C. (1908), S. 110, Cl. (2) — Value of subject matter in dispute in appeal admittedly below Rs. 10,000 — Value more than Rs. 10,000 if another pending appeal by party affected by decree is taken into consideration—Decision in appeal for which leave is sought, not having any effect on other

appeal either by way of *res judicata* or in any other way—Order passed in appeal cannot be held directly or indirectly, to involve claim or question to or respecting property involved in other appeal.

Where the value of the subject matter in dispute on appeal to the Privy Council is admittedly below Rs. 10,000, but the petitioner alleges that there is another appeal pending on behalf of another party affected by the decree and that the value would be more than Rs. 10,000 if the value of the property in that appeal be taken into account but it is admitted that the decision in appeal, for which leave is sought, could have no effect on the other appeal whether by way of *res judicata* or in any other way, the order cannot be held directly or indirectly to involve a claim or question to or respecting property involved in the other appeal within the meaning of Cl. (2), S. 110 and appeal to the Privy Council does not lie.

[P 96 C 1]

*Lala Badri Das—*for Petitioner.

*Barkat Ali—*for Opposite Parties.

Order.—This is an application for leave to appeal to His Majesty in Council against the order passed in Appeal No. 926 of 1933.* The value of the property involved was given in the grounds of appeal as being Rs. 5,000 and this was not objected to by the petitioner. It was therefore necessary to hold an inquiry as to the market value of the property, which was under appeal in Civil Appeal No. 926 of 1933, on 23rd July 1935, the date of the decision, for the purpose of ascertaining whether it was on that date under or over Rs. 10,000 in value. The Subordinate Judge has conducted this inquiry and submitted his report, and his finding is that the value of the property is not more than Rs. 6,000. This report has not been objected to and is correct. The value of the subject matter in dispute on appeal to His Majesty in Council must be Rs. 10,000 or upwards and this is not the case here. It would follow that the appeal to His Majesty in Council is incompetent under S. 110, Civil P. C., but counsel appearing on behalf of the petitioner has submitted that Cl. 2, S. 110, applies, on the ground that the decree involves directly or indirectly some claim or question to or respecting property of the value of Rs. 10,000 or upwards. His argument in this respect was as follows :

There is another appeal pending on behalf of Muhammad Said, another party, affected by the decree. He contended that if the value of the property in Muhammad Said's appeal be taken into

* A I R 1935 Lah 889.

account, the value would be more than Rs. 10,000. He admitted however that the decision in the present case could have no effect on the decision in Muhammad Said's appeal whether by way of res judicata or in any other way. The hearing of Muhammad Said's appeal was delayed on account of an application by Muhammad Said to appeal in forma pauperis. At the present time therefore which is more than a year after the decision, there has been no adjudication with respect to the claim of Muhammad Said in this Court and as the order passed in the appeal before us can have no effect on that appeal, the order cannot be held directly or indirectly to involve a claim or question to or respecting property involved in Muhammad Said's appeal. There is thus no force in this contention which in fact was not argued at the first hearing when we sent down the case to the Subordinate Judge for investigation as to the value of the property in Appeal No. 926 of 1933. For the reasons given, we must refuse leave to appeal to His Majesty in Council, as such an appeal does not lie. The respondents will have their costs.

R.M./R.K.

Leave refused.

* A. I. R. 1937 Lahore 96

BHIDE, J.

Mt. Mohammadi Begam — Creditor —
Petitioner.

v.

Ahsan Ahsan and Co., Insolvent, and
another Creditor, and others — Respon-
dents.

Civil Revn. No. 736 of 1936, Decided on
30th October 1936, from order of Dist.
Judge, Delhi, D/- 17th October 1935.

(a) Provincial Insolvency Act (1920), Ss. 61
and 75 — Creditor, claiming under S. 61
priority in respect of certain debts due to
him—No second appeal lies from order dis-
missing application.

No second appeal lies from an order, made on
an application under S. 61 by a creditor, claim-
ing priority for certain debts due to him on
account of rent for the premises in which the
insolvent's goods are stored by the Official
Receiver. [P 96 C 2]

* (b) Provincial Insolvency Act (1920) S. 61
(3)—Premises in which insolvent's goods are
stored vacated before order of adjudication
—Owner of premises is not entitled to claim
priority for amount due as rent.

No doubt the rent, for premises in which the
insolvent's goods are stored after adjudication,
comes under expenses of administration within
the meaning of S. 61 (3) and takes priority even
over the debts of a secured creditor; yet where the
premises are vacated before the order of adjudica-
tion is passed, the owner of the premises is not
entitled to claim priority under S. 61 (3) for the
amount due to him as rent: *A I R 1930 Cal*
459, Disting. [P 96 C 2]

Abdul Haye—for Petitioner.

Bishen Narain (for Secured Creditors)
and *Bhagwat Dayal* (for Official Receiver)
—for Respondents.

Order. — A preliminary objection is
raised that no second appeal is competent,
as the order in question was passed on an
application made under S. 61, Provincial
Insolvency Act, and priority was claimed
for certain debts due to the appellant on
account of rent for the premises in which
the insolvent's goods were stored by the
Official Receiver. This contention seems
to be correct in view of the provisions of
S. 75, Provincial Insolvency Act, and must
be upheld. The learned counsel for the
appellant prayed that the appeal may be
at least treated as a petition for revision,
and the order of the learned District Judge
be modified as it was clearly erroneous in
law. It was contended that rent for pre-
mises in which the insolvent's goods are
stored after adjudication clearly comes
under expenses of administration within
the meaning of S. 61 (3) and should take
priority even over the debts of a secured
creditor. The learned counsel cited 57
Cal 1210¹ in support of this contention.
The learned counsel for the respondent-
creditor did not challenge the correctness
of the Calcutta decision, but urged that it
supported his client as in this case the
premises in question were vacated on 15th
March 1934, before the order of adjudica-
tion which was passed on 2nd August
1934. It appears from the Official Re-
ceiver's report on the record that the
premises were vacated on 15th March
1934. In the circumstances, there is no
ground for interference in revision. I dis-
miss the petition with costs.

R.M./R.K.

Petition dismissed.

1. Official Trustee of Bengal v. Kishen Gopal,
A I R 1930 Cal 459=134 I C 91=57 Cal 1210
=34 O W N 751=51 O L J 392.

A. I. R. 1937 Lahore 97

ADDISON AND DIN MOHAMMAD, JJ.

Ganesha, Vendee, Defendant—Appellant.

v.

Sadiq, Plaintiff and *another*, Vendor, Defendant—Respondents.

Second Appeal No. 438 of 1936, Decided on 2nd November 1936, from decree of Dist. Judge, Hissar, D/- 7th January 1936.

(a) Deed—Construction—Sale or lease—*C* transferring land to *G* by sale but to defeat right of pre-emptors, entering *G* as occupancy tenant at mutation proceedings—*G* entered as full owner at subsequent mutation proceedings—No consideration passed at subsequent alleged sale—First transaction held to be out and out sale, not conferring occupancy rights on *G*.

C transferred by sale to *G* some land, but in order to defeat the right of pre-emptors, *C* got *G* entered in revenue registers, as an occupancy tenant at mutation proceedings. Subsequently, however, at fresh mutation proceedings *G* was entered as full owner by virtue of sale. No consideration, however, passed at the subsequent alleged sale :

Held : the first transaction did not confer on *G* mere occupancy rights but was an out and out sale in favour of *G* from its inception though it was fraudulently described to be otherwise.

[P 98 C 1]

(b) Pre-emption — Fraud — Limitation — Transaction of sale fraudulently described otherwise—Limitation begins to run from date on which fraud becomes known to pre-emptor.

If, when a land is sold the transaction is fraudulently described as one conferring occupancy rights on the purchaser in order to defeat the rights of pre-emption and if the person having the right of pre-emption is not aware of the fraudulent nature of the transaction, the limitation for pre-emption begins to run from the date on which the fraud comes to the knowledge of the pre-emptor.

[P 98 C 1]

Nanak Chand and *Chiranjiva Lal Aggarwal*—for Appellant.

L. M. Datta—for Respondent (Plaintiff).

Din Mohammad, J.—This case has been referred to us by Jai Lal, J., before whom it originally came on for hearing. The facts are these: One Chiragh Ali successfully pre-empted the sale of village Nadhori sometime in 1930, but as he himself was not in a position to pay the entire sale price at which the suit had been decreed in his favour, he raised the necessary sum by selling small parcels of land in favour of sundry persons. He however did not describe the transactions as sales before the revenue-officers but professed to have created occupancy rights in favour

of the purchasers. One such purchaser was the appellant Ganesha who was already in possession of the land sold to him as a non-occupancy tenant. By virtue of the transaction that took place in 1930, he was entered as an occupancy tenant like others. On 9th June 1933, a fresh mutation was attested in his favour by which the land in his possession was sold to him by Chiragh Ali. No consideration passed on that date, but reference was made to Chiragh Ali's having already received a sum of Rs. 339 by way of nazrana at the time when he created the occupancy rights in favour of the vendee. On 6th June 1934, the respondent Sadiq instituted the suit out of which this appeal has arisen for pre-emption of the said sale in favour of Ganesha. He alleged, among other things, that the original transaction by which Ganesha had been let into the possession of this land as an occupancy tenant was a colourable transaction and that its true nature had come to light only on 9th June 1933. Not admitting the status of Ganesha as an occupancy tenant by virtue of the transaction of 1930, Sadiq claimed a superior right of pre-emption. Ganesha resisted the suit on various grounds. Among other things, he pleaded that, inasmuch as the sale in his favour had taken place in 1930, the present suit was time-barred. He further contended in the alternative that if the transaction that had taken place on 9th June 1933 be treated as sale and hence liable to pre-emption, even then the plaintiff could not succeed, as being merely an occupancy tenant, the plaintiff had no preferential right over him.

Both the Courts below came to the conclusion that the original transaction of 1930 was not a genuine transaction and the real nature of that transaction came to the knowledge of the plaintiff only on 9th June 1933. They consequently held that the plaintiff's suit was not time-barred and as no occupancy rights had been created in Ganesha's favour in 1930, the plaintiff's right was superior to Ganesha's. On second appeal, Jai Lal, J. agreed with the Courts below on the point of limitation but referred the case to a Division Bench on the ground that the issue had been complicated by an apparent clash between two fundamental principles of law and that if, on the one hand, a party was entitled to have recourse to any legitimate device to defeat the claim of pre-emptors,

on the other, a party was not entitled to take advantage of his own fraud. In our view, however, on the facts of the present case, the questions envisaged by the learned Judge do not arise, inasmuch as it has been rightly held by the Courts below that the transaction which took place in 1930 did not confer on Ganesha the status of an occupancy tenant but was an out and out sale, the nature of which was disclosed only in June 1933. Chiragh Ali has clearly admitted that the transaction of 1930 was a sale and that he did not characterise it as such as he was afraid of losing his own case for pre-emption. Ganesha, too, has practically conceded this aspect of the case. This conclusion further gains support from the fact that on the date when the sale is alleged to have taken place, no consideration passed. Ganesha's version of the affair that the transaction of 1933 amounted to a gift in his favour does not stand the test of reason. This being so, the only point that falls for determination in the present case is whether the plaintiff was aware of the fraud at the time when it was committed. If this knowledge is brought home to the plaintiff, his claim must fail, as in that case time will run against him from that date. If, on the other hand, no such knowledge is established, his suit must succeed, as the transfer being a sale from its very inception, Ganesha, as a non-occupancy tenant, will not be in a position to resist the plaintiff's claim. Both the trial Court and the District Judge have found that the plaintiff was not aware of the fraud that was perpetrated by Chiragh Ali and Ganesha in 1930, and this being a finding of fact cannot be disturbed in second appeal. S. 18, Limitation Act, lays down that:

Where any person having a right to institute a suit has, by means of fraud, been kept from the knowledge of such right the time limited for instituting a suit . . . against the person guilty of the fraud or accessory thereto . . . shall be computed from the time when the fraud first became known to the person injuriously affected thereby.

The plaintiff's suit being within time and his right being superior to that of Ganesha, no further question arises in this case. We accordingly affirm the decision of the Courts below and dismiss this appeal with costs.

K.B./A.L.

*Appeal dismissed.***A. I. R. 1937 Lahore 98**

YOUNG, C. J. AND ABDUL RASHID, J.

Jahana — Convict — Appellant.

v.

Emperor — Opposite Party.

Criminal Appeal No. 8 of 1935, Decided on 20th February 1935, from order of Sess. Judge, Jhelum, D/- 19th December 1934.

Criminal Trial — Sole evidence being retracted confession corroborated by recoveries — To base conviction both confession and recoveries must be beyond suspicion — Police Officer arranging confession to be taken in Dak Bungalow and before Second Class Magistrate but not disclosing reasons for doing so — Confession is suspicious and conviction on it is bad.

Where sole evidence against the accused is the confession subsequently retracted and which has been corroborated by certain recoveries, to base conviction on such evidence both the confession and recoveries must be beyond suspicion. Confession should be, unless there are exceptional reasons to the contrary, recorded in open Court and during Court hours. Moreover it is necessary that a confessing accused should not be returned to the custody of the police. [P 99 C 1, 2]

Where the police officer arranged confession to be taken in Dak Bungalow before a Second Class Magistrate without disclosing any reason for so doing and the Magistrate returned the confessing accused to the police custody:

Held : that the confession and recoveries were not free from doubt and conviction based on it was bad. [P 99 C 2; P 100 C 1]

M. L. Puri—for Appellant.*D. R. Sawhney*—for the Crown.

Young, C. J.—Jahana has been condemned to death by the learned Sessions Judge of Jhelum for the murder of Nur Ahmad. He appeals.

Nur Ahmad, on 22nd July 1934, went to see his aunt, one Mt. Karm Bhari. He left there that evening and was never seen alive again. Next day the relatives of Nur Ahmad went to Mt. Karm Bhari and were told all she knew. On the 24th, Mt. Karm Bhari made a report to the police saying that she suspected her own husband Waris and two nephews of her husband of having done some harm to the deceased. It is apparently a fact that Mt. Karm Bhari had been divorced on the 23rd by her husband and would not like him. On the day of this report the dead body of the deceased was discovered half buried under sand. After investigation the police arrested the accused on the 24th of July. The accused stayed under police custody till the 1st of August when he was taken

in a lorry eleven miles to village Mehro Pilloo to a Dak Bungalow and there in the munshi-khana of that Dak Bungalow he made a confession to a Second Class Magistrate who was a Tehsildar, at 7-30 in the evening. The Tehsildar returned the accused to police custody where he remained for another fortnight. This confession taken in this peculiar manner records that the accused had an illicit affair with the wife of his uncle Nur Ahmad, deceased, that he determined to murder his uncle and did so as he was coming back from Mt. Karm Bhari on the 22nd. It further goes on to state that the accused gave him some hatchet blows on the head and neck after he had pressed his throat, that the murdered man had two pieces of clothing upon him, one of red colour and the other of black, and that he took these and buried them in the khuddar. On the next day the accused is alleged to have taken the Sub-Inspector of Police along with a lambardar and a Sarbrah ilakadar to another village to a spot in a field and out of a hole in a mound there he is alleged to have produced a hatchet, subsequently found to be stained with human blood, a red turban and a black chadar, both of which were stained with human blood also.

It is, therefore, seen that the sole evidence, on which the conviction is based is the evidence of the confession which was subsequently retracted (and which?) has been corroborated by the recoveries alluded to. To base a conviction upon this evidence both the confession and the recoveries must be beyond suspicion. In our opinion neither can be said to be free from suspicion. If we take the confession first, as already pointed out, the rule laid down by the High Court that a confession should be, unless there are exceptional reasons to the contrary, recorded in open Court and during Court hours, was disobeyed. It is our opinion that if there were exceptional reasons for the course taken by the police, they should have disclosed those reasons in evidence. Further the police could have gone to a First Class Magistrate at Chakwal or even to the First Class Magistrate who was only two miles away from the village at Bhaun. We are not told why the Second Class Tehsildar was chosen or why the confession should have been recorded in the peculiar surroundings of the munshi-khana of a Rest House. Further it has been pointed out by this High

Court on several occasions that it is necessary that a confessing accused should not be returned to the custody of the police. This rule has been laid down for very obvious and sound reasons. It is seen, therefore, that the confession itself is not beyond suspicion.

With regard to the recoveries, Mt. Karm Bhari, who cannot be said to be in any way in favour of Jahana, accused, in her evidence said that when the body of Nur Ahmad was discovered, a hatchet was lying near the same place and that the hatchet which was produced in Court was, as far as she could say, the same hatchet. This was elicited from this prosecution witness in cross-examination. It is perfectly true that this witness, called for the Crown, never said anything about the hatchet in the committing Magistrate's Court, but there she was not asked any question in cross-examination as to this. Mt. Bhag Bhari, the widow of Nur Ahmad, also said that a hatchet had been lying by the side of the dead body. This woman, if it be true that she had illicit relationship with Jahana, might possibly be prepared to favour him in her evidence. But the curious thing is that the next day the prosecution apparently had seen fit not only to get witnesses to deny this allegation that they had seen a hatchet on the spot, but also to deny that these two women were ever present at the time of the discovery of the dead body. (See the evidence of Mohammad Feroze, p. 16, line 25.) That these women were present when the body was discovered, is patent from the evidence of the constable who was prosecution witness No. 2. He says that Mt. Karm Bhari was present when the body was found. It appears to us that the mere fact that the Crown found it necessary to call this evidence of Mohammad Feroze, which is clearly false, to deny the allegations made by these two women who were also prosecution witnesses, throws considerable suspicion upon the bona fide nature of the prosecution case. Another witness Jiwan was put in the box the day after these women gave their evidence about the hatchet, and started his cross-examination by saying that there was no hatchet lying near the body. He was faced with the declaration he made before the committing Magistrate in which he did state that a hatchet was found lying a short distance from the body, and he agreed that the fact was that there

was a hatchet there. He goes on to say that the Sub-Inspector too had knowledge of the hatchet being there. This witness, we would say, had clearly been told that if he was asked any question about the hatchet, he should deny having seen it there. The recoveries, therefore, cannot be said to be free from suspicion.

Under the circumstances, it is impossible to say that the guilt of the accused is free from doubt. We must, therefore, set aside the conviction and sentence of death and direct that the accused be set at liberty.

P.R./D.S.

Conviction set aside.

A. I. R. 1937 Lahore 100

JAI LAL, J.

Kartar Singh and others — Decree-holders—Appellants.

v.

Khushi Mohammad—Judgment-debtor—Respondent.

Civil Ex. Second Appeal No. 515 of 1936, Decided on 13th October 1936, from order of Dist. Judge, Gujranwala, D/- 25th February 1936.

Civil P. C. (1908), S. 60 (as amended by Punjab Relief of Indebtedness Act) — Two houses belonging to *K* attached in execution of decree against him—Decree-holder alleging that one house was occupied by him and other was vacant—Parties arriving at compromise under which vacant house was to be released and other sold—*K*'s son objecting to sale on ground that house was gifted to him by his father and was occupied by him as his sole property—Objection and suit for declaration of title by son dismissed—On amendment of S. 60, *K* objecting to sale of other house as well—Case held not to be governed by S. 35, Punjab Relief of Indebtedness Act, on account of compromise between parties—That even if so governed, house in dispute was not exempt from sale not being occupied by *K* but by his son.

The effect of the amendment of S. 60, Civil P. C., by the Punjab Relief of Indebtedness Act, is that if a house is reserved for the personal occupation of judgment-debtor then it is saleable only if it has remained unoccupied for more than a year, otherwise only a house actually occupied by the judgment-debtor is exempt. [P 101 O 1]

Two houses belonging to *K* were attached in execution of decree against him. *K* objected to the sale of both the houses on the ground that he was an agriculturist and the houses were occupied as such. The decree-holder alleged that one house was occupied by *K* along with his son and mother and the other house was vacant. The parties arrived at a compromise under which the vacant house was to be released and the other

house was to be sold and the Court ordered accordingly. Objection by *K*'s son to attachment of the house on the ground that the house had been gifted to him by his father and was occupied by him as his sole property, and a suit for declaration of his title were dismissed. On amendment of S. 60, Civil P. C., by Punjab Relief of Indebtedness Act, during the execution proceedings the judgment-debtor raised an objection to sale of the other house as well:

Held: that S. 35, Punjab Relief of Indebtedness Act, did not govern the case on account of the compromise between the parties and it was not open to *K* to raise another objection to sale of the house after he had compromised with the decree-holder. That, even if S. 35 governed the case, the house in dispute was not exempt from sale as it was not occupied personally by the judgment-debtor but by his son. [P 101 C 1; 2]

Bodh Raj Sawhney—for Appellants.

Abdul Karim—for Respondent.

Judgment. — The undisputed facts of the case are as follows: The appellant decree-holder in execution of his money decree attached two houses belonging to the judgment-debtor Khushi Mohammad. Khushi Mohammad objected to the sale of both the houses on the ground that he was an agriculturist and the houses were occupied by him as such. The decree-holder made a statement that the judgment-debtor was residing in a house with his son and his mother and that the other house which is described to be the house next to dharamsala was vacant. He however objected to the release of both the houses. After some evidence had been led by the parties on the objection of the judgment-debtor, the decree-holder made a statement that the house near the dharamsala may be released but that the other house may be sold in execution of the decree. The judgment-debtor made a statement agreeing to the release of the house next to the dharamsala and then to the sale of the other house. He added that if his son be inconvenienced he would take proper steps himself. Thereupon the Court released the house next to the dharamsala and directed the sale of the other house. The son however raised an objection to the attachment and sale of this house on the ground that the same had been gifted to him by his father and was occupied by him as his sole property. This objection was disallowed and a suit was instituted by the son for a declaration of his title to this house. That suit also was dismissed.

The proceedings relating to the sale of this house were pending after the dismissal of the suit when the Punjab Relief

of Indebtedness Act was passed and S. 60, Civil P. C., under which the previous objection of the judgment-debtor Khushi Mohammad had been made and compromised between the parties was amended by the substitution for the words 'occupied by him' by 'not let out on rent or lent to others or left vacant for a period of a year or more.' When this Act was passed the judgment-debtor raised an objection to the sale of the other house also. This objection was disallowed by the trial Court but on appeal the learned District Judge has allowed it holding that by virtue of the amendment of S. 60, Civil P. C., the Court was not competent to sell the second house as well. The decree-holder has appealed to this Court. Now, in the first instance, it was not open to the judgment-debtor to raise another objection to the sale of house after he had compromised the matter with the decree-holder as appears from the order of the executing Court releasing this house on statements made by the decree-holder and the judgment-debtor agreeing to the release of the house next to the dharamsala and to the sale of the house in dispute. Further I am of the opinion that even if provisions of S. 35, Punjab Relief of Indebtedness Act, governed the sale of the house and therefore the previous compromise between the parties became ineffectual the section did not exempt the house in dispute from sale. By virtue of the amendment a house belonging to an agriculturist is exempt from attachment unless it is let out on rent or has been lent to others or has been left vacant for a period of a year or more. This means that if a house is reserved for the personal occupation of the judgment-debtor then it is saleable only if it has remained unoccupied for more than a year, otherwise only a house actually occupied by the judgment-debtor is exempt.

The house in dispute is not occupied personally by the judgment-debtor. It is occupied by his son who claimed it adversely to the judgment-debtor though his objection has been disallowed. The house therefore is not occupied by the judgment-debtor but must be deemed to have been lent by him to his son for occupation and therefore it is saleable. I hold therefore that S. 35, Punjab Relief of Indebtedness Act, does not govern the present case on account of the compromise between the parties; if it does, then the house in dis-

pute is not exempt from sale as it is not occupied by the judgment-debtor but by his son. I accept this appeal, set aside the order of the District Judge and restore that of the executing Court with costs throughout.

R.M./R.K.

Appeal allowed.

A. I. R. 1937 Lahore 101

DIN MOHAMMAD, J.

Mirza Mohammad Ashraf—Petitioner.
v.

Emperor and others—Opposite Parties.

Criminal Revn. No. 933 of 1936, Decided on 24th September 1936, from order of Sess. Judge, Amritsar, D/- 26th May 1936.

(a) Criminal P. C. (1898), Ss. 142, 133—S. 142 is controlled in its effects by S. 133—'Serious injury' or 'imminent danger' contemplated by S. 142 refers to injury or danger emanating from those things themselves which are specified in S. 133—Order under S. 142 can be passed only if injury or danger specified in S. 133 is apprehended and not otherwise.

Section 142 is limited in its scope. The serious injury or the imminent danger contemplated by S. 142 refers to the injury or danger emanating from those things themselves which are specified in S. 133. An order under S. 142 can therefore be passed only if an injury or danger specified in S. 133 is apprehended and not otherwise; where such 'serious injury' or 'imminent danger' is non-existent an order under S. 142 is not justified.

[P 102 C 1, 2]

(b) Criminal P. C. (1898), S. 133—S. 133 does not govern cases where imminent breach of peace is apprehended.

Section 133 is confined to certain matters which are specifically mentioned therein and cannot be brought into play to govern or control other matters which are quite extraneous to it and it is nowhere contemplated by the section that it would govern cases where an imminent breach of peace is apprehended.

[P 102 C 1, 2]

Bashir Ahmad—for Petitioner.

Nazir Hussain—for the Crown.

Order.—A case under S. 133, Criminal P. C., was pending in the Court of the Magistrate, First Class, Batala, and during the pendency of that case the Magistrate passed an order under S. 142, Criminal P. C., in the following terms :

All the four entrances, at present closed, on the four sides of the Reti Chhalla, be opened and left for public use without let or hindrance of any description whatsoever, the entrances on the north and west, being temporarily closed by means of wire and stakes, to be opened to-day, by the removal of the wire, and the stakes to be removed within seven days; the entrances on the south and

east being closed by means of bricks are to be opened within seven days.

This order appears to have been necessitated by an apprehension of the breach of peace on account of the obstruction caused by the persons proceeded against in a public way. Mirza Mohammad Ashraf, Nazim Jaidad Sadr Anjuman Ahmadia, Gadian, presented a petition to the Sessions Judge, Gurdaspur, objecting to the legality of this order. The petition was, under the orders of this Court, transferred to the Court of Session at Amritsar, and the Sessions Judge, agreeing with the Magistrate, has dismissed it. After hearing counsel on both sides, I am of opinion that the order of the Magistrate is illegal and cannot therefore be maintained. The material portion of sub-s. (1) of S. 142, Criminal P. C., reads as follows :

If a Magistrate making an order under S. 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

It would thus appear that S. 142, Criminal P. C., is not an independent section, but is controlled in its effects by S. 133, Criminal P. C. Now, a reference to S. 133, Criminal P. C., shows that the section is confined to certain matters which are specifically mentioned therein and cannot be brought into play to govern or control other matters which are quite extraneous to it. The matters dealt with by this section are as follows :

(a) Unlawful obstruction or nuisance in any way, river or channel, or public place; (b) The conduct of any trade or occupation which is injurious to the health or physical comfort of the community ; (c) The construction of any building or the disposal of any substance, as is likely to occasion conflagration or explosion ; (d) The removal, repair or support of any building, tent or structure, or the removal or support of any tree, which is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by ; (e) The fencing of any tank, wall or excavation adjacent to any public way or public place so as to prevent danger arising to the public ; and (f) the destruction, confining or disposal otherwise of any dangerous animal.

It would be obvious from this analysis of S. 133 that it is nowhere contemplated

by the section that it would govern cases where an imminent breach of the peace is apprehended. The "serious injury" or the "imminent danger" contemplated by S. 142, Criminal P. C., refers to the injury or danger emanating from those things themselves which are specified in S. 133 and consequently S. 142 is limited in its scope. An order under S. 142 could therefore be passed only if an injury or danger specified in S. 133, Criminal P. C., was apprehended and not otherwise. Such "serious injury" or "imminent danger" is non-existent in this case. I am accordingly constrained to hold that the order was ultra vires of the Magistrate and I have no option but to set it aside.

R.M./V.V.

Order set aside.

A. I. R. 1937 Lahore 102

TEK CHAND AND DALIP SINGH, JJ.

Faqir Muhammad — Plaintiff — Petitioner.

v.

Municipal Committee, Phillaur — Defendant—Opposite Party.

Civil Revn. No. 148 of 1936, Decided on 8th June 1936, from decree of Senior Sub-Judge, Jullundur, D/- 7th November 1935.

(a) Punjab Municipal Act (3 of 1911), S. 49—Applicability—S. 49 does not apply to suit against Municipal Committee for recovery of sum alleged to be due for work done on contract for Committee—Notice under S. 49 is not necessary and plaintiff cannot deduct period of one month mentioned therein for purposes of limitation — Mere non-payment for work done in pursuance of contract is not legal omission.

A mere non-payment by Municipal Committee for work done in pursuance of a contract does not amount to an illegal omission and as such S. 49 does not apply to a suit for recovery of a sum of money alleged to be due for work done on contract for the Municipal Committee and which has not been paid for. A notice under S. 49 to the Municipal Committee is not, therefore, necessary before such a suit is brought and the plaintiff is not entitled to deduct the period of one month mentioned in S. 49 for purposes of limitation : *A I R 1934 P C 96, Foll.* [P 104 C 1,2]

(b) Words and Phrases—Illegal—'Illegal' is not synonymous with 'unlawful.'

The word 'illegal' is not synonymous with the word 'unlawful' though it may be sometimes used in that sense. [P 104 C 2]

Muhammad Sharif and Mela Ram—for Petitioner.

Achhru Ram—for Opposite Party.

Order of Reference

Tek Chand, J. — This petition for revision raises an important question of law on which so far as I am aware, there is no decision of this Court published in the authorized or unauthorized reports and I think that the case should be decided by a larger Bench.

The relevant facts are that on 29th August 1934, the plaintiff instituted a suit against the Municipal Committee of Phillaur for Rs. 443-15-3 alleged to be due for work done on contract for the Municipal Committee on various dates in 1930 and 1931, and not paid for. The Municipal Committee pleaded inter alia that the suit was barred by time. It is common ground between the parties that the limitation for a suit of this kind is three years from the date when the work was done. The claim for two of the items in suit, i. e., items 5 and 6 for work done on 24th September 1931, and amounting to Rs. 19 was clearly within time and a decree for this sum with interest has been passed. The Municipal Committee has accepted the decision so far as it relates to these items and they are no longer in dispute.

With regard to the other four items, the plaintiff contends that he had given a notice under S. 49, Municipal Act, to the Municipal Committee and, therefore, he is entitled to exclude the period of one month mentioned therein. Before me it was admitted by counsel for the petitioner that even if this period of one month were excluded, as contended by the plaintiff, items 3 and 4 for Rs. 11-3-3, dated 28th November 1930, and Rs. 7 dated 27th April 1931, would still be barred. He has, therefore, withdrawn the claim in respect of these two items.

The dispute, therefore, relates to items 1 and 2, dated 30th July 1931, for Rupees 284-12-0 and Rs. 65-11-0, respectively. The Courts below have concurrently held that S. 49, Municipal Act, does not apply to suits for recovery of amount due upon a breach of the contract alleged to be committed by the Municipal Committee and, therefore, the plaintiff is not entitled to a deduction of one month. As already stated no decision of this Court or the Punjab Chief Court bearing on the point has been brought to my notice. There are, however, a number of cases decided by the other Courts in which similar provisions in the Municipal or Local Boards Acts of those Provinces have been held to be

inapplicable to suits for recovery of amounts alleged to be due on breach of contract. Counsel for the petitioner contends that these decisions have become obsolete in view of the ruling of their Lordships of the Privy Council in 51 Bom 725,¹ where their Lordships had to consider the provisions of S. 80, Civil P. C., the wording of which is similar to that of S. 49, Punjab Municipal Act. The Bombay High Court, however, has held in 57 Bom 67,² that the Privy Council decision above referred to does not affect the soundness of the previous decisions of that Court and the other Courts relating to the provisions of Local Acts analogous to S. 49, Punjab Municipal Act. The Sind Judicial Commissioner in A I R 1930 Sind 209,³ also has taken the same view. Counsel for the plaintiff has referred me to decisions in which a contrary view has been taken. The question is by no means free from difficulty and is one of general importance, and I think should be decided by a larger Bench. I accordingly refer the case to a Division Bench. A very early date will be fixed.

Judgment.

Dalip Singh, J.—The facts of this case are sufficiently given in the referring order, dated 24th April 1936, and need not be recapitulated here. The short question to be decided by the Division Bench is whether in the facts and circumstances of this case a notice under S. 49, Punjab Municipal Act, was necessary to be given to the Municipal Committee before the suit could be brought. It follows, and the learned counsel on either side do not contest this, that if the answer is in the negative, the suit would be barred by limitation as held by the trial Court with regard to the two items now in dispute, which are mentioned in the referring order and which, including interest, come to Rs. 308 and Rs. 100-11-0 making a total of Rs. 408-11-0.

It seems to me that the matter is covered by the Privy Council ruling reported in 61 Cal 470.⁴ As I understand that

1. Bhag Chand v. Secy. of State, A I R 1927 P C 176=104 IC 257=54 IA 338=51 Bom 725(PC).
2. District Local Board of Poona v. Vishnu Raghoba, A I R 1933 Bom 164=142 IC 625=57 Bom 67=35 Bom L R 55.
3. Larkana Municipality v. Atmaram Hashmatrai, A I R 1930 Sind 209=123 IC 237=24 S L R 439.
4. Revati Mohan Das v. Jotindra Mohan Ghosh, A I R 1934 P C 96=148 IC 482=61 I A 171=61 Cal 470 (PC).

ruling their Lordships of the Privy Council laid down that in suits brought against a public officer under the Civil Procedure Code, a notice under S. 80 might be necessary in suits based on contracts. The decision overrules all the previous rulings that in suits based on a contract no notice was so necessary. Their Lordships of the Privy Council, however, also laid down that notice was not always necessary in all suits based on a breach of contract.

We have, therefore, to consider whether this suit, which is a suit based on a breach of contract, demanded a notice to the Municipality under S. 49, Municipal Act, whose wording is similar to that of S. 80 for purposes of the point in issue. Before their Lordships of the Privy Council it was contended that non-payment of a mortgage debt due was sufficient to bring S. 80, Civil P. C., into play. Their Lordships held, however, that non-payment was not "an act purporting to be done by the manager in his official capacity." They pointed out that under the General Clauses Act, 1897, S. 3, an "act" might include an "illegal omission," but they went on to state that there was no "illegal omission" in the case before them as the mortgage imposed no personal liability on the manager, and if payment was not made the mortgagee could realise his dues by sale. The fact that the manager had an option to pay the debt and save the property no doubt conferred a right on him, but failure to exercise the option was not in any sense a breach of duty. Their Lordships held further that it was also difficult to see how mere omission to pay either interest or principal could be an act purporting to be done by the manager in his official capacity. The same reasoning appears to me to apply to the facts of the present suit. The learned counsel for the petitioner in the first instance conceded that this was a suit based entirely upon non-payment for work done in pursuance of a contract. He subsequently resiled from this position and contended that as the plaintiff had made a demand, and no payment had followed the demand, there was, therefore, a refusal to pay the sum due. It is unnecessary to notice his latter contention at any length except to state firstly, that it is not supported by the plaint, and, secondly, that the refusal referred to was subsequent to the expiry of limitation, the sum having become due on 30th July 1931, and the

refusal having taken place on 15th August 1934, more than three years after the date when the sum became payable. Obviously this can make no difference.

It, therefore, becomes unnecessary to decide what might have been the position in case the suit had been based on a refusal to pay the sum due made within the expiry of limitation, or to notice the arguments advanced by the learned counsel for the respondent that the words in S. 49 draw a distinction between the official capacity of the Municipal Committee and its other capacities and that the correct interpretation is that the Municipality acting in its official capacity means the Municipality acting under powers statutorily conferred or duties statutorily imposed on it and not to mere acts of the Municipality in pursuance of contracts entered into by it under the powers conferred under S. 18. This contention may not be without force, but I do not express any final opinion on it. It appears to me that the case in question is covered by the decision of their Lordships that a mere non-payment is not an "illegal omission." The word "illegal" is defined in Byrne's Law Dictionary as follows: "An act is illegal when it is one which the law directly forbids." It is not synonymous with the word "unlawful" though it may be sometime used in that sense. In this particular case it would appear to me that the word is used in the narrower sense and, therefore, a mere non-payment cannot be said to be an illegal omission.

I would, therefore, hold that in the circumstances no notice was necessary and the suit was rightly held barred by limitation. I would, therefore, dismiss the petition with costs.

Tek Chand, J.—I agree.

R.M./A.L.

Petition dismissed.

A. I. R. 1937 Lahore 104

DIN MOHAMMAD, J.

Nur Ilahi—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 427 of 1936, Decided on 10th June 1936, from order of Dist. Magistrate, Attock, D/-14th January 1936.

Criminal Trial — Sentence — Sentence of whipping cannot be given to person sentenced to more than five years' rigorous imprisonment though sentences aggregating more than five years' rigorous imprisonment are passed in different cases.

Section 393, Criminal P. C., clearly lays down that a person who is sentenced to imprisonment for more than five years shall not be punishable with stripes and the section applies even if the sentences aggregating more than five years' rigorous imprisonment are passed in different cases : *A I R 1930 Rang 138 and 1 Mad 56, Foll.* [P 106 C 1]

Des Raj Sawhney—for the Crown.

Judgment.—This judgment will dispose of Criminal Appeals Nos. 427, 480 and 481 of 1936. They have been preferred through jail by Nur Ilahi who has been convicted in three different cases by the District Magistrate of Attock at Campbellpur. Appeal No. 427 relates to a case under S. 307, I. P. C. Appeal No. 480 relates to a case under S. 457, I. P. C., and Appeal No. 481 relates to a case under S. 19 (f), Arms Act. They are all disposed of together as practically they arise out of the same transaction.

The shop of one Mohammad Yusaf was broken into on the night intervening 5th and 6th January 1935 and a Singer sewing machine with some other articles was removed. He made a report to the police on the morning of the 6th January and, in the course of investigation on the 7th January, Head Constable Mohammad Zaman was informed that the stolen machine was with one Nur Ilahi, resident of the village. He accordingly went to the shop of Mohsan Din Mochi where Nur Ilahi was said to be sitting at the time. The Head Constable was accompanied by Saidullah Jan, Fazl Qadir, Lambardar, Faqir Mohammad, Chaukidar, and some other persons. On arrival at the shop, as soon as the Head Constable accosted Nur Ilahi, he attacked him with a knife aiming a blow at his chest. The Head Constable parried the blow but his left arm which interposed was severely wounded. Nur Ilahi's companion, Rasul Khan, then aimed at the Head Constable with a spear which struck Saidullah Jan who interposed at the time. Fazal Qadir was also injured in his attempt to snatch away the knife from Nur Ilahi and both Nur Ilahi and Rasul Khan also received injuries in the scuffle that ensued. On the morning of the 8th, Mohammad Iqbal Khan, Tahsildar, was asked to take part in the investigation, and in his presence the

stolen machine was recovered from a niche in the house of Nur Ilahi. As stated above a case under S. 307 was started against Nur Ilahi for committing a murderous assault on Mohammad Zaman, and a case under S. 457 for breaking into the house of Mohammad Yusaf and committing the theft of a sewing machine and a case under S. 19 (f), Arms Act for illegal possession of a dagger. He has been sentenced to seven years' rigorous imprisonment including three months' solitary confinement under S. 307 and, in addition, he has been required to furnish a bond under S. 106, Criminal P. C., read with S. 120, to keep the peace and be of good behaviour for a period of three years on the expiration of his sentence. Under S. 457 he has been ordered 30 stripes and under the Arms Act he has been awarded two years' rigorous imprisonment which will not run concurrently with his sentence under S. 307, I. P. C.

I am constrained to remark that the case has been very perfunctorily conducted by the Prosecuting Inspector and very carelessly tried by the District Magistrate with the result that not only several circumstances requiring explanation were not brought on the record but also illegal sentences were passed. While going through the statement of Dr. Sucha Singh, P. W., I found that Fazal Qadar, Nur Ilahi and Rasul Khan had also been medically examined along with Mohammad Zaman and Saidullah Jan. Fazal Qadar had two incised wounds on his hands, Nur Ilahi had 23 contusions and abrasions and Rasul Khan had four contusions and one abrasion. In the first instance the injuries of Nur Ilahi and Rasul Khan were not taken in detail by the District Magistrate and even no document was brought on the record which could have proved the details of the injuries. Secondly, there is no reference to the injuries of Fazal Qadar, Nur Ilahi and Rasul Khan in the statements of the witnesses recorded at the trial. I have not been able to find even any mention of Fazal Qadar in the statements of Mohammad Zaman, Saidullah Jan or Mohsan Din. It is very commendable that the trial of a criminal case be expedited, but this should not be done at the expense of law and procedure. It was incumbent on the prosecution to explain the injuries on the persons of Nur Ilahi and Rasul Khan so as to satisfy any Court going through the record that they were

not inconsistent with the story of the prosecution. I had to study the zimnis to satisfy myself whether no injustice had been done, as the presence of injuries on Fazal Qadar, Nur Ilahi and Rasul Khan, which had not even been touched upon in the evidence, raised a suspicion in my mind as to the truth of the case as put forward by the prosecution.

As regards the sentences, the District Magistrate imposed an aggregate sentence of 9 years' rigorous imprisonment on Nur Ilahi in two different cases, and before ordering stripes under S. 457, I. P. C., he should have satisfied himself whether he could pass that order under the law. It was also the duty of the Prosecuting Inspector to have advised the Court on the legal aspect of the case, but it appears that he did not realize his responsibility and failed in his duty that he owed to the Court. S. 393, Criminal P. C., clearly lays down that a person, who is sentenced to imprisonment for more than five years, shall not be punishable with stripes and there is ample authority for the proposition that this section applies even if the sentences aggregating more than five years' rigorous imprisonment are passed in different cases. I would draw the attention of the District Magistrate to 7 Rang 769,¹ which has followed with approval 1 Mad 56.² The Public Prosecutor has not placed before me any amendment of this section specially made for the Punjab, and in these circumstances I take it that the law as it stands applies. It was, therefore, quite illegal on the part of the District Magistrate to have ordered stripes in the circumstances explained above.

I am satisfied on the merits that the convictions must be maintained, but with a view to legalize the sentences passed on the appellant I shall have to interfere with them. I accordingly, reduce the sentence of seven years' rigorous imprisonment awarded under S. 307, I. P. C., to four years' rigorous imprisonment and the sentence of two years' rigorous imprisonment awarded under the Arms Act to six months' rigorous imprisonment and confirm the sentence of 30 stripes awarded under S. 457, I. P. C. I may have set aside the sentence of whipping in order to maintain the other

sentences, but I have interfered with the sentences of imprisonment as I am convinced that the sentences are excessive. The order of solitary confinement and the order under S. 106, Criminal P. C., are cancelled. With this modification I dismiss these appeals.

K.B./V.V.

Sentence reduced.

A. I. R. 1937 Lahore 106

ADDISON AND DIN MOHAMMAD, JJ.

Lal Chand Mehra and another —
Petitioners—Appellants.

v.

*Local Committee of Management, Gurdwaras, Amritsar, Objector and others —*Respondents.

First Appeal No. 126 of 1936, Decided on 27th October 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 25th November 1936.

(a) Will — Construction — Will appointing trustees specifically for collection of debts—Will giving them power to sell property given in dharmarth if necessary and spend sale money in dharmarth—Trustees are not empowered to manage dharmarth property.

Where a will appoints trustees specifically for collection of debts, due on mortgages and otherwise, and further authorizes them to sell the property, given in dharmarth, and spend the sale money in dharmarth, the will does not give trustees power to manage dharmarth property.

[P 108 C 1]

(b) Trust — Creation of — Trust indefinite and by way of dharmarth—Trust is void.

A trust, if it is indefinite and by way of dharmarth, cannot be enforced and is void.

[P 108 C 1]

(c) Punjab Sikh Gurdwaras Act (8 of 1925), S. 10—Claim under S. 10 must be personal.

A claim under S. 10 must be a personal claim and not a claim by a trustee.

[P 108 C 1]

(d) Punjab Sikh Gurdwaras Act (8 of 1925), S. 27—Trust entirely in favour of dharamsala — The property is of dharamsala and trustees can claim order under S. 27 as to who should administer the trust.

Where a trust is entirely in favour of a dharamsala with respect to certain property, the property is of the dharamsala and once there is a notification declaring a Gurdwara to be a Sikh Gurdwara, the trustees come in under S. 27 of the Act and can claim an order as to who should administer the trust.

[P 108 C 1, 2]

Kharak Singh and L. C. Mehra (in person)—for Appellants.

Charan Singh—for Respondents.

Addison, J.—A claim under S. 10, Sikh Gurdwaras Act, was put in by Mr. Lal

1. *Nga Nyi Gyi v. Emperor*, A I R 1930 Rang 138=1930 Cr C 305=120 I C 697=31 Cr L J 176=7 Rang 769.

2. High Court Proceedings, 19th April 1876, (1876) 1 Mad 56=2 Weir 448.

Chand Mehra, Advocate. He prayed that it be declared that the Dharamsala Mai Bhani is not a Sikh Gurdwara but a private Dharamsala and that other property entered in Sch. 2 was the private property of Dr. Gurdit Singh for which he had created a trust for charitable purposes. This petition is headed "Lal Chand Mehra v. The Shromani Gurdwara Prabandhak Committee" and is in English. At the place for signature, the signature of the petitioner is also given in English, but below the signature of Lal Chand Mehra comes another signature in Urdu, that of Autar Singh, without any indication that another signature was to be made there. In the petition no claim was made on behalf of Autar Singh and at the place where he signed there was no description showing that there was another petitioner, though such a description was below Mr. Lal Chand's signature. The signature is a short scrawl in Urdu.

It is clear from the proceedings before the Sikh Gurdwaras Tribunal that Lal Chand was treated as the sole petitioner though in the typewritten copies of the proceedings, on 28th June, it is written that Sardar Kharak Singh and Mr. Nihal Chand, Advocates for "petitioners", were present. Neither Mr. Nihal Chand nor Sardar Kharak Singh held a power-of-attorney on behalf of Autar Singh so that the plural 'petitioners' was obviously put in by mistake. It is not clear when this signature of Autar Singh was added as it could have been done at any time. It was certainly there before the petition for review was put in. This petition for review was dismissed by the Sikh Gurdwaras Tribunal.

Mr. Lal Chand claimed a right, title and interest in three properties under S. 10 of the Act. The first was an area of 18 kanals 4 marlas containing a kotha at Kot Said Mahmud. The second was an area of 71 kanals 18 marlas of land at Dhapai. The third was a building at Amritsar known as Dharamsala Mai Bhani or Bibi Bhani. It may be here mentioned that there was a petition under S. 7 of the Act which was duly gazetted and there was no petition under S. 8, claiming that the institution was not a Sikh Gurdwara. This means that under S. 9 of the Act there should have been a gazette notification to the effect that the Gurdwara was a Sikh Gurdwara. Apparently this has not yet issued. A petition under S. 10 can only

be to the effect that the property mentioned is the private property of the petitioner or that he has a right, title or interest in it.

Mr. Lal Chand claimed a right, title or interest by reason of a will dated 30th June 1920. It was executed shortly before Dr. Gurdit Singh died. The petitioner claimed as trustee under this will and that was the only claim which he put forward. The Tribunal has held that the building known as Dharamsala Mai Bhani is not disposed of by the will.

As regards the area of 18 kanals 4 marlas the Tribunal gave Mr. Lal Chand a declaration that he as trustee could manage and sell it and apply the proceeds to charity and that as regards the plot of land measuring 71 kanals 18 marlas he could sell it as trustee and apply the proceeds to meet the expenses of the Dharamsala Bibi Bhani in accordance with the provisions of the will. Against this decision Mr. Lal Chand and Autar Singh have preferred one appeal and the Local Gurdwara Committee, another appeal.

The will is the only document on which the claim of Mr. Lal Chand is founded. We agree that there is nothing in the will giving any right either to Mr. Lal Chand or Autar Singh with respect to the Dharamsala proper. With respect to the first area of 18 kanals 4 marlas, the provisions of the will are as follows :

I have given the kothi with the compound and the land attached thereto by way of dharmarth; the trustees are entitled to sell the same if they consider that proper and to spend the sale money in dharmarth.

Upto this stage in the will there is no mention of any trustees. Two trustees, however, are mentioned later on in the following words :

As regards the amounts in connection with mortgage deeds and lands due to me from debtors I appoint two persons, Mr. Lal Chand, Barrister, and Jetha Ram alias Jetha Mal, who is my relative, as trustees, and empower them to realize the abovementioned amounts from the debtors through the Courts or otherwise. The money will be spent as under.

Then follows the details as to how this money is to be spent. The will then proceeds :

Out of the remaining income they will start a langar (free kitchen) at the dharamsala in my name. The langar however must remain under the management of the Pujari unless he is dishonest.

It is arguable whether these trustees appointed for the collection of debts, due

on mortgages and otherwise, were specifically empowered to deal with the immoveable property which was given in dharmarth as their appointment appears to have been specifically made for the purpose of collection of debts. At the same time it is said earlier in the will, before the trustees were appointed, that the trustees could sell the area of 18 kanals 4 marlas if they considered that proper and to spend the sale money in dharmarth. Even this clause, however, does not give them power to manage the property: it only gives them power to sell. This question, however, need not be further considered as the trust is void, if it exists, by reason of indefiniteness. It has been held by the Privy Council and by all the Courts that a trust by way of dharmarth cannot be enforced. It follows that the claim of Mr. Lal Chand in respect of this area of 18 kanals 4 marlas must be dismissed as he has no right, title or interest in it. It is not for us to find in these proceedings who is the person interested and in fact there is no material before us to come to any such conclusion.

This leaves the area of 71 kanals 18 marlas at Dhapai. This is given by the will to the dharamsala and it is expressly ordered that the property shall be mutated in favour of the dharamsala. All that the trustees were allowed to do in connection with this property was to sell it if they saw that the dharamsala was not deriving any benefit from the land. Mahant Asa Singh, whose successor Autar Singh is, was given power to get the land mutated in favour of the dharamsala and it was stated that the property was dedicated to the dharamsala as long as it existed. Here again, therefore, the trustees had no power of management though they were empowered to sell the land if no income could be derived from it. There is no evidence that no income can be derived from it, so that the trustees cannot be said to have any connection with the land at present.

Apart from that, we are clear that such a claim does not lie under S. 10, Sikh Gurdwaras Act. A claim under that section must be a personal claim and not a claim by a trustee. It has already been shown that the property was dedicated to the dharamsala and it was ordered that it should be entered in the name of the dharamsala. It is therefore the property

of the dharamsala. Provision is made for trustees in S. 27 of the Act. Once there has been a notification, declaring a Gurdwara to be a Sikh Gurdwara, the trustees come in under the provisions of S. 27, Sikh Gurdwaras Act, and can claim an order as to who should administer the trust. As the trust is entirely in favour of the dharamsala with respect to the 71 kanals 18 marlas of land, it would seem to follow under the provisions of S. 27 (2) of the Act that the Tribunal would have to order that the Committee of the Gurdwara should manage the property but this question does not arise at the present time.

With respect to the appellant Autar Singh it was contended that his claim had not been disposed of. As already shown he made no claim though it was stated in para. 8 of Mr. Lal Chand's petition that after Bhai Asa Singh's death, which took place in 1926, his chela Bhai Autar Singh was appointed in his place to discharge the same duties as his Guru. There was no claim by Autar Singh, however, that the dharamsala was his. The only claim was by Mr. Lal Chand Mehra that it was a private dharamsala of which he was the trustee. As already held, however, the will gives him no power or control over the dharamsala. Nor is there any evidence that the dharamsala belongs to Autar Singh, who is only the Mahant at best.

For the reasons given we dismiss Appeal No. 126 of 1936, with costs and accepting Appeal No. 136 of 1936, with costs throughout, we set aside the decree of the Tribunal and dismiss the claim petition put in under S. 10 of the Act.

V.B.B./A.L. *Order accordingly.*

A. I. R. 1937 Lahore 108

ABDUL RASHID, J.

Sardari Lal—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1006 of 1936, Decided on 9th November 1936, from order of Addl. Sessions Judge, Gujranwala, D/- 31st July 1936.

Penal Code (1860), S. 100 — Squeezing of testicles can result in death—Accused stabbing deceased as result of latter squeezing and pressing hard his testicles — Case of accused falls under S. 100.

Squeezing of testicles can result in death. Where during a quarrel between the accused and the deceased, the latter catches hold of the testicles of the accused and presses them hard as a result of which the accused loses his self control and strikes the deceased two blows with a knife lying near during the quarrel, his case falls under S. 100 inasmuch as it can be said that the accused had apprehension of death or grievous hurt while his testicles were being pressed by the deceased : 19 *Mad* 356, *Rel. on.* [P 110 C 1]

Bhagat Ram Puri and Charanjit Lal
—for Appellant.

Basant Krishan for *Gort. Advocate*—
for the Crown.

Judgment.—The appellant, Sardari Lal, has been sentenced to seven years' rigorous imprisonment under the provisions of S. 304, part 1, I. P. C. He has preferred an appeal to this Court through Mr. B. R. Puri. Sardari Lal, appellant, was an uncle of Chaman Lal, deceased. A number of disputes had arisen between Sardari Lal on the one side and Chaman Lal, deceased, on the other. Shortly before the present occurrence, which took place on the evening of 13th May 1936, Sardari Lal had filed a criminal complaint under Ss. 451 and 379, I. P. C. against Chaman Lal and others. The next date of hearing in this case was 14th May 1936. The case for the prosecution is that on the evening of 13th May, Tara Chand, Chaman Lal deceased, Sardari Lal, witness, Charan Das, Ram Lal and Imam Shah were sitting near a well in the Mandi of Wazirabad when Ganda Mal, barber, came there from the shop of Sardari Lal, appellant. He told these persons that the appellant had got a knife prepared in order to attack them. Tara Chand replied that they were not afraid of the appellant as every one was destined to die one day. Sardari Lal, appellant, overheard this talk from some distance, rushed to the place where the complainant's party was sitting and immediately attacked Chaman Lal. Chaman Lal was stabbed and ultimately died as a result of an injury which had pierced his lung. Some injuries were also caused to Ram Lal and Charan Das who tried to rescue the deceased. Imam Shah managed to snatch away the knife from the appellant. Tara Chand went to the police-station and lodged the first information report at 7 p. m.

The appellant put forward a rival version in Court. He stated that on the day of occurrence Lachhman Das and Mulkh

Raj came to him and told him that Tara Chand and Chaman Lal desired him to withdraw the criminal complaint that he had filed against them. He told Lachhman Das and Mulkh Raj that he was not prepared to accede to their wishes. In the evening Tara Chand came there with a similar request and the appellant again refused to withdraw the criminal complaint. This led to an altercation between Tara Chand and the appellant. Thereupon Tara Chand hit the appellant with a doi and then both of them started to grapple with each other. Meanwhile Chaman Lal came running towards him armed with a knife. Chaman Lal fell down and the knife dropped out of his hand. The appellant picked up the knife. Chaman Lal, thereupon, caught hold of his testicles and pressed them hard. He lost control of himself and struck the deceased two blows with the knife that he had picked up. As the appellant and the deceased are nearly related to each other several witnesses for the prosecution appear to have been won over. The fact, however, remains that during the course of the committal proceedings and at the trial several of the prosecution witnesses supported the defence version of the incident either wholly or partially.

The learned Sessions Judge has discovered several unsatisfactory features in the evidence of the prosecution witnesses. After a great deal of hesitation, however, he has placed reliance on the statements of Charan Das, Ram Lal and Imam Shah. Charan Das no doubt supported the prosecution case in his examination-in-chief at the trial. In cross-examination, however, he stated that he went to the spot on hearing the shrieks of the accused. Chaman Lal, deceased, was grappling with the accused and was holding his testicles. He was thus bending down when he was struck by the accused. The incident took place at a distance of two or three kadams from the shop of Sardari Lal, accused. The admissions made by this witness are very significant as he appears to be a disinterested person. There is no indication on the record that he is related to the parties or that he is inclined to favour the accused for any other reason. The learned Sessions Judge has observed in his judgment that so far as Ram Lal is concerned he has made contradictory statements regarding the origin of the fight. In the Court of the committing Magis-

trate, he supported the version of facts given in the first information report while in the Court of the Sessions Judge he supported the defence version to a certain extent. The statement of Imam Shah is also open to the same objections as that of Ram Lal.

After examining the entire evidence on the record, I am of the opinion that Charan Das is the only prosecution witness on whom any reliance can be placed in this case. His evidence establishes that the appellant was screaming while his testicles were being pressed by the deceased, and that it was after he had started screaming that he stabbed Chaman Lal deceased. The learned Sessions Judge has made the following observation in his judgment :

In these circumstances and specially because the prosecution witnesses have shown extreme unwillingness to disclose the manner in which the fight originated, I feel I am justified in concluding that the accused had some right of private defence which in killing the deceased he has certainly considerably exceeded. There is nothing to show that he had any apprehension of death or grievous hurt and consequently his case cannot by any stretch of imagination fall under S. 100, I. P. C.

Squeezing of testicles can result in death. A case of this type is reported in 19 Mad 356.¹ It cannot, therefore, be said that the appellant had no apprehension of death or grievous hurt while his testicles were being pressed by the deceased. For the reasons given above I accept this appeal and acquit the appellant.

R.M./D.S. *Appeal allowed.*

1. Queen Empress v. Kalyani, (1896) 19 Mad 356=1 Weir 313.

A. I. R. 1937 Lahore 110

ADDISON AND DIN MOHAMMAD, JJ.

Fateh Din and others — Plaintiffs — Appellants.

v.

Mt. Hakim Bibi and others—Defendants — Respondents.

Second Appeal No. 132 of 1936, Decided on 3rd November 1936, from decree of Dist. Judge, Gujranwala, D/- 4th November 1935.

Custom (Punjab) — Succession — Arains of Wazirabad Tahsil, Gujranwala District — Daughter and resident son-in-law (*khanadamad*) are entitled to succeed on death of daughter's father without male issue.

The essence of the custom prevailing among the Arains of the Wazirabad Tahsil of the Gujranwala District, to the effect that if a daughter along with her husband lives with her father, the latter living as a resident son-in-law (*khanadamad*), till his death, she or he is entitled to inherit if there is no son and the father has gifted to either of them his property by written deed, is that a daughter and a resident son-in-law in the Tahsil are entitled to succeed on the death of the daughter's father. The provision about a deed of gift or written will is only recommendatory and not mandatory. When custom first started there were no written deeds in the Punjab and that is a refinement obviously added later : *A I R 1935 P C 132 and 31 P R 1895, Rel. on.*

[P 110 C 2 ; P 111 C 1]

Manohar Lal Mehra for *Mohammad Alam*—for Appellants.

Mukand Lal Puri and *Manohar Lal*—for Respondents.

Addison, J.—This suit was brought by the reversioners of Sher Mohammad, an Arain of village Sodhra, in the Wazirabad Tahsil of the Gujranwala District, for a declaration that a gift made by the widows of Sher Mohammad to his daughter Mt. Hakim Bibi should not affect their reversionary rights after the death of the widows. The trial Court held that there was no doubt that the husband of Mt. Hakim Bibi had been established as a *khanadamad* and that therefore he or she could have succeeded to his property if he had made a gift in his lifetime. As he had not done so, the suit was decreed. Mt. Hakim Bibi appealed against this decision to the District Judge. He held that the gift was valid and, accepting the appeal, dismissed the suit. Against this decision the collaterals have preferred this second appeal.

In Answer 48 of the Code of Tribal Custom of the Gujranwala District, compiled in 1914, it is said that if a daughter and her husband live with her father as resident son-in-law (*khanadamad*) till his death, she or he is entitled to inherit if there is no son and the father had gifted or bequeathed to either of them his property by a written deed. This answer applies certainly to all tribes in the Wazirabad Tahsil and Arains of the Sharakpur Tahsil. As the parties in this case are Arains and live in the Wazirabad Tahsil the statement certainly applies to them. It has been found in the present case that the husband of Mt. Hakim Bibi was *khanadamad* in the true sense of the term. On the marriage of Mt. Hakim Bibi she did not leave her father's house,

but continued to live with him along with her husband. In fact her husband had been taken into the house before the marriage. The husband belonged to another village and remained with his wife's father for 16 years till his death. It has also been found that Sher Mohammad intended that his daughter and her husband should succeed him, but he died before making a formal gift or will. This explains why his widows on his death made such a gift and the only question is whether the daughter is entitled to succeed, there being no deed of gift or written will in her favour. It seems to us that the essence of the custom is that a daughter and a resident son-in-law, who has been made *khanadamad*, are entitled to succeed in this Tahsil on the death of the daughter's father and that the provision about a deed of gift or written will is only recommendatory and not mandatory. When custom first started there were practically no written deeds in the Punjab and this is a refinement obviously added later : see 57 All 494.¹ In this view the decision of the District Judge is correct.

We are fortified in this conclusion by a perusal of 31 P R 1895.² That was a case from Gujrat, but the provision in the *wajib-ul-arz* is very similar, namely, that there should be a verbal or written gift ; and it was found in that case also that there had been no verbal or written gift. Nevertheless it was held that by custom among Gujars of the Gujrat District a married daughter was entitled to succeed her father, a sonless proprietor, in a case where, though no definite act of donation was proved, it was a fair inference from the established facts that the sonless proprietor settled his daughter and her husband in his house and on his land with a view to their succeeding him as his heirs to the exclusion of his collaterals. This is on all fours with the present case and for the reasons given we dismiss this appeal but make no order as to costs.

R.M./D.S.

Appeal dismissed.

1. *Basant Singh v. Brij Raj Saran Singh*, A I R 1935 P C 132=156 I C 864=62 I A 180 = 57 All 494 (P C).

2. *Baggi v. Manun*, (1895) 31 P R 1895.

A. I. R. 1937 Lahore 111

JAI LAL, J.

Hira Lal and others — Plaintiffs — Appellants.

v.

Mt. Fayazi Khanam — Defendant — Respondent.

Second Appeal No. 1913 of 1935, Decided on 12th March 1936, from decree of Dist. Judge, Delhi, D/- 26th July 1935.

Limitation — Bar of — Limitation for suit expiring on 21st August—Plaint presented on 20th August to Judge personally at 9 p. m. with application for extension of time for making up deficiency in court-fee — Judge transferring suit for trial to another Judge—Plaint reaching Court to which it was transferred on the 22nd — Deficiency in court-fee made up on the 21st—Suit held to be in time —Assuming it was made up on the 22nd and 23rd, Court held to be competent to extend time for payment under S. 149, Civil P. C. — Having accepted court-fee on subsequent date, Court held to have granted time.

The plaint in a suit, the limitation for which expired on 21st August, was presented on 20th August to the Judge personally at about 9 p. m. The plaint, when presented, did not bear the requisite court-fee stamp but was accompanied by an application for extension of time for payment of the court-fee. The Judge made a note that the plaint had been presented to him and transferred it for trial to another Judge, to whom it ultimately reached on 22nd August. Before the plaint had reached the Court of that Judge, the plaintiff had made up the deficiency in the court-fee stamp by paying the same in the Court in which the plaint was originally presented :

Held : that the plaint must be deemed to have been presented on 20th August, and as the court-fee was made good on the 21st the suit was in time. Even assuming that it was made good on the 22nd or the 23rd, it made no difference, because the plaint having been presented on 20th August the Court was competent to extend time for payment of requisite court-fee under S. 149, Civil P. C., and the Court must be deemed to have granted time by accepting the court-fee on a subsequent date. [P 111 C 2 ; P 112 C 1, 2]

Nawal Kishore—for Appellants.

Shamair Chand—for Respondent.

Judgment. — This second appeal is by the plaintiffs. The suit has been held by the District Judge to be barred by time. The facts are these : The plaint was presented on 20th August 1934, to the Senior Subordinate Judge personally at about 9 p. m. When the plaint was presented it did not bear the requisite court-fee stamp, but it was accompanied by an application for an extension of time for the payment of the court-fee. The limitation for the suit expired on 21st August 1934. On the 20th the Senior Sub-Judge made a

note that the plaint had been presented to him and he transferred the suit for trial to Mr. Tek Chand Sethi, Subordinate Judge. The plaint ultimately reached the Court of Mr. Tek Chand Sethi on 22nd August. The learned District Judge has remarked that it was handed back to the plaintiffs for presentation to that Court but the affidavit of the plaintiff is that it was sent by the Senior Sub-Judge direct to the Court of Mr. Tek Chand Sethi. On 22nd August, Mr. Sethi was on leave and the plaintiffs appeared in his Court on the 23rd and were given a date for further action in the suit. Neither on the 22nd nor on the 23rd did the plaintiffs obtain an express order from the Subordinate Judge granting them time to make up the deficiency in the court-fee stamp, but it appears, as is stated in the affidavit of the plaintiff, that before the plaint reached the Court of Mr. Tek Chand Sethi, Subordinate Judge, the plaintiffs had made up the deficiency in the court-fee stamp by paying the same in the Senior Subordinate Judge's Court. Objection as to limitation was raised before the trial Judge but was overruled and the suit was decreed. On appeal to the District Judge, however, it was held that the suit was barred by time on the date when the plaint was presented in the Court of Mr. Tek Chand Sethi on 23rd August.

The District Judge however has made two mistakes of fact. In the first instance he has remarked that the plaint was presented in the Court of Mr. Tek Chand Sethi on 23rd August whereas an extract from the registers of suits shows that it was registered in his Court on 22nd August. The learned Judge then says that it was the plaintiff to whom the plaint was immediately returned by the Senior Sub-Judge on 20th August and he presented it on the 23rd in the Court of Mr. Tek Chand Sethi and that no explanation for this delay has been given by the plaintiffs. The affidavit of the plaintiff is that the plaint was retained by the Senior Subordinate Judge and was sent by him to the Court of Mr. Tek Chand Sethi. There was therefore no occasion for the plaintiff to explain any delay in the presentation of the plaint in the Court of Mr. Tek Chand Sethi. The plaint under the circumstances must be deemed to have been presented on 20th August and as court-fee was made good on the 21st the suit was within time.

Even if it be assumed that the court-fee was made good on the 22nd or 23rd, which does not appear to be the case, it will not make any difference because the plaint having been presented on 20th August the Court was competent to extend the time for payment of the requisite court-fee stamp under S. 149, Civil P. C., and the Court must be deemed to have granted time by accepting the court-fee on a subsequent date. For all these reasons there is no substance in the objection that the suit was barred by time. I accept this appeal, set aside the decree of the District Judge and restore that of the trial Judge with costs throughout.

R.M./R.K.

*Appeal allowed.***A. I. R. 1937 Lahore 112**

JAI LAL, J.

Deputy Commissioner, Mianwali—
Petitioner.

v.

Amir Khan, etc.—Respondents.

Civil Ref. No. 21 of 1936, Decided on 19th October 1936, from order of Dist. Judge, Mianwali, D/- 3rd November 1934.

(a) Punjab Alienation of Land Act (13 of 1900), S. 21-A (2)—Limitation—Period commences not from date of decision of illegality of order but from knowledge of order.

For an application for revision under S. 21-A (2) of the Punjab Alienation of Land Act, it is not from the date on which the Deputy Commissioner makes up his mind that the order is illegal that the time is to count but from the date on which the order is brought to his notice.

[P 113 C 1]

(b) Punjab Alienation of Land Act (13 of 1900), S. 6 (1) (a)—Digging of land and use of earth is profit—Mortgagee is entitled to dig land.

There is no provision in the Punjab Alienation of Land Act prohibiting the digging up of land by a lessee or a mortgagee. Digging up the land and use of the earth fall within the definition of receipt of profits of the land which under S. 6 (1) (a) entitles the mortgagee to receive rents and profits of the land for a period of twenty years.

[P 113 C 2]

(c) Punjab Alienation of Land Act (13 of 1900), S. 16—Sale even if conducted by Receiver and not by Collector does not affect.

The sale of an interest in the land even if conducted by the General Receiver and not by the Collector is a matter which has nothing to do with the Punjab Alienation of Land Act. [P 113 C 2]

(d) Punjab Alienation of Land Act (13 of 1900), S. 21-A—Revision lies only against illegal orders.

An application for revision is entertainable only if the order passed is contrary to any provisions of the Punjab Alienation of Land Act. [P 113 C 2]

V. N. Sethi—for Respondent (Amir Khan).

Order.—This is an application by the Deputy Commissioner of Mianwali for revision of an order passed by the District Judge, Mianwali, on the 3rd November 1934. The application is under S. 21-A (2) of the Punjab Alienation of Land Act. It appears that one Amir Khan was adjudicated insolvent and his land was farmed out for twenty years under the orders of the District Judge. The learned Judge directed that "the Receiver may notify any bidder that he may dig up the land to any reasonable extent." It is this order that is sought to be revised by this application. It seems that the attention of the Deputy Commissioner was invited to the alleged illegality of the order by the insolvent by his application dated the 21st November 1935, which, however, was not presented till the 31st January 1936. On that date the Deputy Commissioner passed an order on the application that the Revenue Officer should make enquiry and report on it. Finally, on the receipt of the report of the Revenue Assistant, the Deputy Commissioner made this application on the 26th June 1936. It is rightly contended on behalf of the respondent that this application is barred by time. An application for revision under S. 21-A (2) of the Punjab Alienation of Land Act can be made within two months of the date on which the Deputy Commissioner is informed of the order which is alleged to be contrary to any provisions of the Punjab Alienation of Land Act. It is not from the date on which the Deputy Commissioner makes up his mind that the order is illegal that the time is to count but from the date on which the order is brought to his notice. The order in question was brought to his notice on the 31st January 1936 and the application which was made on the 26th June 1936, would be obviously barred by time.

On the merits also, in my opinion, this application must be rejected. An application for revision is entertainable only if the order passed is contrary to any provisions of the Punjab Alienation of Land Act. I am not satisfied that the order in question falls within this category. The Deputy Commissioner is of opinion that:

The permission to dig up the land will allow the mortgagee to commit an act which is destructive or permanently injurious to the property as contemplated in S. 76 (e) of the Transfer of Property Act.

I am not concerned with the provisions of the Transfer of Property Act for the purposes of this petition. Moreover, the order does safeguard the interest of the insolvent by providing that the land may be dug up to any reasonable extent. There is no provision in the Punjab Alienation of Land Act prohibiting the digging up of land by a lessee or a mortgagee. S. 6 (1) (a) relied upon by the Deputy Commissioner entitles the mortgagee to receive rents and profits of the land for a period of twenty years. Digging up the land and use of the earth would fall within the definition of receipt of profits of the land. Another objection raised to the sale of the interest in the land is that it was conducted by the General Receiver and not by the Collector. That again is a matter which has nothing to do with the Punjab Alienation of Land Act. I, therefore, dismiss this application both as barred by time and on the merits. There will be no order as to the costs of this reference.

B.D./D.S. *Application dismissed.*

A. I. R. 1937 Lahore 113

JAI LAL, J.

Ch. Mohammad Ali—Appellant.

v.

L. Ram Dass—Respondent.

Exn. First Appeal No. 260 of 1936, Decided on 6th October 1936, from order of Sub-Judge, First Class, Lahore, D/- 28th March 1936.

(a) **Execution sale—Setting aside—Judgment-debtor permitting Court to sell property without fresh proclamation if he fails to pay decretal amount within given period—Court selling property accordingly—Sale cannot be set aside on ground of irregularity in sale proclamation.**

Where a judgment-debtor applies to Court to grant him time to raise the decretal amount and agrees that if he is unable to do so within the time allowed, the property may be sold without fresh proclamation, it is not open to him to object to the sale on the ground of any irregularity in the proclamation of sale, which had been issued but stayed owing to his application, the contents of which were known to him already.

[P 114 C 1, 2]

(b) **Execution sale—Setting aside—Irregularity—Deposit of one-fourth purchase money after three days of sale—Court accepting it—It is mere irregularity and cannot vitiate sale.**

Where the deposit of 25 per cent of the purchase money is not made by auction-purchaser at the time of sale but three days after it, and it is accepted by the Court, it is a mere irregularity and cannot vitiate the sale.

[P 114 C 2]

(c) **Attachment—Exemption—Kothas owned by agriculturist in Lahore Cantonment not**

used for agricultural purposes—Agriculturist not owning property in Lahore District—Kothas are not exempt from attachment.

Where an agriculturist owned kothas in the Lahore Cantonment but they were not used for agricultural purposes and the agriculturist did not own lands in the Lahore district:

Held: that the kothas could not be exempt from attachment either under S. 60, Civil P. C., or S. 35, Punjab Relief of Indebtedness Act.

[P 114 C 2]

Chunni Lal Vohra—for Appellant.

Har Bhajan Das—for Respondent.

Judgment.—The judgment will dispose of two Appeals Nos. 260 of 1936 and 270 of 1936 by the judgment-debtor Ch. Mohammad Ali and the decree-holder Lala Ram Das respectively. In execution of a money decree the decree-holder got 27 kothas belonging to the judgment-debtor and situated in Lahore Cantonment sold, and purchased them himself for Rs. 3,000. Objections were raised by the judgment-debtor that the sale was bad on account of material irregularities in publishing and conducting it and that consequently substantial loss had accrued to him. These objections have been dismissed by the learned Subordinate Judge. Some other objections were also raised by the judgment-debtor including one that the kothas could not be sold because he was an agriculturist. It appears that on 8th August 1935 the judgment-debtor made an application to the executing Court asking for three months' time to enable him to arrange for the decretal amount by private alienation of his property and expressly stated in that application that in case he is unable to raise the money within three months the property be sold by auction on 8th November 1935 without fresh proclamation. To this arrangement the decree-holder consented and the Court granted time and leave to the judgment-debtor to raise the money by private alienation but the latter was unable to make any arrangement to pay the decree-holder. The property was consequently sold without fresh proclamation and was purchased by the decree-holder for Rs. 3,000.

Before me it is contended that the sale was vitiated on account of an irregularity in the original proclamation of sale in which the renting value of the property was not mentioned, nor was the approximate value of the property mentioned. It is true that there were these omissions in the proclamation of sale, but in view of the statement made by the judgment-debtor, on the basis of which the Court granted

him time to raise the decretal amount by private alienation of the property, it is not open to him now to object to the sale on the ground of any irregularity which existed in the proclamation of sale which had been issued prior to the statement and the contents of which were known to him. It is further to be observed that a notice under O. 21, R. 66, Civil P. C., was issued to the judgment-debtor, but he did not appear in pursuance thereof and therefore the proclamation of sale had to be prepared in his absence. In my opinion the view of the learned Subordinate Judge is correct that the judgment-debtor is not entitled to raise these objections at this stage. Another objection raised by him, which has been repeated before me, is that the decree-holder did not deposit at the time of the sale 25 per cent of the purchase money, but it does appear that three days afterwards the decree-holder made the deposit and this deposit was accepted by the Court. I do not see that the judgment-debtor has suffered on account of this omission. In any case, this was a mere irregularity and could not vitiate the sale. It was open to the Court to refuse to accept the deposit and to order a fresh sale, but the Court did not follow that course; on the other hand it accepted the deposit as if it had been made at the time of the sale.

It is then contended that the judgment-debtor is an agriculturist and therefore the kothas sold were exempt from sale by virtue of S. 60, Civil P. C. read with S. 35, Relief of Indebtedness Act. It is, however, conceded before me that the judgment-debtor is a resident of Ferozepore and that he has no land in the Lahore District. The kothas in question are situated in Lahore Cantonment and it is conceded that some of them are rented to other persons. It is not shown that they have been occupied by the judgment-debtor or are required by him for his own occupation and I cannot understand how he can claim exemption in respect of these kothas considering that they are situated in Lahore Cantonment and the judgment-debtor has absolutely no land in the Lahore District. It is further to be noted that on 8th August 1935, the judgment-debtor made a statement that the kothas might be sold on 8th November 1935 if he was unable to raise the money for payment to the decree-holder by private alienation thereof. It is not open now to the

judgment-debtor to claim exemption in respect of the kothas, even if he was otherwise entitled to make such a claim. This practically disposes of the appeal by the judgment-debtor.

I may, however, dispose of another objection by the judgment-debtor that the property has been sold for much less than its market value. Some witnesses were produced by the judgment-debtor, who merely gave their opinion that the property was worth Rs. 10,000 to Rs. 15,000. The decree-holder in his application for execution had mentioned the value of the property to be Rs. 8,000, but he explained to the Subordinate Judge, which explanation has been accepted by the learned Judge, that when he valued the kothas at Rs. 8,000 he was under the impression that the judgment-debtor was the owner of the site under them but that he subsequently discovered that he is only the owner of the materials, the site being owned by the Lahore Cantonment authority. It is obvious that no reliance can be placed on the vague statements made by the witnesses who, without giving any reasons, state that the property is worth Rs. 10,000 to Rs. 15,000. Some other witnesses were produced by the judgment-debtor who stated that they were prepared to pay up to Rs. 3,500 for the property, but when they were asked to deposit 25 per cent of the amount that they were prepared to pay, they failed to do so. In these circumstances the learned Judge was entitled to come to the conclusion that there was no evidence to show that the property was worth much more than what it has fetched in the auction sale. In any case, this question is immaterial having regard to the fact that it has not been shown that it was open to the judgment-debtor to object to the sale on the ground of any material irregularity in publishing or conducting it. The appeal of the judgment-debtor is consequently dismissed with costs.

During the execution proceedings the judgment-debtor also pleaded that he had paid Rs. 900 to the decree-holder of which the latter had not given credit to him. Oral evidence was led in support of this contention and this evidence has been believed by the learned Subordinate Judge. It is contended on behalf of the decree-holder in his appeal that the evidence given on behalf of the judgment-debtor is contradictory and unreliable, especially in

view of the fact that on 8th August 1935 the judgment-debtor made an application to the Court but did not allege that he had paid Rs. 900 to the decree-holder. His allegation is that this amount was paid in February 1935. These are no doubt important matters to be taken into consideration, but in spite of these the learned Subordinate Judge has come to the conclusion on a consideration of the evidence produced by the judgment-debtor that the payment of Rs. 900 has been proved. I see no reason to differ from the conclusion of the Subordinate Judge. I dismiss the appeal of the decree-holder with costs.

P.R./A.L.

Appeal dismissed.

A. I. R. 1937 Lahore 115

JAI LAL, J.

Roshan Lal and another — Defendants
—Appellants.

v.

Charan Das, Plaintiff and another,
Defendant—Respondents.

Second Appeal No. 1692 of 1935, Decided on 5th March 1936, from decree of Senior Sub-Judge, Gurdaspur, D/- 8th May 1935.

Civil P. C. (1908), O. 41, R. 27—Lower appellate Court calling witness not called by parties and giving good reasons for so doing—There is nothing illegal in exercise of its discretion by it—High Court cannot in second appeal, decide whether discretion had not been rightly exercised.

Where the lower appellate Court calls, of its own motion, a witness not called by the parties, in order to elucidate a point involved in the appeal, and gives good reasons for the calling of the witness, there is nothing illegal in the exercise of its discretion by the lower appellate Court and it is not open to the Court in second appeal to decide whether the discretion had not been rightly exercised.

[P 116 C 1]

Shambu Lal Puri—for Appellants.

Shamair Chand—for Respondents.

Judgment.—The only question in this second appeal is whether the respondent was a bona fide transferee for consideration. The consideration was paid before the registering officer, but the question was whether the transaction was a bona fide one. Apparently it was suggested that the money had been returned to the alienor after it had been ostensibly paid before the registering officer. The trial Court held that the transaction was not a bona

vide one and for consideration. On appeal the Senior Subordinate Judge on his own motion called a witness and examined him. This witness, it was alleged, had advanced the money to the alienee to pay the consideration for the alienation. No prayer was made by the alienee to call this witness, but the learned Judge was of opinion that in such cases it was necessary for an alienee to call the person from whom he had borrowed the money; in other words, to prove, not only the payment of the money ostensibly, but also to show that he had the money to pay. It was on account of this observation by the learned Judge that he decided to examine a witness, who, according to him, should have been called originally by the alienee.

It is contended on this appeal that this action of the Senior Subordinate Judge was illegal and that O. 41, R. 27, Civil P. C., does not authorize the procedure. In my opinion, in the present case, the learned Senior Subordinate Judge gave good reasons for calling a witness. On this second appeal it is not open to me to decide whether the discretion had not been rightly exercised. There was nothing illegal in the exercise of the discretion and consequently the appeal fails on the only point that is urged before me. There is no substance in the objection that opportunity should have been given to the appellants to rebut the evidence recorded by the Senior Subordinate Judge. This request does not seem to have been made before the learned Judge below and it is not even alleged now that it was so made. I dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1937 Lahore 116**

ADDISON AND DIN MOHAMMAD, JJ.

Bhai Waryam Singh — Defendant — Appellant.

v.

Intazamia Committee Gurdwara Guru Gobind Singh, Plaintiff and others, Defendants—Respondents.

First Appeal No. 189 of 1936, Decided on 28th October 1936, from decree of Dist. Judge, Ferozepore, D/- 31st January 1936.

(a) Mis-joinder—Surplusage of plaintiffs — Suit is not incompetent.

The fact that there is a surplusage of plaintiffs will not make a suit incompetent. [P 117 C 2]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), S. 99—Notice of meeting—Members meeting together shows reasonable notice — Notice need not be in writing.

The fact that the members meet does go to show that the members had sufficient reasonable notice of the meeting and that the members themselves combined together to meet. Such notice of meeting need not be in writing. [P 117 C 2]

(c) Punjab Sikh Gurdwaras Act (8 of 1925), S. 103—Minute book—Chairman to sign it — Minute book if signed by others along with Chairman does not make resolutions illegal —Form and shape of minute book is immaterial.

Under S. 103 only the Chairman is compelled to sign the minute book. But where other members signed along with the Chairman, it does not make the resolution illegal as it was signed by the Chairman. It is nowhere defined in the Act in what form or shape the minute book shall be, so a student's exercise book can form a minute book.

[P 117 C 2]

Nand Lal and *A. G. Maurice* — for Appellant.

Bhagat Singh—for Respondents.

Addison, J. — There is a Gurdwara Guru Gobind Singh in Chak Fateh Singh-wala in the Ferozepore District. Under S. 5 (3), Sikh Gurdwaras Act, the Government issued Notification No. 131-G, dated 30th May 1927, specifying the rights and interests in respect of the property of the aforesaid Gurdwara regarding which no claim had been brought under the provisions of S. 5 (1). The Gurdwara itself was declared a notified Sikh Gurdwara under Notification No. 892 dated 28th April 1926. The Committee for its management consists of four elected members and one member nominated by the Board: see S. 87 of the Act. Under S. 88 (3) the Commissioner notified the fact that the Committee had been duly constituted by Notification No. 246 dated 14th January 1927. That date, therefore, is the date of the constitution of the Committee.

The present suit was brought by the President and three members of the Committee under S. 28 of the Act for possession of the Gurdwara and the property attached thereto. The suit should have been instituted in the Court of the District Judge within 90 days from the date of the publication specified in S. 28 (2) of the Act. It was so instituted, but it was instituted in the wrong Court, namely that of the Senior Subordinate Judge who sent it for trial to the Court of another Subordinate Judge, Second Class. He found that he had no jurisdiction as the value of the suit was over Rs. 5,000, and the suit was

sent to the District Judge to be transferred to a proper Court. The District Judge sent it to the Court of the Senior Subordinate Judge. The Senior Subordinate Judge held that he had no jurisdiction and he returned it, on 10th January 1928, to the plaintiff to present it in the Court of the District Judge. This was done the same day. The Additional District Judge held by his order dated 11th November 1928 that the suit was time-barred because the time spent in the Courts of the Senior Subordinate Judge and the Subordinate Judge, Second Class, could not be excluded under the provisions of S. 14, Lim. Act. The suit was therefore dismissed. There was an appeal to this Court. The appeal was accepted and it was held that the plaintiff was entitled, under the circumstances of this case, to exclude the time infructuously spent either in the Court of the Senior Subordinate Judge or in the Court of the Subordinate Judge to which it was sent for a time. As the necessary dates were not available before the Judges who heard the appeal they accepted the appeal and remanded the suit to the District Judge for final determination of the question of limitation after deducting the time spent in the subordinate Courts. The District Judge has held that the suit was within time and that the other defences set up were frivolous. He accordingly decreed the suit and Mahant Waryam Singh, defendant, has appealed.

The first point taken in the appeal was that the decision of the District Judge was wrong in holding that the suit was not barred by time. The argument is founded on the words used by the Division Bench of this Court, which heard the case, to the effect that the plaintiff was entitled to exclude the time infructuously spent either in the Court of the Senior Subordinate Judge or the Court of the Subordinate Judge to which it was sent for a time. It was contended that this meant that only one or other of those times could be excluded but not both. Obviously, however, the word "either" is a clerical error for "whether." This follows from the penultimate sentence in the judgment of this Court where it was said that the suit was remanded to the District Judge for final determination of the question of limitation after deducting the time spent in the subordinate Courts (not Court). There is thus no force in this contention

and it was not disputed before us that the suit would be within time if those periods were excluded.

It was next contended that the suit was not brought by persons competent to bring it as the resolution passed by the Committee on 9th August 1927 was to the effect that the President Inder Singh, son of Waryam Singh, was deputed to institute the present suit, whereas it was brought by this President and three other members. The fact that there was a surplusage of plaintiffs would not make the suit incompetent. There is no force in this argument and we overrule it. Thirdly, it was contended that proper notice was not given when the meeting of the Committee was convened at which was passed the resolution in question. Under S. 99 of the Act, when the offices of President and Vice-President are vacant, any two members may, by giving reasonable notice to the other members, convene a meeting for the election of a President. At that time no President or Vice-President had been elected. The Shiromani Gurdwara Prabandhak Committee, on 29th July 1927, drew the attention of the five members to the fact that it was their duty to meet and take steps to carry out their functions. After receiving this notice the Committee met on 9th August, proceeded to elect Inder Singh as President and Sarwan Singh as Vice-President and then passed the resolution authorizing the President to bring the present suit. The fact that they met shows that there was reasonable notice and that the members themselves combined together to meet. It is not said that the notice should be in writing. We, therefore, hold that reasonable notice was given and that the Committee did meet. There is thus no force in this contention.

It was also argued that the minute book was signed by the President and three members, while according to S. 103 of the Act only the Chairman is compelled to sign it. Here again, the fact that three other members signed it does not make the resolution illegal as it was signed by the Chairman. It was also said in connexion with this minute book that it was merely a student's exercise-book and that such a book could not be held to be a minute book. It is nowhere however defined in the Act in what form or shape the minute book shall be. This is also a frivolous objection. No other ground

was argued and as a matter of fact no defence on the merits was possible. For the reasons given we dismiss the appeal with costs.

B.D./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 118

JAI LAL, J.

Bir Bal—Petitioner.

v.

Jiwan Singh—Opposite Party.

Civil Revn. No. 646 of 1935, Decided on 8th January 1936, from order of Dist. Judge, Rawalpindi, D/- 6th June 1935.

Suit—Dismissal for default—Restoration—Date fixed for payment of adjournment costs—Party ill and his pleader though present in Court failing to hear case being called—Suit dismissed for default—Restoration of suit should be granted.

On an adjourned date of hearing *B* was ordered by Court to pay *A* adjournment costs, but on that date it was found that *A* was ill and could not attend and his counsel though present in Court all the day, could not hear the case being called, with the result that the suit was dismissed. Thereupon on that very date *A*'s counsel filed an application for restoration :

Held : as day was fixed merely for the payment of costs by *B*, it was not really necessary for *A* to appear in Court as he could have realized the costs from the Court subsequently if *B* had deposited them that day. Therefore, to such a case O. 9, R. 8, Civil P. C., has no application; and the circumstances of this case were such that *A* was entitled to the restoration of his suit.

[P 118 C 2 ; P 119 C 1]

Ram Lal Anand 1—for Petitioner.

Des Raj Sawhney—for Opposite Party.

Order.—This is a petition for the revision of the order passed on appeal by the District Judge of Rawalpindi whereby he dismissed the petitioner's appeal against an order of the trial Judge refusing to restore his suit which had been dismissed in default. The suit was for the recovery of money due on the footing of a mortgage and had originally been decreed by the trial Court but had been remanded by the appellate Court on an appeal by the defendant who had claimed that some witnesses cited by him should be allowed to be produced before the trial Judge. On remand of the case to the trial Judge the parties appeared before him and finally the 27th August 1934 was fixed as the date on which the defendant had to pay Rs. 16 as costs of adjournment to the plaintiff. On that date, apparently according to the

order on the record, no other proceedings had to take place except possibly the fixing of a date for recording the evidence. On that day neither the plaintiff nor his counsel appeared in Court and the suit was dismissed in default. On the same day an application was made by the petitioner's counsel for the restoration of the suit. Evidence was led on behalf of the plaintiff that he could not appear because he was ill and this has not been found to be a false allegation by the Courts below. On the other hand the learned District Judge appears to accept this allegation to be correct but the application has been dismissed on the ground that no reason has been shown why the counsel did not appear when the case was called.

Now it is alleged that the counsel did appear in Court in other cases on that day and was throughout present in the Bar room, but he did not hear the case being called. He did not, however, make any statement either at the bar or in the witness box or by means of an affidavit to the effect that he was present in Court waiting for the case being called and did not hear the case being called. It is on this ground that both the trial Judge and the learned District Judge on appeal have accepted as true the allegation of the defendant that the case had been called but nobody appeared. But an affidavit was filed by the counsel in the Court of the District Judge. That affidavit was not accepted by him and was returned to the petitioner. It thus appears that the petitioner has not been quite diligent about the case. At the same time it does appear that there was misunderstanding on the part of the counsel in not appearing in Court when the case was called. It is obvious that he was present in Court throughout the day because the application for restoration was made on the same day and this fact lends strong support to the allegation that the counsel was present waiting for the case to be called and did not hear when the case was called.

Another point taken by the petitioner's counsel is that the case could not have been dismissed in default on 27th August 1934, because that day was fixed merely for the payment of costs by the defendant and it was not really necessary for the plaintiff to appear in Court as he could have realized the costs from the Court subsequently if the defendant had deposited them that day. It is therefore con-

tended that to such a case O. 9, R. 8, has no application. In my opinion the circumstances of this case are such that the petitioner was entitled to the restoration of his suit.

There is another ground raised that even if the suit could be dismissed under O. 9, R. 8, it could be dismissed only to the extent to which the defendant had denied the claim of the plaintiff and that as the defendant had admitted a part of the plaintiff's claim the suit should have been decreed *pro tanto*. In view, however of the fact that the plaintiff, as I have already stated, has not been quite diligent in this case the restoration of the suit should have been directed on the payment of costs by him. I accept this petition and set aside the order of the learned District Judge and of the trial Court refusing to set aside the dismissal of the suit in default, but the petitioner, that is to say the plaintiff, must pay Rs. 32 (Rupees thirty two) as the costs of the respondent of these proceedings irrespective of the result of the suit.

B.D./D.S.

Petition accepted.

A. I. R. 1937 Lahore 119

ADDISON AND DIN MOHAMMAD, JJ.

Sher Afzal—Plaintiff—Appellant.

v.

(*Lala*) *Bulaqi Mal* and others — Defendants—Respondents.

First Appeal No. 59 of 1936, Decided on 13th October 1936, from decree of Sub-Judge, 1st Class, Lahore, D/- 29th October 1935.

Custom (Punjab)—Alienation—Necessity—Payment of decretal debt constitutes necessity—Loans by father for acquiring land, reckless extravagance or wanton waste on his part not being proved—Alienation of ancestral property is valid being for necessity and consideration.

Payment for discharge of decretal debt constitutes necessity. A debt which is not otherwise tainted in any manner can be treated as a just and antecedent debt even if the alienee be the same creditor from whom loans have been taken.

[P 120 C 1]

Where alienation of ancestral property to discharge a part of a decretal debt was made by the father to a creditor from whom he had taken loans for the purpose of acquiring lands:

Held : that inasmuch as reckless extravagance and wanton waste on the part of the father were not proved, the alienation of ancestral property was valid as being for necessity and for consideration : *A I R 1935 Lah 927, Rel. on.* [P 120 C 1]

M. L. Sethi—for Appellant.

Darbari Lal—for Respondent (*Bulaqi Mal*).

Din Mohammad, J.—The suit which has given rise to this appeal was instituted by Sher Afzal, challenging a mortgage made by his father Chaudhri Chiragh Din of a house that he owned in the town of Lahore. He alleged that the alienor being a Rajput of Kala Shah Kaku in the District of Sheikhupura, was governed by custom and that the alienation in suit was not for consideration or necessity. The defendant Bulaqi Mal traversed all these allegations and contended that the loans in part payment of which the mortgage in suit was executed, were advanced to Chaudhri Chiragh Din for the purchase of land, etc. Various issues arose on the pleadings of the parties, some of which were decided in favour of the plaintiff and some against him. In the result, the plaintiff's suit was dismissed with costs. The plaintiff has appealed.

This appeal can be disposed of on the short question whether the alienation in question was effected for consideration and necessity. If this point was decided against the plaintiff, no other issue would arise. In order to determine the question at issue it may be necessary here to give a brief history of the various loans which were advanced by the defendant to the plaintiff's father before the transaction in suit took place. It appears that on 15th August 1920, Chaudhri Chiragh Din executed a promissory note for Rs. 7,500 in favour of the defendant. On 29th November 1920 he raised a further loan of Rs. 6,500 and executed a promissory note therefor. On 21st August 1921 another sum of Rs. 2,500 was borrowed by him and his total debts, excluding interest, on that date amounted to Rs. 16,500. On 29th June 1924, in lieu of the three promissory notes mentioned above, he executed a consolidated promissory note for Rupees 35,000 in favour of the defendant. On 4th February 1925 a suit was instituted against him for recovery of the amount due from him and was decreed on 19th January 1926. It was towards a part payment of the decretal amount standing against Chaudhri Chiragh Din that on 14th June 1927 he executed the mortgage deed in suit. The sum secured under it was Rs. 4,000 which was said to have been credited towards the decree dated 19th January 1926.

It is not denied that Chaudhri Chiragh Din, even if he was governed by Customary law, could effect this alienation provided it was for consideration and necessity. As indicated above, consideration cannot be attacked. The only question that remains now to be determined is whether necessity has been established. It is evident that the alienation was made to discharge a part of the decretal debt and this, in our opinion, constitutes necessity. The question of what is a just antecedent debt, for which an owner, governed by Customary law, can validly transfer his property in favour of his creditors, very recently came before a Division Bench of this Court in A I R 1935 Lah 927.¹ The learned Judges exhaustively discussed the question in all its aspects and came to the conclusion that even if the alienee was the previous creditor himself, a debt which was not otherwise tainted in any manner, could be treated as a just antecedent debt. It is admitted that Chaudhri Chiragh Din was holding the office of an Extra Assistant Commissioner at the time when the loans mentioned above were raised and there is not an iota of evidence to show that his act in raising those loans amounted to reckless extravagance or wanton waste. Apart from the fact that the defendant made an assertion on oath that the money was raised for the purchase of land, the plaintiff himself had unequivocally stated that at the time when the loans were raised, his father had acquired lands and other property. It is true that subsequently he professed complete ignorance of his father's affairs at the suggestion of his counsel, as remarked by the Subordinate Judge, in the course of his statement at p. 23 of the printed record; but this inspired modification of his previous position can be of no avail to him. We have no hesitation in holding, therefore, that the alienation was made for consideration and necessity and that Chaudhri Chiragh Din was competent to make it even if he was governed by Customary law. As stated above, in the face of this finding it is not necessary to decide the other questions that have been raised by the appellant in this case. We accordingly affirm the decree of the Court below and dismiss this appeal with costs.

S.C./A.L.

Appeal dismissed.

1. Mahomed Bashir v. Sawal Singh, A I R 1935 Lah 927=161 I C 361=38 P L R 367.

A. I. R. 1937 Lahore 120

JAI LAL, J.

Shaukat Ali—Plaintiff—Appellant.

v.

Majid Ali and another—Defendants — Respondents.

Second Appeal No. 186 of 1936, Decided on 7th October 1936, from decree of Dist. Judge, Ambala, D/- 15th November 1935.

(a) Punjab Pre-emption Act (7 of 1913), S. 16 (4)—Applicability—"Street" as used in S. 16 (4) means "public street" — The words "kacha khas" imply private street.

"Street" as used in S. 16 (4) means "public street." The words "kacha khas" imply a private street. The section is applicable to cases where two houses abut on a lane which is a private street owned by the owners of the houses in lane and opens into a public street. [P 121 O 1, 2]

(b) Evidence Act (1872), S. 11—Recitals in deeds about description of property are relevant.

Recitals in deeds in respect of properties by owners thereof, stating that a lane on which their houses abut is a private street, are relevant under the section. [P 121 C 2]

Barkat Ali—for Appellant.*Indar Dev for Achhru Ram* — for Respondents.

Judgment. — This second appeal arises out of a suit for pre-emption of the sale for Rs. 2,000 of a house situated in Mohalla Sadhaura. It was alleged by the plaintiff pre-emptor that he was entitled to pre-empt under S. 16 fourthly, of the Punjab Pre-emption Act of 1913 which provides that where the sale is of property having a common entrance from the street with other properties the right of pre-emption shall vest in the owners of such properties. The plaintiff alleged that the price of Rs. 2,000 mentioned in the sale deed was not fixed or paid in good faith. Both the Courts below are agreed that the price was not fixed or paid in good faith. Therefore if the plaintiff were entitled to a right of pre-emption under S. 16 fourthly, he would be entitled to pre-empt the sale on payment of Rs. 1,600, the market value of the house. It has also been found that custom of pre-emption prevails in that Mohalla. The only ground on which the suit has been dismissed by the learned District Judge is that the street in which the house of the plaintiff and the house sold have been built is a public street and therefore there is no common entrance to the two houses from a street which, according to the District Judge, must be a public street. In support of his conclusion

the learned District Judge has relied upon 44 P R 1912.¹ Some observations made in that judgment support the conclusion of the learned Judge, but the question in this case is whether the street on which both the houses abut is a public street or a private street.

There is no contention before me that the expression "street" as used in S. 16 does not mean a public street. The question therefore appears to be one of fact whether the street on which the two houses abut is a public street or whether it is a private street in the sense that the land under the street is owned by the owners of the houses abutting it. The learned District Judge has held that the street has not been proved to be a privately owned street. Ordinarily this would be a finding of fact, but it is contended on behalf of the appellant that it is vitiated by the fact that the learned District Judge has ignored important evidence. Three Municipal Commissioners were cited as witnesses by the plaintiff-appellant and they deposed that the Municipal Committee did not claim the street as a public street vesting in it. This evidence has been rejected by the learned Judge on the ground that the records of the Committee have not been produced. This remark of the learned Judge is wrong, as it appears that two Municipal officials gave evidence in support of the plaintiff's contention. The Secretary of the Municipal Committee appeared with the records of the Municipal Committee in which the street in question was not mentioned among those streets which vested in the Municipal Committee. The Overseer of the Municipal Committee also appeared as a witness and stated that the Municipal Committee never repaired or did anything in connexion with the street in question.

The most important consideration in favour of the appellant is the fact that in the sale deed which relates to the sale in question the street in dispute is described as kucha khas and it has been held by LeRossignol, J. in *Civil Appeal No. 2169 of 1917* that kucha khas implies a private street and not a public street. There is no evidence in this case that the public ever exercised any right over this street. Indeed, in a number of sale deeds relating to houses in this street, it is described as

the property of the owners of the houses which are built on the street. These deeds have not been relied on by the learned District Judge on the ground that the defendant is not bound by the recitals in them. In my opinion the recitals could not be disregarded. In view of what I have stated above, the street in question must be deemed to be private street and not a public street and therefore the plaintiff would be entitled to pre-empt the sale under S. 16 fourthly of the Punjab Pre-emption Act.

I accept this appeal, set aside the decree of the learned District Judge and grant the plaintiff a decree with costs throughout for pre-emption on payment of Rs. 1,600. This amount shall be paid in Court by the plaintiff within 30 days from to-day after deducting the costs awarded to the plaintiff. If the plaintiff fails to deposit the amount within the specified time the suit shall be deemed to have been dismissed with costs throughout.

P.R./A.L.

Appeal allowed.

A. I. R. 1937 Lahore 121

TEK CHAND, J.

(Maulvi) Abdul Qayum—Defendant—Petitioner.

v.

(Sheikh) Mohammad Fazal Azim—Plaintiff—Opposite Party.

Civil Revn. No. 126 of 1936, Decided on 14th July 1936, from decree of Judge, Small Cause Court, Delhi, D/- 16th January 1936.

(a) Landlord and Tenant—Termination of tenancy—Tenant, under agreement, is bound to deliver up complete possession to landlord by end of term even if no stipulation to that effect—Under-tenant holding over against will of tenant—Landlord is entitled to damages from tenant—Measure of damages is rental value of premises and expenses for ejecting under-tenant.

A tenant, under an agreement without any stipulation that he should deliver up the possession of the premises at the end of the term, is nevertheless bound by law to deliver up complete possession; and if actual possession is with an under-tenant, who at the determination of the tenancy holds over against the will of the tenant, the remedy of the landlord is to sue the tenant for damages, the measure of which is the rental value of the premises for the time he is kept out of possession, and the costs of the legal proceedings to oust the under-tenant from wrongful possession: *Henderson v. Squire*, (1868) 4 Q B D 171, *Foll.*; 22 Bom 348, *Rel. on.* [P 124 C 1]

1. *Naba v. Piara Mal*, (1912) 44 P R 1912=13 I C 427=95 P L R 1912.

(b) Landlord and Tenant—Tenant offering vacant possession of house but landlord wrongfully refusing to take it—Landlord is not then entitled to claim rent from tenant after such refusal—Tenant is not responsible for re-entry by other persons—Landlord is entitled to get rent from persons in actual possession.

Where the tenant offers vacant possession of the house to the landlord and the landlord wrongfully refuses to take it, the tenant is no longer liable to pay rent after the date of such refusal, nor is he responsible for subsequent re-entry by other persons. The landlord cannot go on suing the tenant indefinitely for rent at progressively increasing rates. He is entitled to get the rent only from the persons in actual possession of the premises. [P 124 C 2; P 125 C 1]

A person's property was sold by a mukhtar and on the same date the mukhtar executed a rent deed to the vendee and owner of the property continued in possession. On the death of the owner, it was proved that the mukhtar who was the tenant under the deed offered vacant possession of the property to the vendee but subsequent to this the heirs of the owner entered into possession of the property and continued there saying that the mukhtar had not paid the sale price which he had received. The vendee sued the mukhtar for rent:

Held: that the mukhtar had discharged his obligation by giving vacant possession and as such he was not liable to pay rent subsequent to that date and that the landlord could realise it only from the persons in possession of the property. [P 125 C 1]

Held further: that even if the mukhtar had not paid the sale price, the remedy of the heirs of the owner of the property was to sue the mukhtar for the same. [P 125 C 1]

Shamair Chand and Prakash Chandra Jain—for Petitioner.

Manchar Lal—for Opposite Party.

Order.—This judgment will dispose of Civil Revisions Nos. 126, 127, 128, 219, 220 and 221 of 1936, which arise from three suits instituted by Fazal Azim, plaintiff-respondent, against Abdul Qayum, defendant-petitioner, for recovery of rent of a house for different periods. The Judge, Small Cause Court, Delhi, has decreed the three suits, leaving the parties to bear their own costs. Both parties have come up in revision; the defendant prays that the suits be dismissed, while the plaintiff urges that he should be allowed his costs in the Court below.

As the cases present some curious features, it is necessary to set out the facts in some detail. The original owner of the house in dispute was Mt. Afzal Zamani Begum. The defendant Abdul Qayum is her step-son. By a deed executed and registered on 8th September 1928, Mt. Afzal Zamani Begum, through Abdul

Qayum, defendant, as her mukhtar, sold the house to one Majid Khan for Rs. 2,500. On the same date Abdul Qayum executed and registered a rent deed in favour of the vendee, Majid Khan, for the house agreeing to pay rent at the rate of Rs. 12 per lunar month. It was stated in the deed that the house had been taken on rent for the residence of Mt. Afzal Zamani Begum, that the term of tenancy was one year, but that if Mt. Afzal Zamani Begum died before the expiry of the year, the tenancy would come to an end on her death. Mt. Afzal Zamani Begum thus continued to live in the house as before, though the defendant Abdul Qayum had become the tenant under the vendee. Shortly after the sale, Fazal-i-Azim, plaintiff, who is the owner of the adjoining house, expressed his intention to pre-empt the sale, and the vendee Majid Khan admitted his claim out of Court and sold the house to him. Fazal-i-Azim thus became the owner of the house.

In February 1929, Mt. Afzal Zamani Begum died. It appears however that her nephews Habib-ul-Rahman, Muzaffar Shah and Fazal-ul-Rahman, and niece Mt. Zahura Sultan, who claimed to be her heirs, and who had been residing with her in this house in her lifetime, continued in possession after her death. It is common ground that the defendant Abdul Qayum resides in another house in a different mohalla and has never himself lived in this house. It appears that Habib-ul-Rahman, etc., refused to vacate the house after the death of Mt. Afzal Zamani Begum, as they alleged that Abdul Qayum had not paid her the sale price which he as her agent had received from Majid Khan vendee, and to which on her death they as her heirs were entitled. If this contention of theirs was correct, their proper course was to sue Abdul Qayum for recovery of the sale price, or such portion of it as had been retained by him. But they chose to stick to their possession of the house. For reasons, about which it is not necessary to speculate, neither Abdul Qayum nor the plaintiff took any legal step to dispossess Habib-ul-Rahman, etc. There has however been considerable litigation between the plaintiff and the defendant inter se. The plaintiff, on the strength of the rent deed of 8th September 1928, served the defendant with notices through post, from time to time, asking him to deliver vacant possession of the

house, or in the alternative pay enhanced rent, and has successfully brought several suits for recovery of rent at progressively increasing rates as follows: (After setting out the rates in the several suits, his Lordship proceeded.) On 31st May 1931 the defendant paid the plaintiff a sum of Rs. 1,047-8-0. The defendant alleges that this payment was made in accordance with the award of Anwar Ahmad who had been appointed arbitrator by the parties to settle the dispute relating to the house.

It is stated that the award required the defendant to pay Rs. 1,047-8-0 in full settlement of all outstanding decrees and arrears of rent due up-to-date, and in future to go on paying Rs. 10 per mensem so long as the plaintiff was not able to get possession from Habib-ul-Rahman, etc., by his own efforts. The plaintiff's case however is that no binding award had been delivered, and the payment of Rs. 1,047 was made by the defendant to satisfy the decrees which were outstanding against him for rent at Rs. 48 upto the end of May 1931, as stated in the receipt itself. As to which of these rival versions is correct will be considered later. It will be sufficient for the purpose of this narrative to say, that on 12th June 1931, the plaintiff appeared in the Court and stated that he had received the amount for which the seventh suit had been filed, and on this statement the suit was dismissed. On 18th December 1931, the plaintiff sued the defendant again for Rs. 192, being rent for two months (5th October 1931 to 2nd December 1931) at Rs. 96 per mensem. This suit was dismissed in default on 12th February 1932. In the following months however three more suits were instituted as follows, and it is these suits which have given rise to the present revision-petitions: (a) Suit No. 613 of 1932 instituted on 8th March 1932 for recovery of Rs. 288, alleged to be due as rent for three lunar months (3rd December 1931 to 29th February 1932) at Rs. 96 per mensem. (b) Suit No. 1880 of 1932 instituted on 15th August 1932 for Rs. 480 alleged to be due as rent from 1st March 1932 to 26th July 1932 at Rs. 96 per mensem. (c) Suit No. 21 of 1933 instituted on 5th March 1933 for recovery of Rs. 480 for five months' rent (27th July 1932 to 20th December 1932) at Rs. 96 per mensem. These three suits were tried together by the Judge, Small Cause Court, and disposed of in one judgment. It is

stated that the plaintiff has instituted yet another suit for Rs. 3,456 as rent for 36 months (21st December 1932 to 12th January 1936), which is pending in the Court of the Subordinate Judge at Delhi. We are however not concerned with that suit in the present litigation. In reply to the three suits (a), (b) and (c) abovementioned, the defendant raised numerous pleas of which those material are:

(1) That the relation of landlord and tenant no longer subsists between the parties and the defendant is not liable to pay anything because of—

(i) the award of Anwar Ahmad, whereby Rs. 1,047 was to be paid in full settlement of all previous dues, up to 31st May 1931, whether included in Court decrees or not, and for the future the defendant was to pay to the plaintiff Rs. 10 per mensem till the plaintiff was able to obtain possession of the house by his own efforts;

(ii) the settlement arrived at between the parties through M. Bhure Mian, whereby the plaintiff exonerated the defendant from all further liability under the rent deed of 8th September 1928, on payment of Rs. 500 which sum the defendant actually paid him forthwith;

(iii) the defendant having got the house vacated by Habib-ul-Rahman, etc., and sent a notice by registered post to the plaintiff on 14th March 1932 asking him to take possession, and his wrongful refusal to do so; and

(iv) the defendant having on 30th April 1931, given vacant possession of the house through an Honorary Magistrate and the police.

(2) That the stipulated rent of the house being Rs. 12 only, the plaintiff is in no case entitled to claim Rs. 96 per mensem, which is far above the rental value of the house.

(3) That the plaintiff is not acting honestly and in good faith but has collusively allowed Habib-ul-Rahman, etc., to continue in possession, with a view to recover enhanced rent at exorbitant rates, increasing in arithmetical progression for an indefinite length of time.

The lower Court has rejected all these pleas and, as already stated, has passed decrees against the defendant for the sums claimed. On revision the learned counsel for the petitioner has raised all these points again. Before discussing them, however, it seems necessary to have a clear idea of the relative legal rights and obligations of the parties. It is no longer in dispute that the relationship of landlord and tenant was created between Majid Khan, the predecessor-in-interest of the plaintiff and the defendant, and that even though he himself had not been in actual occupation of the house for a single day, he had become liable to discharge all the obligations of a tenant to the plaintiff as his landlord. It is admitted that one of these obligations is that, on the determination of the lease, he was bound to put the landlord into possession of the property: [See

S. 108 (g), T. P. Act]. The tenancy in this case was for a term of one year, which was liable to be reduced if Mt. Afzal Zamani Begum died earlier [S. 111 (a) and (b), T. P. Act]. The tenancy, therefore, determined in February 1929, when Mt. Afzal Zamani Begum died, or, at any rate, on 8th September 1929, when the term of one year expired. On that date, therefore, the defendant was bound to put the plaintiff into possession of the house. He, however, failed to do so, as Mt. Afzal Zamani Begum's alleged heirs were in occupation and declined to vacate. In these circumstances, what was the plaintiff's remedy? The answer to this is to be found in the well-known case in (1868) 4 Q B D 170,¹ which has been followed in numerous cases in England and India.

In that case, it was held that a tenant, under an agreement, without any stipulation that he should deliver up the possession of the premises at the end of the term, is nevertheless bound by law to deliver up complete possession and if actual possession is with an under-tenant, who at the determination of the tenancy holds over against the will of the tenant, the remedy of the landlord is to sue the tenant for damages the measure of which is the rental value of the premises for the time he is kept out of possession, and the costs of the legal proceedings to oust the under-tenant from wrongful possession. In India the leading case on the subject is 22 Bom 348,² where it was held that:

A tenant giving up demised lands to his landlord is bound to give him vacant possession. The result, however, of his not doing so is not to continue the tenancy but to create a claim for damage on the part of the landlord. The tenant is liable in damage to the extent of the loss of rent, which the landlord sustains during the actual period for which he is kept out of possession, and the expenses he is put to in recovering possession of the land.

The first contention raised by the defendant's learned counsel is that the defendant had been exonerated from all liability under the lease by reason of the award of Anwar Ahmad, and the subsequent settlement arrived at between the parties by M. Bhure Mian. On both these points, however, the lower Court, after a careful examination of the evidence, has held that the alleged award was invalid and the settlement is unproved, and after hearing

counsel, I see no reason to interfere with these findings in revision. This contention, therefore, fails. It was next argued that the defendant had in fact offered vacant possession of the house to the plaintiff, (i) when he sent a notice by registered post on 14th March 1932, asking the plaintiff to take possession on 17th March, and (ii) in any case, through the police and Haji Abdul Ghani, Honorary Magistrate, on 30th April 1932. It is no doubt true that the defendant did write to the plaintiff on 14th March 1932, as stated above, but it is by no means clearly established that the house was really vacant on that date. The plaintiff in reply to the defendant's notice wrote back on 17th March 1932, that he had actually gone to the house at the time fixed, but did not meet the defendant there, and had found the house occupied by Habib-ul-Rahman, etc. The evidence bearing on the point is inconclusive, and I am unable to hold that vacant possession of the house was offered on 17th March 1932. The position with regard to the offer of possession through the police and the Honorary Magistrate on 30th April, however, is different.

There is considerable oral and documentary evidence, relating to this matter on the record, but unfortunately the learned Judge of the Court below has dealt with the part of the case very perfunctorily. He has not discussed the evidence at all and has merely observed that the defendant has failed to prove that "possession was then given to the plaintiff or some other person on his behalf." (His Lordship then discussed the evidence and held that it was proved that the defendant offered vacant possession of the house on 30th April 1932, and the plaintiff wrongfully refused to take it and that accordingly the defendant was no longer liable to pay rent after that date. The judgment then proceeded.) It is urged by Mr. Manohar Lal, that Habib-ul-Rahman, etc., are still in possession through Abdul Sattar. But this does not, in my opinion, affect the case. Whether, as alleged by the defendant, these persons took possession in June or July 1932 at the instance of and in collusion with the plaintiff, or whether they themselves walked into the house by breaking open the lock which had been put on it by the Honorary Magistrate, it is not necessary to decide for the purposes of this litigation. It is quite clear that the house was vacant on 30th April 1932,

1. Henderson v. Squire, (1868) 4 Q B D 170=17 W R 519=38 L J Q B 73=19 L T 601.

2. Baliram Giri v. Wasudeo, (1898) 22 Bom 348.

and they took possession long after the offer was made through the Honorary Magistrate and, therefore, the defendant had discharged his obligation, and is no longer responsible for their subsequent re-entry. Even if it be assumed that the defendant has not wrongfully paid his step-mother or her heirs the sale price, or any portion of it, their proper remedy was to sue him for recovery of that amount, and for the plaintiff to sue the persons in actual occupation of the house for possession. He cannot go on suing the defendant indefinitely for rent at progressively increasing rates. The evidence on the record makes it clear that the present rental value of the house is not more than Rs. 15 a month, and yet he claims damages at Rs. 96 or Rs. 192 a month.

The position, therefore, is that the plaintiff is entitled to recover damages from the defendant for his failure to deliver possession till 30th April 1932, and the true measure of these damages is the rental value of the house, which is Rs. 12 or Rs. 15 a month. But in the previous suits the correct legal position does not appear to have been appreciated, and decrees have been passed at Rs. 24, Rs. 48 and Rs. 96 per mensem, and the defendant has actually made payments at these rates. It is, therefore, rightly contended by Mr. Manohar Lal that for the period prior to 30th April 1932, covered by the present suits, the defendant must pay at Rs. 96. Subsequent to that date, however, he is not entitled to receive anything.

The first Suit (No. 613 of 1932) was for recovery of Rs. 288 as rent from 3rd December 1931 to 29th February 1932. This must therefore be decreed in full. In the second Suit (No. 1880 of 1932) a decree for rent from 1st March 1932 to 30th April 1932 at Rs. 96 or Rs. 196 in all, must be passed and the rest of the claim dismissed. The third Suit (No. 21 of 1933) for recovery of Rs. 480 as rent from 22nd July 1932 to 20th December 1932 must fail. Accordingly C. R. No. 127 of 1936 (which arises from Suit No. 613 of 1932) is dismissed and the lower Court's decree affirmed. Civil Revision No. 128 of 1936 (which arises from Suit No. 1880 of 1932) is partially accepted and in lieu of the decree passed by the lower Court a decree for Rs. 196 is passed, the rest of the claim being disallowed. Civil Revision No. 126 of 1936 (which arises from Suit No. 21 of 1933) must be accepted and the plaintiff's suit dismissed.

Having regard to all the circumstances, I leave the parties to bear their own costs in both Courts. Accordingly, the plaintiff's revisions Nos. 219 to 221 of 1936 fail and are dismissed, and the parties are left to bear their own costs in both Courts in these revisions.

R.W./K.S.

Order accordingly.

A. I. R. 1937 Lahore 125

ADDISON AND DIN MOHAMMAD, JJ.

Drehan Khan—Plaintiff—Appellant.

v.

(*Sardar*) *Bahadur Khan* and others—
Defendants—Respondents.

First Appeal No. 58 of 1936, Decided on 21st October 1936, from decree of Senior Sub-Judge, Multan, D/- 9th November 1935.

Frontier Crimes Regulation (3 of 1901), Ss. 10, 49, 60—Dispute about some property referred to Jirga—Deputy Commissioner and Commissioner finally disposing of differences relating to such property—Civil Court has no jurisdiction to entertain suit relating to same matter.

Dispute about some property was referred to Jirga under S. 8, Frontier Crimes Regulation. The Deputy Commissioner finally disposed of the differences between the parties relating to such property on the report of Jirga. The order of Deputy Commissioner was confirmed in revision by the Commissioner. A fresh suit for declaration was brought in a civil Court relating to the same property:

Held: that civil Court had no jurisdiction under S. 60 of the Regulation to re-open the matter decided by the Council of Elders (Jirga) and decreed by Deputy Commissioner. [P 127 C 1]

M. L. Puri and *Bishan Narain*—for Appellant.

Mohammad Alam, *Shabir Ahmad* and *Mohammad Bakhsh*—for Respondents.

Din Mohammad, J.—The suit out of which this appeal has arisen was instituted by Khan Bahadur Sardar Drehan Khan against his three brothers for a declaration that he was the exclusive owner of the house property situate at Multan. His suit was dismissed on the ground that the matter in suit having been decided by a Council of Elders (Jirga) followed by a decree of the Deputy Commissioner, Dera Ghazi Khan, the civil Court had no jurisdiction. On appeal this Court came to the conclusion that the decree referred to in the judgment of the trial Judge was not such a final decree as was contemplated by S. 10, Frontier Crimes Regulation

1901, and that consequently the jurisdiction of the civil Court was not ousted. The case was accordingly remanded to the Court below for decision in accordance with law. The Senior Subordinate Judge has again dismissed the suit mainly on the ground that S. 10 read with S. 60, Frontier Crimes Regulation 1901, bars the jurisdiction of the civil Court. The plaintiff has appealed. The main point stressed by counsel for the appellant is that the property in suit was not in dispute before the Jirga and that consequently the present suit was not barred. It was also contended that inasmuch as this Court had come to a definite conclusion that the jurisdiction of the civil Court was not barred, the Subordinate Judge was not competent to decide otherwise.

After going through the record and hearing arguments of counsel on both sides, we have come to the conclusion that this appeal cannot succeed. There is abundant evidence on the record to show that the property in suit was definitely included in the dispute that was referred to the Council of Elders and the decree finally passed by the Deputy Commissioner also referred to it. In para. 2 of the plaint put in by the appellant himself it was stated that defendant 1 had, both in his application to the Deputy Commissioner, Dera Ghazi Khan, and his statement of claim before the Council of Elders, alleged that the property in suit was the joint property of the family of the parties and had thus challenged his exclusive right to own and possess it. In Ex. D. 18, which is a statement of claim put in by the defendants on 10th April 1928, in the Court of the Deputy Commissioner, Dera Ghazi Khan, it was averred that they wished the residential property to be partitioned in such a manner as to allow the party in possession to continue in possession thereof and that "the bungalows and deras situate at Dera Ghazi Khan, Kot Mithan, Rajanpur and Multan should remain joint." In their preliminary decision announced on 13th April 1928, the Elders decided that the residential houses should be allowed to remain in the possession of the party already in possession thereof and that their value should be assessed by the assessors nominated by the parties themselves and adjustment in value be made according to the shares of the respective parties therein. In the report submitted by Mr. Ghulam Ali, Naib Tahsildar, on 29th August

1928, it is stated that the plaintiff Khan Bahadur Sardar Drehan Khan had claimed exclusive ownership of the houses situate at Kot Mithan, Rajanpur, Dera Ghazi Khan, Multan and Fort Munro on the ground that they were Tumandari houses. It may be remarked here that from among the sons of the late Sardar Miran Khan Darishak, the plaintiff, was nominated as Tumandar and was known as Tumandar Darishak. In the same report reference was made to a house situate at Multan and its value was assessed at Rs. 15,000. On 15th September 1928, it appears that the case was laid before the Deputy Commissioner, Dera Ghazi Khan. The order of the Deputy Commissioner is printed at p. 42 of the Supplementary paper-book referred to above and is headed:

In the matter of partition of the residential houses between Sardar Drehan Khan, Tumandar Darishak and his brothers.

The Deputy Commissioner excluded the house at Fort Munro from partition but ordered the partition of all other houses which had been built or acquired with the joint funds. He further directed that the value of the houses should be got assessed by arbitrators in accordance with the proposal of the Jirga and he sent the case to the Political Assistant for necessary action. On 9th April 1929, the plaintiff submitted an application to the Deputy Commissioner, Dera Ghazi Khan, wherein he drew the attention of the Deputy Commissioner among other things to the fact, that the house at Multan had been purchased by him and was consequently owned by him to the exclusion of his brothers. This application was decided against the plaintiff by the Deputy Commissioner on 11th April 1929. The plaintiff filed an application for revision of the said order of the Deputy Commissioner, Dera Ghazi Khan, in the Court of the Commissioner, Multan Division, who disposed of it by his order dated 6th July 1929. The Commissioner not only did not interfere with the order of the Deputy Commissioner mentioned above, but further remarked as follows :

The house at Multan, though situated outside the limits of Dera Ghazi Khan, was included in the dispute referred to the Jirga under S. 8, Frontier Crimes Regulation, and I hold the Jirga had power to decide about this house too.

The report submitted by the Council of Elders on 22nd February 1930, covered the entire immoveable property excluding the land granted by the Government. The

Deputy Commissioner too, in his final decree, dated 28th July 1930, made a reference to the immoveable property owned by the parties and observed that the decision given in that respect in the report of the Jirga, dated 13th April 1928, on which he had already passed his orders, held good. The residential houses in possession of the parties which were to be divided in accordance with the report of the arbitrators were particularly referred to in that order. It would thus appear that the property in suit was actually involved in the dispute before the Jirga and both the Jirga and the Deputy Commissioner had finally disposed of the differences between the parties relating thereto. This being so, the conclusion is irresistible that the civil Court had no jurisdiction to reopen the matter decided by the Council of Elders and decreed by the Deputy Commissioner, Dera Ghazi Khan. Reference in this connexion may be made to Ss. 10, 49 and 60, Frontier Crimes Regulation, 1901. S. 10 says :

No civil Court shall take cognizance of any claim in respect of which the Deputy Commissioner has proceeded under S. 8, sub-s. (3) Cl. (a), Cl. (b) or Cl. (d).

This sub-section provides for reference of a dispute to a Council of Elders under certain circumstances. S. 49 provides for a revision by the Commissioner of any decision, decree, sentence or order given, passed or made in any proceeding under this Regulation. It may be stated here that Ss. 8 and 10 fall under Ch. 3, and S. 49 falls under Ch. 6 of the Regulation. S. 60 lays down :

Except as therein otherwise provided, no decision, decree, sentence or order given, passed or made or act done under Ch. 3, 4, 5 or Ch. 6, shall be called in question in, or set aside by, any civil or criminal Court.

In the face of these clear provisions it cannot be urged that what the Deputy Commissioner and the Commissioner did on the report of the Council of Elders could be challenged in any manner. It now remains to consider whether the previous judgment of this Court pronounced on 13th November 1933, concluded this matter and thus prevented the Court below from coming to a different decision. We are disposed to think that it did not. It may be useful to remember in this connexion that the original judgment from which an appeal was preferred to this Court in the first instance was pronounced on 16th May 1930, and that the final

decree of the Deputy Commissioner, which bars the present suit, was not passed until 28th July 1930. The judgment of this Court referred to the order of the Deputy Commissioner, dated 7th May 1928, and remarked that that order not being final the jurisdiction of the civil Court was not barred. There can be no doubt that the order referred to, in the previous judgment of this Court, was not final and consequently it could not oust the jurisdiction of the civil Court. The order of the Deputy Commissioner, dated 28th July 1930, was not then considered and the present bar is pleaded on the basis of that order and not on that of the order dated 7th May 1928. It is obvious, therefore, that, although the previous judgment of this Court was correct, so far as it went, it did not prevent the trial Judge from coming to a different conclusion in the light of the order which was pronounced after the original appeal had been filed and which had not been considered by this Court before. On these grounds we hold that the suit of the plaintiff was barred under the provisions of the Frontier Crimes Regulation, 1901, and we accordingly dismiss this appeal with costs throughout.

K.B./A.L.

Appeal dismissed.

* * A. I. R. 1937 Lahore 127:

YOUNG, C. J. AND MONROE, J..

Mangal Singh and another—Appellants.
v.

Emperor—Opposite Party.

Criminal Appeal No. 262 and Murder Ref. No. 52 of 1936, Decided on 27th April 1936, from order of Sess. Judge, Montgomery, D/- 13th February 1936.

(a) **Criminal Trial—Confession—Confession of co-accused — Confession is admissible against another only so far as equal implication is concerned — Confessor implicating another for offences of murder and concealment of dead body while implicating himself only so far as concealment—Confession will be admissible against another so far as offence of concealment is concerned.**

A confession of a co-accused is admissible against another accused only if it equally implicates the confessor with his colleague in crime.

[P 129 C 1, 2]

Where a confessor implicates himself in a crime of concealment of a dead body, but implicates another accused not only for the fact of concealment, but also for the crime of murder, the confession will be admissible against the accused so

far as regards the offence of concealment is concerned, but will be inadmissible so far as crime of murder is concerned. [P 129 C 1, 2]

(b) Criminal Trial — Circumstantial evidence—Murder—Absence of explanation does not prove offence—Absence of explanation of suspicious circumstances is circumstantial evidence that should be considered.

The mere absence of explanation, cannot prove the crime of murder, but the fact that a criminal does not explain very suspicious circumstances against him is certainly circumstantial evidence which may be taken into consideration against him. [P 129 C 2]

* * (c) Criminal Trial — Jury and Judge—Question of law or fact — Murder trial—Accused not able to explain suspicious circumstances against him — Inference to be drawn from want of explanation is question of fact and not question of law—Such question should be decided by jury — Current Indian practice of treating such question as question of law derogated from in preference to English practice.

Where in a murder case, an accused failed to give any explanation of the very suspicious circumstances against him, the question was whether it was possible to treat the circumstances as establishing a crime on point of fact or on a point of law and whether such circumstances should be left to the jury for a decision or the Judge should decide holding it as a point of law :

Held : although authorities in India have treated this question as point of law, yet evidence in such cases was left to the jury in England and it was for the jury to come to a finding. The latter practice of treating such question as point of fact is a better and commendable practice to the former one : *A I R 1926 Lah 88, Explained and Dissent.* [P 129 C 2; P 130 C 1]

J. G. Sethi—for Appellants.

Des Raj Sawhney—for the Crown.

Young, C. J.—Mangal Singh and Kartar Singh were charged with the murder of Narain Singh. The learned Sessions Judge of Montgomery acquitted Kartar Singh of murder, but convicted him under S. 201, Penal Code, and gave him three years' rigorous imprisonment. Mangal Singh has been found guilty of murder and sentenced to death. Both the convicts appeal and in the case of Mangal Singh we have to consider the question of the confirmation of the sentence of death.

The deceased Narain Singh was the father of Kartar Singh, a boy 14 or 15 years of age. The mother of Kartar Singh was also the mother of Mangal Singh by a previous marriage. The first wife of Narain Singh having died Narain Singh had married a widow. The mother of Kartar Singh and Mangal Singh died and Narain Singh commenced to live with his deceased brother's wife Mt. Basant Kaur. Mt. Basant Kaur had three daughters and

very naturally Narain Singh used to spend money upon Mt. Basant Kaur and her family. It is suggested that Kartar Singh and Mangal Singh both objected to this, which they considered a waste of their father's money. Mangal Singh also, it is said, wished that some of Narain Singh's land should be entered in his name. Narain Singh always put this question off to the annoyance of Mangal Singh. Some time before the murder of Narain Singh it is alleged that Mangal Singh attacked Narain Singh with a spade but Narain Singh was rescued. For one reason or another the case for the Crown is that Mangal Singh disliked his step-father and because of his dislike he murdered him. Kartar Singh, it was suggested, also shared the disapproval of his father and assisted in the murder.

Mt. Basant Kaur was anxious when Narain Singh disappeared. She made inquiries from Mangal Singh where his step-father was. Mangal Singh appears to have told two stories, both false. One was that Narain Singh had gone to fetch Matto, one of his younger sons, and, secondly, that Narain Singh was lying ill in a hospital at Amritsar and so could not come home. In the latter case it is alleged that Mangal Singh produced a postcard purporting to come from his step-father, but no postcard has been produced in this case and Mt. Basant Kaur says that when she asked for the postcard Mangal Singh said that he had lost it. Mt. Basant Kaur accompanied by Kartar Singh went to the hospital at Amritsar and made inquiries for the deceased. She was there told that Narain Singh had never been to the hospital at all.

On Mt. Basant Kaur's return she collected a panchayat and it was thought fit to send messengers out to various places where it was thought Narain Singh might have gone. One of the persons who went to look for the deceased was Mangal Singh. These messengers, with the exception of one man who was sent to Pairewal and Mangal Singh, all returned by 13th October. Another panchayat was called and Kartar Singh was asked by the members of the panchayat about his father. It is then said that Kartar Singh confessed that Narain Singh had been murdered between the night of 2nd and 3rd October while sleeping in his house and that Mangal Singh had murdered him by hitting him on the head with a heavy wooden

pestle and then strangled him and that Kartar Singh himself had thereafter assisted Mangal Singh to take the body away and bury it in their field. This information was at once lodged at the police station by Jagat Singh, a Lambardar, who took Kartar Singh with him when he made the first information report. The police were subsequently taken by Kartar Singh and shown the spot where he said the body had been buried. From that place the body was dug up. On 15th October, Mangal Singh was arrested at another village. His chaddar was suspected to be bloodstained and it was taken off. This chaddar has been proved to have been stained with human blood. Kartar Singh also produced a heavy danda or pestle which also has been found to be stained with human blood.

There was also the evidence of Sahib Singh and Maghar Singh, that while they were going round their land on the night of the murder, they were attracted by some sounds in the field of Narain Singh. They thought that some cattle might be grazing on the land and they had better see about it. They saw in that field on that night Mangal Singh and Kartar Singh engaged in digging a pit with a cart standing by. Mangal Singh, it is said, told these two witnesses that they were digging out a stump of a tree. We take the case of Mangal Singh first. The evidence against him is that he had reason to dislike his step-father who would not do what he wished and whom he thought was wasting the family money. We are satisfied that the evidence with regard to this is true and that sometime before the murder Mangal Singh actually had attacked his father with a spade.

The next piece of evidence which the learned Judge in the Court below has admitted against Mangal Singh is the evidence of Kartar Singh's confession. This was an oral confession. We are satisfied that the confession did not implicate Kartar Singh in the murder of his father. He puts the blame entirely upon Mangal Singh. As far as it implicates Kartar Singh it only does so to the extent of the crime of concealing the evidence of the murder, that is burying the body. The learned Judge, therefore, in our opinion, was wrong in admitting that part of the confession relating to the murder as evidence against Mangal Singh. A confession of a co-accused is admissible against

another accused only if it equally implicates the confessor with his colleague in crime. In fact, as far as the murder is concerned, the oral statement of Kartar Singh does not amount to a confession at all and, therefore, it cannot be admitted against Mangal Singh. It can be admitted against Mangal Singh only so far as it relates to the concealment of the body and the crime committed under S. 201, Penal Code. (Their Lordships after discussing the evidence in detail proceeded.) Another fact which can be taken into consideration against Mangal Singh is that, although the evidence is clear that Narain Singh had been brutally murdered, and that Mangal Singh assisted in burying the body of a murdered man, he gave no explanation whatever of this damning fact. The mere absence of explanation, of course, cannot prove the crime of murder, but the fact that a criminal does not explain very suspicious circumstances against him is certainly circumstantial evidence which may be taken into consideration against him.

The evidence, therefore, against Mangal Singh shortly put is as follows: He buried the body of Narain Singh who clearly had been murdered. Shortly after he had been murdered, the body was buried in the field belonging to the family. The next morning on being questioned as to the whereabouts of Narain Singh, Mangal Singh lied. Quite apart from the evidence that he said that Narain Singh had gone to fetch Matto, he undoubtedly said that he had received a postcard which stated that Narain Singh was ill in the Amritsar hospital. He left the village on 11th October on the pretence of looking for Narain Singh. He knew perfectly well when he went that Narain Singh's body was lying where he had buried it. He did not return to the village and was arrested on the 15th outside the village at a railway station. His loin-cloth was stained with human blood. He failed to give any explanation of the very suspicious circumstances against him.

On this evidence it has been strenuously and ably argued by counsel for the appellant that it is impossible to find a verdict of murder. He argues that the evidence, if believed, would establish an offence under S. 201, Penal Code, and he argues that it can only establish such an offence. We agree that all the authorities to which he has referred are in his favour on this

point. The authorities in India appear to have treated this question as point of law, that is, that evidence of this nature ought not properly to be left to a jury in a murder case by a Judge. With the greatest respect to the decisions to which we have been referred, one of which is a decision of this High Court reported in 7 Lah 84,¹ we cannot hold that this question is a question of law at all. Evidence of this nature would certainly in England be left to a jury by a Judge. The question in each case is whether circumstantial evidence of this nature satisfies a jury of the guilt of the accused under S. 302, Penal Code. The facts of the case reported in 7 Lah 84¹ were for that Bench, and their finding on those facts cannot bind any other Bench. The evidence that we have detailed above is clearly evidence which ought to be left to a jury and evidence upon which a jury might reasonably find a verdict of murder. This is in our opinion the real test.

After a very careful consideration of all the facts of this case we are satisfied that the only reasonable inference to be drawn from the facts of this case is that Mangal Singh is guilty of the murder of Narain Singh. With regard to Kartar Singh, we take into consideration the fact that he is very much younger than Mangal Singh and that he had not the same reason for disliking his father. Under the circumstances outlined above he would be under the influence of the elder man and might easily be persuaded by him to take part in the burial of the body after the murder in fact had been committed. Under the circumstances we consider that the sentence of three years' rigorous imprisonment is too severe. We reduce his sentence to one year's rigorous imprisonment and suggest to the Government that if possible he might serve the sentence in a Borstal or other Institution. We confirm the sentence of death passed on Mangal Singh and dismiss his appeal.

B.D./A.L.

Order accordingly.

1. Rannun v. Emperor, A I R 1926 Lah 88=94
I C 901=27 Cr L J 709=7 Lah 84.

A. I. R. 1937 Lahore 130.

ADDISON AND DIN MOHAMMAD, JJ.

Mt. Khadija Bibi and another—
Plaintiffs—Appellants.

v.

Hari Singh and others—Defendants—
Respondents.

First Appeal No. 193 of 1936, Decided on 13th October 1936, from decree of Senior Sub-Judge, Jhelum, D/- 23rd March 1936.

Custom (Punjab) — Succession — Trading Khojas of Chakwal town who were converted from Hinduism and who are not agriculturists follow Mahomedan law of Inheritance—To prove that they follow custom it must be established that they did not follow Mahomedan law when they were converted.

Trading Khojas of Chakwal town who were converted from Hinduism and who are not agriculturists do not follow custom in matters of inheritance but Mahomedan law. It is true that these Khojas were once Hindus, but it must be established by the party who pleads that they follow custom, that when they were converted to Mahomedanism, they did not follow Mahomedan law but custom and also what that custom was: A I R 1925 Lah 420, Ref. [P 130 C 2; P 131 C 1,2]

Mohd. Monir and Mohd. Amin—for
Appellants.

Ichhru Ram and Indar Dev Dua—for
Respondents.

Addison, J.—The only question involved in this first appeal is whether the parties follow Mohamedan law or custom. They are Khojas, carrying on business in the town of Chakwal. They were converted to Mahomedanism on some unknown date and they were before that Mehta Khatri. The trial Judge has found that they follow custom in matters of inheritance, the custom being that the son excludes the widow and daughters. This is a common state of affairs in cases of agriculturists who follow custom in the Punjab.

Six mutations have been placed on the record but five of them pertain to occupancy tenancies, the succession to which is governed by the Punjab Tenancy Act. There is one mutation, however, at p. 37 of the paper book in which Shamas Din, a Khoja, is shown as having a small share in a joint khata with others. He was also an occupancy tenant and the mutation as regards the occupancy tenancy is on the record. In it he was properly succeeded by his sons. His sons also succeeded to the small share of the proprietary land shown in his name. It might be mentioned

that the land revenue assessed on his share is only As. 8-6. There is evidence that he left daughters.

The witnesses who appeared for the plaintiffs, who are a widow and a daughter, stated that Khojas follow Mohamedan law. The first of them, Hafiz Sodagar Din, however, stated that his sisters were not given a share in the land on the death of his father but were given ornaments and cash instead. This may have been for the reason that the daughters could not manage the land and thus their share was made up of cash and ornaments. Apparently, some of these Khojas hold a small area of agricultural land which, however, they do not till with their own hands and, in the case of the present parties, it is not shown that they hold any agricultural land. The witness stated further that Sharaf Din's land could not legally be inherited by his daughters. This, however, does not go against the plaintiffs as his land was only an occupancy tenancy (see page 23) so that his statement is correct in this respect. Similarly, witness No. 2 for the plaintiffs, Fazal Ilahi, in cross-examination said how could his sisters get his father's house when he was alive, but he added that after his death he would give his sisters his share. The only other witness who gave evidence for the plaintiffs was Babu Gul Mohammad, P. W. 5. He supported the plaintiffs' case. He is, however, a connection of the plaintiffs. As against this, two witnesses for the defendants, who are not Khojas, stated that daughters were excluded in matters of inheritance amongst Khojas.

In our judgment this evidence is insufficient to establish that these trading Khojas of the town of Chakwal, who do not till land and many of whom even do not hold any land, follow custom in matters of inheritance. As pointed out in 6 Lah 140¹ at page 147, the share of daughters in land in circumstances like the present is often not claimed by them. It is true that these Khojas were once Hindus but it must be established that when they were converted to Mahomedanism they did not follow Mahomedan law. We were, however, referred to Question 39 of Talbot's Customary Law of the Jhelum District where in answer to Question 39 it was said by all tribes that sons first suc-

ceed and thereafter the widow and daughters. There is a note, however, to the effect that the rights of widows and daughters are more fully dealt with in the following paragraphs. In answer to Question 57 different tribes give different answers to the question "In what circumstances are daughters entitled to inherit?" and the answer of the Khojas was that Mahomedan law is followed. This shows that Khojas do follow Mahomedan law with respect to daughters. In any case, it was for the defendants to establish that these Khojas follow custom and also to prove what the custom was. In our judgment on the record they have failed to prove that they do follow custom in the matter in dispute. After all custom in the Punjab is usually followed by agriculturists and it cannot be said that these Khojas are agriculturists.

For the reasons given above we accept the appeal and decree the plaintiffs' suit for a declaration that they are owners of 11/32 share in the property in dispute by right of inheritance and that the decree obtained by defendant 1 for the sale of the property on the footing of the mortgage effected by Mohammad Gul cannot be executed as against that share. The parties will bear their own costs throughout.

M.D./D.S.

Appeal accepted.

A. I. R. 1937 Lahore 131

SKEMP, J.

Emperor

v.

Ghani Shah and others.

Criminal Revision No. 323 of 1935,
Decided on 25th July 1935.

Revision — Sentence — Accused convicted under Ss. 325 and 149, Penal Code, only fined when sentence of imprisonment was more proper—Fines paid and more than five months elapsing since settlement of dispute — High Court will not pass sentences of imprisonment in revision.

Where the accused convicted under Ss 325 and 149, Penal Code, are sentenced, each to a sentence of fine, although normally the sentence of imprisonment should have been inflicted on them and the accused have paid their fines and more than five months have elapsed since the dispute was settled, it would be harsh and unnecessary for the High Court to pass sentences of imprisonment in revision: 313 P L R 1913 and A I R 1929 Lah 102, *Rel. on.* [P 132 C 1]

Ratan Lal Chawla for Govt. Advocate
—for the Crown.

M. L. Puri—for Opposite Parties.

1. Hussain Shah v. Gul Mahomed, A I R 1925 Lah 420=88 I C 816=6 Lah 140.

Order.—In this case five persons were convicted under Ss. 325 and 149, Penal Code, and sentenced each to pay Rs. 50 fine. Immediately after pronouncing judgment the Magistrate realized that a sentence of fine only for causing grievous hurt was illegal and he reported the matter to the District Magistrate who has referred the case to this Court for enhancement.

The victim was one Aishi Ram, who was found to have forty injuries, two of which were grievous, namely, a broken forearm and the blow on the head which did not heal for more than twenty days, apparently because dirt got into it. As the beating was inflicted by five persons, I agree with the District Magistrate that normally a sentence of imprisonment should have been inflicted. The trial Magistrate, however, in this case considered that any term of imprisonment might embitter the accused and render such future quarrels more likely. He also found as a fact that the complainant was partly to blame for the assault and that the story narrated was not the whole truth. He said :

I am unable to hold that the attack was premeditated or without provocation. The complainant admits that he owes money to the accused. The accused allege that they demanded money from him and he abused them, which resulted in a fight. This version is more probable. It appears that Ghanisham Das (the principal accused) demanded money from the complainant who abused him and this led to a fight.

Mr. Puri who represents the respondents, argues that the complainant was particularly insulting in what he said. Mr. Puri has also referred to 313 P L R 1913¹ and A I R 1929 Lah 102.² The former ruling of Shadi Lal, J. is a stronger case than the present, because with less provocation more serious injuries were inflicted and a sentence of only Rs. 25 was passed, and yet the learned Judge refused to interfere. The respondents have paid their fines, upwards of five months have elapsed since the case was settled, and I think it would be harsh and unnecessary to pass sentences of imprisonment now. With these remarks I reject the petition for revision.

R.M./R.K.

Petition rejected.

1. Emperor v. Hari Singh, (1913) 313 P L R 1913=21 I C 471=14 Cr L J 545.

2. Emperor v. Karam Khan, A I R 1929 Lah 102=118 I C 540=30 Cr L J 939.

A. I. R. 1937 Lahore 132

SKEMP, J.

Emperor

v.

Dayal Singh—Accused.

Criminal Revn. No. 1529 of 1935, Decided on 7th February 1936, from report of Dist. Magistrate, Kangra, D/. 3rd November 1935.

(a) Criminal Trial—Revision—Interference by High Court—Revision against acquittal—High Court will not interfere when appeal could be brought except in very unusual cases.

Where, it being open to the Local Government, on being moved, to bring an appeal from an acquittal, the practice of the High Court is, not to interfere in revision except in very unusual cases. [Case found not fit for interference] : A I R 1924 Lah 451 and A I R 1923 Lah 601, *Rel. on.*

[P 133 C 1]

(b) Motor Vehicles Act (1914) S. 16—Punjab Motor Vehicles Rules (1931), Rr. 23, 47 and 91—R. 23 is made in public interest—Lorry driver carrying passengers in excess of those permitted in license is guilty under Rr. 47 and 91 although checker and ticket seller are present.

Rule 23 of the Punjab Motor Vehicles Rules makes the driver as well as the owner responsible for breach of any rule, provided that the rule has been contravened. The rule has been made in the public interest and imposes on the driver the duty of refusing to drive if he knows that a rule is broken.

[P 133 C 1]

A lorry driver carrying passengers in excess of those permitted in the license for the vehicle is guilty under Rr. 47 and 91 of the Punjab Motor Vehicles Rules, even though the checker and ticket seller are present on the occasion.

[P 132 C 2]

Mohammad Amin—for the Crown.

Amar Nath Chona—for Accused.

Order.—The Tehsildar, Kulu, a Magistrate of the 2nd Class, tried a lorry driver for carrying passengers in excess of those permitted in the license for the vehicle. It was admitted that the vehicle was licensed to carry only twenty-one passengers including the driver and the cleaner, whereas a police officer found twenty three persons including the driver, the cleaner and a checker. The Magistrate acquitted the driver on the ground that the driver was not responsible in the presence of the checker and ticket seller. The District Magistrate of Kangra has sent up the case on revision remarking that it is one of special importance and involves an erroneous view of an important principle.

The trial Magistrate's view was wrong in law, because R. 23 of the Punjab Motor

Vehicles Rules, 1931 makes the driver as well as the owner responsible for breach of any rule, provided that the driver knows that the rule has been contravened. This rule has been made in the public interest and imposes on the driver the duty of refusing to drive if he knows that a rule is being broken. But Mr. Amar Nath Chona for the driver has pointed out that there is a mass of authority that the High Court should not interfere in revision in cases where an appeal could be brought. In this case it was open to the Local Government, on being moved, to appeal against the order of acquittal. Where there is no appeal against an acquittal the practice is not to interfere on revision except in very unusual cases. For this proposition I think I need refer, out of the authorities quoted, only to 5 Lah 16,¹ a Division Bench case, and 84 I C 641.² This particular driver was certainly not committing such an act that it is necessary to resort to extraordinary jurisdiction. For these reasons I refuse to set aside the acquittal and reject the petition for revision.

R.M./R.K.

Petition rejected.

1. Emperor v. Achar Singh, A I R 1924 Lah 451 81 I C 547=25 Cr L J 931=5 Lah 16.
2. Ganga Singh v. Ramzan, A I R 1923 Lah 601 =84 I C 641=26 Cr L J 337=6 L L J 50.

* A. I. R. 1937 Lahore 133

YOUNG, C. J. AND MONROE, J.

Sardar Khan — Petitioner.

v.

Emperor — Opposite Party.

Criminal Revn. No. 800 of 1935, Decided on 4th December 1935, from order of Dist. Magistrate, Attock, D/- 24th April 1935.

* Criminal P. C. (1898), Ss. 514, 106—Surety bond under S. 106 — Object of — Bond is for prevention of crime and for providing additional security for keeping the peace by principal and not merely for ensuring payment under bond—On the principal committing breach of peace surety is liable for amount of bond even though payments made by principal : 30 P R 1890 Cr ; 26 P R 1894 Cr ; 226 P L R 1911 ; 4 Lah 462 = A I R 1924 Lah 262 = 81 I C 955 and 5 Lah 448 = A I R 1925 Lah 228 = 84 I C 546, Overruled.

When the bond is executed by surety in accordance with the provisions of S. 106, Criminal P. C., the surety is under obligation to pay the amount under the bond in the event of a breach of peace by the principal even where payment is made by the principal of amount due under his own bond. The object of the Code is to prevent crime, and not to obtain money for the Crown. The object of security bond is to provide additional

security for the principal's keeping the peace and not merely for ensuring recovery of amount of the bond : 30 P R 1890 Cr ; 26 P R 1894 Cr ; 226 P L R 1911 ; 4 Lah 462 = A I R 1924 Lah 262 = 81 I C 955 and 5 Lah 448 = A I R 1925 Lah 228 = 84 I C 546, Overruled ; 36 Cal 562, Appr.

[P 135 C 1, 2]

Mohsin Shah—for Petitioner.

Hem Raj Mahajan for Govt. Advocate
—for the Crown.

Order of Reference

Coldstream, J.—On 21st December 1932, the Sub-Divisional Magistrate, Pindigheb, passed an order under S. 106, Criminal P. C., directing Fateh Khan to execute a bond for Rs. 500 with one surety for keeping the peace for a period of one year. The present petitioner, Sardar Khan, stood surety and himself executed a bond to the effect that he would forfeit Rs. 500 if Fateh Khan broke the peace. Less than four months later Fateh Khan committed an offence under S. 396, I. P. C., and was convicted and sentenced to transportation for life. His appeal was dismissed by the High Court on 27th April 1934. On 11th April 1933 the police had reported to the Court that Fateh Khan had been bound over to keep the peace and suggested that action should be taken to forfeit his bond. No action was, however, taken until 4th August 1934 after the High Court had rejected the appeal. The Sub-Divisional Magistrate issued notice to Sardar Khan and after hearing him passed an order forfeiting both the personal bond executed by Fateh Khan and the surety bond executed by Sardar Khan, the petitioner. Against this order Fateh Khan did not appeal. Sardar Khan, however, appealed to the District Magistrate who upheld the order of the Sub-Divisional Magistrate. Against the District Magistrate's judgment, Sardar Khan has come to this Court on revision.

The only point which calls for consideration is whether there is force in the contention pressed before me by Mr. Mohsin Shah for the petitioner that the order making his client liable to pay Rs. 500 in addition to any amount which may be recovered from Fateh Khan, his principal, is not in accordance with law. The learned counsel for the Crown has referred me to 36 Cal 562¹ in support of the view taken by the learned District Magistrate (*see* pp. 12 and 13 of the District Magistrate's judgment) to which view some support is

1. Emperor v. Kuldip Sahai, (1909) 36 Cal 562 = 2 I C 89 = 10 Cr L J 89 = 13 C W N 555.

given by a judgment of the Madras Court in 10 Cr L J 294.² On the other hand, the Lahore Court has taken an opposite view on three occasions: *see* 31 P R 1890,³ 4 Lah 462⁴ and 5 Lah 448.⁵ None of the judgments to which I have referred deals with a bond executed in compliance with an order under S. 106, Criminal P. C., but I think that this fact does not render them inapplicable for the purposes of this case. The meaning of the words in S. 106, Criminal P. C., would, I think, naturally be taken to be that the surety will be bound to make good the amount stated in the bond executed by his principal in the event of the latter's failure to do so, but the form of the surety bond given in Sch. 5 to the Civil P. C. (*see* Form 11) seems to show that in the case of surety bonds executed under the provisions of Ss. 108, 109 and 110, the intention is that the surety should be liable independently of his principal. No form of bond to be taken from a surety is appended to form No. 10 (bond to keep the peace under S. 107). In view of the conflict of opinion in this matter I refer the petition for determination on this point to a Division Bench.

OPINION

Young, C. J.—This petition was referred to this Court for determination of one question only: whether when a bond has been given under S. 106, Criminal P. C. with a surety and the person bound commits a breach of the peace, the amounts payable under the bond by the person bound and by the surety can be recovered or whether the surety only becomes liable in the event of default in payment by the person bound? S. 106, Criminal P. C., provides that whenever any person accused of any one of certain offences is convicted of such offence and the Court is of opinion that it is necessary to require him to execute a bond for keeping the peace, the Court may at the time of passing sentence order him to execute a bond for a sum proportionate to his means with or without sureties for keeping the peace during such period not exceeding

three years as it thinks fit to fix. In the present case, an order was made under this section on 21st December 1932, by the Sub-Divisional Magistrate of Pindigheb, ordering Fateh Khan to execute a bond for Rs. 500 with one surety for keeping the peace for a period of one year. Fateh Khan entered into a bond binding himself not to commit a breach of the peace during the term of one year and in case of his making default he bound himself to forfeit to His Majesty the King Emperor the sum of Rs. 500. On the same form underneath the bond of Fateh Khan the petitioner declared himself surety for Fateh Khan that he would be of good behaviour to His Majesty the King Emperor and to all his subjects during the said term and in case of Fateh Khan's making default therein he, Sardar Khan, bound himself to pay His Majesty the sum of Rs. 500.

It will be observed in the first place that the bond of both Fateh Khan and Sardar Khan has been made in accordance with the provisions of S. 106 and in the second place that Sardar Khan's obligation is to pay in the event of a breach of the peace by Fateh Khan and not in default of payment by Fateh Khan after he has committed a breach of the peace. In our opinion this section and the form of the bond supply the answer to the question before us. There can be no doubt that the obligation of Sardar Khan to pay Rs. 500 became absolute when a breach of the peace was committed by Fateh Khan. The learned Judge's reason for referring the case was that there are conflicting decisions on the point, 36 Cal 562¹ supporting the view that surety's obligation to pay is independent of that of the person accused. But on the other hand there are five decisions of this Court to which the learned counsel for the petitioner has drawn our attention and which support the contrary view. In 30 P R 1890⁶ it was held that only one bond should be taken from the accused and his sureties for one determinate amount, the sureties engaging to be bound jointly and severally for the same amount as the accused, so that it may be realizable from any one of the obligors, and further there was no warrant in law for taking separate bonds from the accused and his sureties individually and severally exceeding in the

2. Kular Annappa Naik v. Emperor, (1909) 3 I C 470=10 Cr L J 294.

3. Guran Ditta v. Empress, (1890) 31 P R 1890 Cr.

4. Emperor v. Abdul Aziz, A I R 1924 Lah 262=81 I C 955=25 Cr L J 1131=4 Lah 462.

5. Harnam v. Emperor, A I R 1925 Lah 228=84 I C 546=25 Cr L J 322=5 Lah 448.

6. Jawaya v. Empress, (1890) 30 P R 1890 Cr.

aggregate the amount for which the accused is liable. The judgment in this case is a very short one of a Single Judge and he has not considered at all the wording of S. 106, which makes the surety liable not for payment of money but for the good conduct of the person bound.

The next is 26 P R 1894.⁷ It is a judgment of the same Judge, and the learned Judge relied on his own previous judgment. The third case is 226 P L R 1911⁸ at p. 857, also the decision of a Single Judge. There is no reference to S. 106 or discussion of the law. Without giving any reason, the learned Judge said that only the amount, for which the bond of the person bound was taken, could be recovered and that amount might be recovered from him or any one or both of the sureties. The fourth case is 4 Lah 462⁴ which is also the judgment of a Single Judge and which followed 26 P R 1894.⁷ The fifth case is 5 Lah 448⁵ which also follows 26 P R 1894⁷ and 226 P L R 1911.⁸ In this case, the learned Judge referred to decision of the Division Bench of the Calcutta High Court (36 Cal 562¹), from the view of which he differed. In this case (36 Cal 562¹) it was held that upon the forfeiture of a bond by a person to keep the peace for a term, the surety is liable to pay the amount specified in his bond in addition to the penalty paid by the principal. The question there arose under S. 107, Criminal P. C., where the provision is that the Magistrate may require such person to show cause why he should not be ordered to execute a bond, with or without sureties for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.

It will be seen that wording is substantially the same as in S. 106. The learned Judges in their judgment seem to us to have discovered the fallacy which, with respect we consider, underlies the Punjab decisions when they said:

Prima facie, no doubt, a surety merely agrees to pay the creditor failing the debtor, and his liability is as a rule, co-extensive with that of the principal. But this is not a case of ordinary suretyship for the payment of money. As pointed out by Edge, C. J. in 20 All 206,⁹ the object of these provisions of the Code is to prevent crime, and not to obtain money for the Crown. It is not, as in the case of, for example, an administration bond with sureties, the object to secure the

payment of money or the avoidance of pecuniary loss. Hence it is provided in S. 118 of the Code that the amount of every bond demanded under these provisions shall be fixed with due regard to the circumstances of the case and shall not be excessive, while in S. 106 it is expressly directed that the amount of the principal bond shall be proportionate to the means of the person bound down. That being so, it is obvious that the power to require sureties must have been given with some object other than that of ensuring the recovery of the amount of the bond; in other words an additional security for the principal's keeping the peace, not a surety for his paying forfeit is demandable.

The learned Judges also relied on the form of the bond used which was taken, as in the present case, from Sch. 5 to the Code. We have no doubt that the considered decision of the Calcutta High Court is to be preferred to the Lahore decisions, and we think that the view expressed in these decisions is, on first principles and also a consideration of the words of the statute, untenable. We answer the question referred by the learned Judge as follows: The order requiring Sardar Khan petitioner, to pay Rs. 500 in addition to any amount which may be recovered from Fateh Khan is in accordance with law.

(On receipt of the opinion of the Division Bench, Coldstream, J. delivered the following judgment.)

Judgment.—This judgment is to be read with my Referring Order dated 9th October 1935. The Division Bench have held that the order which I am asked to revise was not illegal. The learned District Magistrate has considered the question of the amount to be forfeited and I am not prepared to interfere with his decision on the point. The petition is dismissed.

S.C./A.L.

Petition dismissed.

A. I. R. 1937 Lahore 135

ADDISON AND ABDUL RASHID, JJ.

Punjab & Sindh Bank, Ltd.—Plaintiff
—Appellant.

v.

Jaswant Singh and others—Defendants
—Respondents.

First Appeal No. 14 of 1935, Decided on 4th May 1936, from decree of Senior Sub-Judge, Shahpur, D/- 6th October 1934.

(a) Registration Act (1908), S. 17—Letter of request to Bank to advance money to bearer on security of property—Bank advancing less money than requested—Letter does

7. Kaku v. Empress, (1894) 26 P R 1894 Cr.

8. Ali Mahomed v. Emperor, (1911) 226 P L R 1911=11 I C 588=12 Cr L J 404.

9. Queen-Empress v. Rahim Bakhsh, (1898) 20 All 206=1898 A W N 21.

not create any charge on property and hence requires no registration.

A letter amounting to request to the Bank to lend money on the security of title deeds of property sent with bearer and pay the amount to the bearer does not create any charge on the property and therefore does not require registration. [P 139 C 1]

(b) Registration Act (1908), Ss. 17 and 49—Equitable mortgage—Requisites of—Writing is not necessary, but if written it is not admissible in evidence if not registered—Memorandum signed by mortgagor though embodying terms of equitable mortgage is not necessary to be registered unless on its face it constitutes agreement between parties—Document not constituting bargain between parties but evidence of past transaction requires no registration.

For creating an equitable mortgage all that is necessary is a loan coupled with deposit of title deeds relating to the property to be mortgaged, with intention of creating a charge on property. No writing is necessary. But if parties choose to put their agreement with respect to the transaction in writing, that document will exclude all other evidence of the transaction. Again a document which falls under S. 17, Registration Act and is not registered will not be admissible in evidence. [P 140 C 1]

A memorandum signed by the mortgagor in relation to equitable mortgage by deposit of documents of title may be a document required to be

registered under the Registration Act even though it does not embody all the particulars of transaction, but registration is not so required, unless the memorandum on its face embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as deposit is necessary, it constitutes agreement between the parties. [P 140 C 1]

A document not constituting the bargain between the parties but which is an evidence of past transaction does not require registration: *A I R 1931 P C 36* and *A I R 1935 Lah 821, Rel. on*; *A I R 1923 P C 50*; *A I R 1932 Cal 356* and *A I R 1924 Mad 547, Ref.* [P 140 C 2]

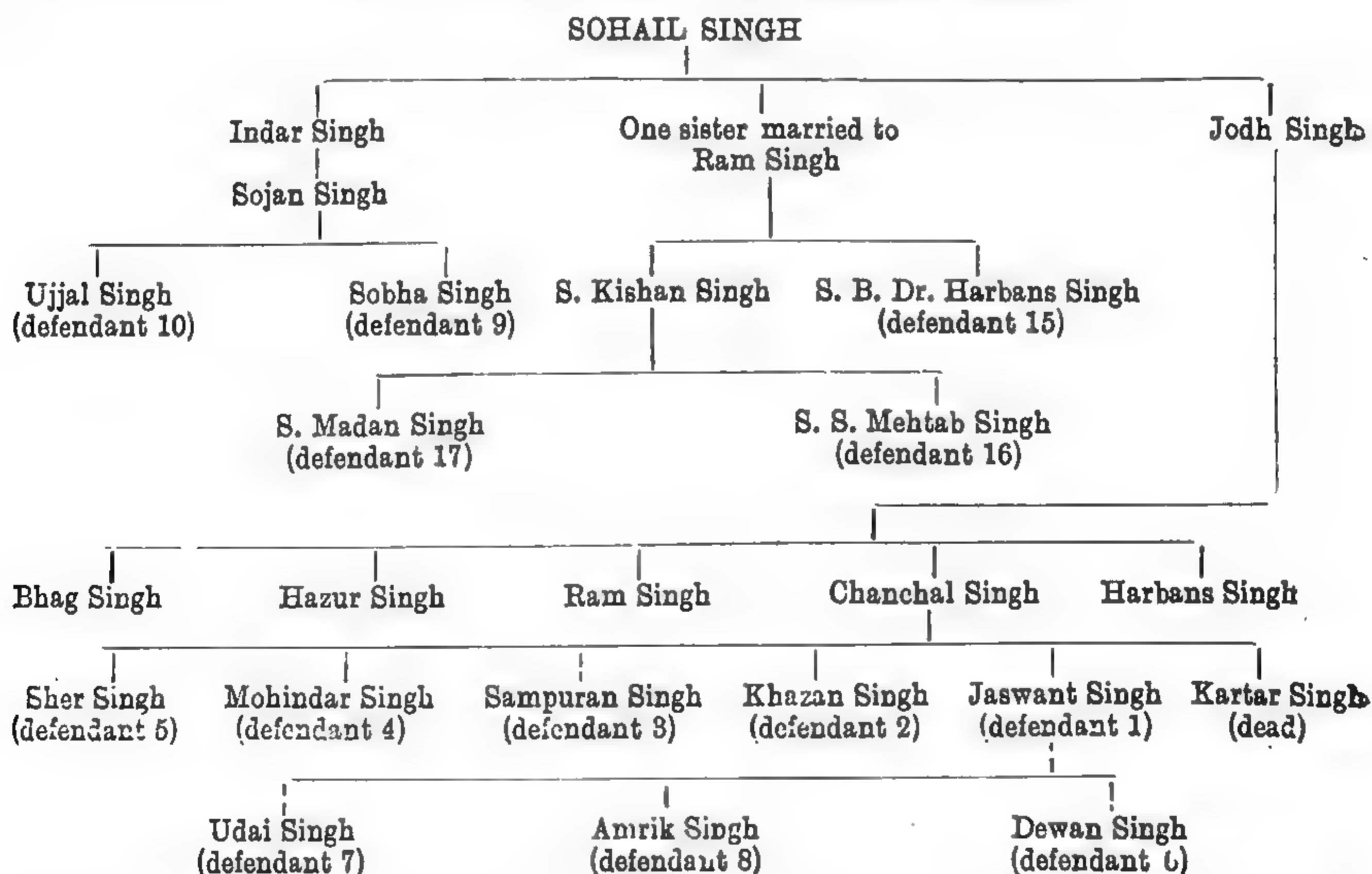
(c) Practice—Appeal—New plea—New point cannot be raised in appeal which requires production of further evidence by other party.

The person appealing will not be entitled to raise a point for the first time in appeal when decision of the point would necessitate the production of further evidence by the other party. [P 141 C 1, 2]

Mehr Chand Mahajan, D. R. Sawhney and Ratan Lal Chawla—for Appellant.

Iqbal Singh, S. L. Puri, J. G. Sethi, Ghulam Mohy-ud-Din and Mohammad Amin—for Respondents.

Abdul Rashid, J.—The following pedigree table will be helpful in understanding the facts of this case :



The suit which has given rise to the present appeal was instituted by the Punjab and Sindh Bank, Limited, on 2nd December 1930, for recovery of Rupees 1,92,893-9-9 by sale of four properties equitably mortgaged with the Bank by deposit of title deeds. The four properties

have been referred to in the plaint and the judgment of the trial Court as properties A, B, C and D. It is necessary therefore to give a brief description of these properties. Property A is a cotton factory situate at Bhalwal. It is commonly known as the old or large factory.

Property B is also a cotton ginning factory situate at Bhalwal, but it is known as the new or small factory. Property C consists of about five squares of land situate at Chak No. 33 N. B., Tahsil Sargodha. Property D consists of 2,946 kanals of agricultural land situate at village Kotla Mir Baz. The case of the plaintiff was that Chanchal Singh and his sons constituted a joint Hindu family and carried on business in the name of Messrs. Chanchal Singh-Kartar Singh. They started their dealings with the Bank at Amritsar in the name of Chanchal Singh-Kartar Singh, on 21st January 1915, and borrowed large sums from the Bank on the basis of promissory notes executed on different dates ranging from January 1915 to November 1918. In January 1917, the firm Chanchal Singh-Kartar Singh made over documents of title relating to the cotton ginning and pressing factory situate at Sargodha as collateral security for payment of debts due to the Bank and effected an equitable mortgage of this property. In the beginning of January 1918 documents of title, relating to the big factory at Bhalwal (property A), and land situate at Kotla Mir Baz (property D) were made over to the plaintiff and an equitable mortgage of these properties was effected in order to provide further collateral security for the sum due to the plaintiff from the firm Chanchal Singh-Kartar Singh.

On 1st July 1923, after rendition of previous accounts, the firm Chanchal Singh-Kartar Singh executed a promissory note for Rs. 1,38,735-14-1 in favour of the Bank and the charge of the aforesaid debts continued on the three properties mentioned above. In May 1926 a partition took place between Kartar Singh on one side and Chanchal Singh and his other sons on the other. Rs. 20,000 out of the amount due to the Bank were set apart as being due from Kartar Singh personally. This sum was charged only on the factory situate at Sargodha which had fallen to the share of Kartar Singh in the partition. The remaining sum due to the Bank was payable by Messrs. Chanchal Singh-Jaswant Singh and properties A and B continued to be equitably mortgaged for payment of the amount due to the Bank after deducting the sum of Rs. 20,000, the liability for which was taken over by Kartar Singh. On 14th December 1927, after rendition of accounts the firm Chanchal Singh-Jaswant Singh, executed a

fresh promissory note for Rs. 1,55,298-7-6 in favour of the Bank. Properties A and D continued to be equitably mortgaged with the Bank, and the title deeds of properties B and C were also handed over to the Bank at this time in order to create an equitable mortgage of these properties as security for the sum due from the firm Chanchal Singh-Jaswant Singh. The sum sued upon consists of principal and interest due on the promissory note dated 14th December 1927.

As mentioned above, Kartar Singh separated from the joint Hindu family consisting of Chanchal Singh and his sons in May 1926. Thereafter the name of the joint Hindu family firm was changed from Chanchal Singh-Kartar Singh to Chanchal Singh-Jaswant Singh, Jaswant Singh, being the eldest out of the other five sons of Chanchal Singh, who remained joint with him. The sons and grandsons of Chanchal Singh are defendants 1 to 8. Sobha Singh, defendant 9, and Ujjal Singh, defendant 10, the sons of Sojan Singh, have been made defendants, as property D is claimed as having fallen to their share as a result of a partition between Chanchal Singh and Sojan Singh. Defendants 11 to 14 are vendees who purchased part of the land situate at Kotla Mir Baz from Sobha Singh and Ujjal Singh. Defendants 15 and 16 have been impleaded as they are vendees of a part of property A. Jaswant Singh, defendant 1, and Khazan Singh, defendant 2, did not appear and ex parte proceedings were taken against them in the lower Court. Mohindar Singh, Sampuran Singh, Dewan Singh, Udai Singh and Amrik Singh were shown as minors in the plaint, and the Ahlmad of the Court was appointed as their guardian ad litem. He filed a written statement professing ignorance of all the transactions between the plaintiff and Chanchal Singh, Kartar Singh and Jaswant Singh. Out of the descendants of Chanchal Singh, Sampuran Singh and Sher Singh in their written statements admitted that they formed a joint Hindu family with their father Chanchal Singh but professed ignorance of the transactions with the plaintiff. It was also stated by these defendants that Chanchal Singh was 73 years of age, and that the mortgages, if any, were effected under undue influence as he had no necessity to incur such heavy liabilities.

Sobha Singh and Ujjal Singh, defendants, pleaded that the land at Kotla Mir Baz and the land at Chak No. 33 and the big factory at Bhalwal (properties D, C and A) belonged jointly to Chanchal Singh and their father Sojan Singh. This property was partitioned by means of an award made by Sardar Bahadur Mehtab Singh on 4th October 1919. The award was duly registered, and property D together with other properties which do not form the subject matter of the present litigation fell to the exclusive share of Sojan Singh, while properties A and C were declared to be the exclusive properties of Chanchal Singh. It was further pleaded that the plaintiffs had knowledge of this award and as a creation of the charge on property D did not take place until 4th August 1920; it was of no effect against them as that property had already come under their exclusive ownership before the creation of the charge. It was also pleaded that if the award be not held binding on the plaintiff, then the share of Sardar Chanchal Singh, amounting to 25/32 in property A, 4/16 in property C and 4/16 in property D was alone liable for the sum due to the plaintiff. It was also stated in the written statement that the plaintiff could not claim the whole properties awarded to Chanchal Singh on partition unless and until he relinquished his charge on that property which was taken away from Chanchal Singh in consequence of the partition, and that the plaintiff could follow Chanchal Singh's share in property D only after exhausting all the other properties that had fallen to the share of Chanchal Singh at the time of the partition.

The trial Court held that the various promissory notes signed by Chanchal Singh, Kartar Singh and Jaswant Singh were duly executed by the executants and that the money was raised for the purposes of the joint family business. It was, however, held that the creation of a charge on properties A and D was evidenced by documents which were inadmissible in evidence, and that, therefore, the creation of charge by way of an equitable mortgage on properties A and D remained unproved. It was further held that property D had been released by the Bank on 23rd August 1926, and that on that date properties B and C had been accepted as security in place of property D. On these findings the plaintiff was

awarded preliminary decree for Rupees 1,92,893-9-9 with costs against defendants 1 to 8 and 15 to 17 by sale of the properties B and C. Defendants 1 to 8 were also made liable personally as mortgagors. The suit, so far as it related to properties A and D, was dismissed. Against this decision the plaintiff has preferred an appeal to this Court. No appeal has, however, been preferred by the defendants in respect of properties B and C.

Only two points were agitated in appeal by the learned counsel for the appellant: firstly, that the trial Court had erred in holding that the documents evidencing the creation of an equitable charge on properties A and D were inadmissible in evidence for want of registration, and secondly that the lower Court was wrong in holding that property D had been released by the bank by the acceptance of properties B and C as security on 23rd August 1926, for payment of the money due from defendants 1 to 8. In order to claim a charge on property D, reliance was placed on the principle underlying S. 41, T. P. Act. It appears that Chanchal Singh used to live at Bhalwal. He used to execute promissory notes in favour of the Bank and after signing them used to send them to Amritsar through Kartar Singh or Jaswant Singh. The bearer of the promissory note used to carry a letter from Chanchal Singh addressed to the Manager of the Bank asking him to pay Kartar Singh or Jaswant Singh, as the case may be, the consideration of the promissory note bearing his signature. On the back of this letter Kartar Singh or Jaswant Singh, as the case may be, used to execute a receipt for the money received by him and sign it after affixing a one-anna stamp. On 28th December 1917 Chanchal Singh wrote the following letter (Ex. P. 48-A) to the Manager of the Punjab and Sindh Bank, Limited, Amritsar:

Dear Manager,

Compliments—I am sending to you dear Jaswant Singh with the title deeds relating to the Khalsa factory of Bhalwal (property A), three sale deeds, two malkiyat fards of the patwari containing khasra numbers and one plan of site attached to the factory. Please put them before the Board, get them accepted, pay money to Jaswant Singh and secure his signature on the promissory note. I hope that dear Kartar Singh might have also reached you with the title deeds relating to the factory at Dhuri in the Patiala State. Please keep the title deeds of any of these two

factories, which are complete, and return those of the other. Please do lend the money in any case. Please lend one lac or any amount you think proper. Secure the signature of Jaswant Singh. Any service?

This letter was presented by Jaswant Singh to the Manager of the Bank but only a sum of Rs. 10,000 was advanced thereon. A promissory note was also executed for this amount. In our opinion the lower Court was wrong in holding that this letter required registration. This letter does not create any charge on property. It merely amounts to a request by Chanchal Singh to the Bank to lend money on the security of property A or on the security of another property which does not form the subject matter of the present litigation. It was open to the Bank on receipt of this letter not to advance any money at all. The money asked for was one lac of rupees or any other sum that may be sanctioned by the Board of the Bank. Even the learned counsel for the respondents was compelled to concede that this letter did not constitute any bargain between the parties and that he could not support the finding of the trial Court that it required registration.

It appears that in the beginning of January 1918, a document marked as Form 84-A (Ex. P-18) was sent to Chanchal Singh. This form was signed by Chanchal Singh, on or before 4th January, and was sent to the Bank through his son Jaswant Singh. It is this form which, according to the respondents, constituted the bargain between the parties and which resulted in the creation of a charge with respect to properties A and D. This form may be reproduced *in extenso* :

To

The Punjab and Sindh Bank, Limited,
Amritsar Office.

Dear Sir,

We have already taken from you an advance of Rs. 1,05,135 at.....per cent. per annum, with..... monthly rests for which we gave you a separate promissory note. As a further and collateral security for the principal, interest and other charges due thereon, we have already deposited title deeds of property (as detailed in Schedule "A" given below) and with authority to be held till our debt is fully paid or satisfied. Please note that we shall have no objection to execute and get registered a deed of legal mortgage, if and when so required by the Bank.

Schedule "A"

No.	Description	Estimated value.			Remarks
		Rs.	a.	p.	
(1)	Factory at Sargodha with land and buildings	1,35,000	0	0	
(2)	Factory at Bhalwal with land and buildings (A)	1,90,000	0	0	
(3)	Piece of land situated at Kotla Mir Baz Khan, Tahsil and District Shahpur (D)	50,000	0	0	
Total		Rs. 3,75,000	0	0	

The above Schedule is correct.

Yours faithfully,
Signature of Chanchal Singh,
(in Gurmukhi)
(Sd.) Kartar Singh
(in English)

Dated January 5, 1918.

This form was accompanied by a covering letter addressed to the Manager of the Bank by Chanchal Singh stating that he was sending his son Jaswant Singh together with the form which he had duly signed. In this letter Chanchal Singh asked the manager that the sum of Rs. 20,000 which the bank had offered to advance was very small and that at least Rs. 50,000 might be advanced if the Board agreed. If the Board did not agree, as much as the manager thought proper could be paid over to Jaswant Singh after securing his signature. It was contended by the learned counsel for the respondents that the use of the past tense in this form was a mere subterfuge, and that in fact this form constitutes the bargain between the parties. It was urged that it was only after Chanchal Singh had signed this form that the sum of Rs. 1,05,135 was made up and that previous to the signature on this form only Rs. 82,000 had been advanced by the bank. It was maintained by the counsel for the respondents that the title deeds of the properties A and B were lying with the Bank from 26th December to 4th January only for the purpose of inspection and that the title deeds of the property D were sent with the form, and that in these circumstances the properties in dispute became security for the debt only by virtue of the signing of the form by Chanchal Singh. In our opinion this contention is without any force. A perusal of the form does not show, on the face of it, that it constitutes the bargain between the parties. It appears on the other hand

that title deeds of all the properties mentioned in the form had been already deposited with the bank before the form was sent to the manager. In A I R 1935 Lah 821,¹ it was held that a form exactly similar to the one under discussion did not constitute the bargain between the parties but was evidence of past transactions and did not require registration. It was further held that:

For the purpose of creating an equitable mortgage all that is necessary is a loan coupled with a deposit of title deeds relating to the property to be mortgaged with the intention of creating a charge on the property. No writing is needed for the creation of such a mortgage; but if the parties choose to put their agreement with respect to the transaction in writing, that document will exclude all other evidence of the transaction. Further, if the document falls within the purview of S. 17, Registration Act, and is not registered, it will not be admissible in evidence by virtue of S. 49 of the same Act.

Exhibit P-21 in the reported case was a form exactly similar to the form in the present case. It was urged by one party with respect to that form that it merely contained an acknowledgment of transactions which had already taken place, and did not purport or operate to create any charge on immoveable property as required by S. 17. It was urged by the other party in that case that at any rate the form declared a charge on such property, but even this contention was not given effect to by the learned Judges. This ruling is, therefore, fully applicable to the facts of the present case.

It has been held by their Lordships of the Privy Council in 54 Mad 257,² that a memorandum signed by the mortgagor in relation to a mortgage by deposit of documents of title may be a document which the Indian Registration Act requires to be registered, even though it does not embody all the particulars of the transaction; but registration is not so required unless the memorandum on its face embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that, so far as the deposit is concerned, it constitutes the agreement between the parties. The facts in that case were that the plaintiff verbally agreed at Madras to make a further

advance to the defendants, making Rupees 60,000 in all, upon the deposit of certain documents of title. The defendants' agent signed and handed to the plaintiff a memorandum stating: "As agreed upon in person I have delivered to you the under-mentioned document as security," a list of the documents following, also a promissory note for Rs. 60,000. After examination of the documents the agreed amount was handed over. It was held by their Lordships that the memorandum was not a document which required registration even if the agreed advance was conditional upon it being given; and that, there being no written agreement, the memorandum as well as oral evidence was admissible to prove the intent to create a security by deposit of the documents named.

The learned counsel for the respondents places his reliance on 50 Cal 338.³ This ruling was, however, considered by their Lordships of the Privy Council in 54 Mad 257,² referred to above. It merely lays down that where upon a mortgage by deposit of title deeds a document is drawn up constituting the bargain between the parties, the document is not admissible in evidence to prove the mortgage unless it is registered under the Indian Registration Act. The whole question is whether form 84-A in the present case constitutes the bargain between the parties or whether it is evidence of a past transaction. 59 Cal 586⁴ and 47 Mad 398,⁵ and a number of other rulings, were quoted by the learned counsel for the respondents. It is unnecessary to refer to them in detail as they do not lay down any different proposition of law than the one enunciated by their Lordships of the Privy Council in 54 Mad 257.² We are, therefore, of the opinion that the finding of the trial Court that the creation of charge on properties A and D is evidenced by documents which are inadmissible in evidence cannot be sustained. This was the only reason for dismissing the plaintiff's suit in respect of the charge on property A. We, therefore,

3. Subramanian v. Lutchman, A I R 1923 P C 50=71 I C 650=50 I A 77=1 Rang 66=50 Cal 338 (P C).

4. Shailendranath Palit v. Hade Kaza Mane, A I R 1932 Cal 356=137 I C 500=36 C W N 193=54 C L J 328=59 Cal 586.

5. Krishnayya v. Ponnuswami Ayar, A I R 1924 Mad 547=34 I C 629=47 Mad 398=46 M L J 295.

1. Punjab and Sind Bank, Ltd. v. Rustomji, A I R 1935 Lah 821=160 I C 173.

2. Sundarachariar v. Narayana Ayar, A I R 1931 P C 36=131 I C 328=58 I A 68=54 Mad 257 (P C).

hold that property A is liable for the claim of the plaintiff in the same manner as properties B and C.

Properties D, C and A belonged jointly to Chanchal Singh and Sojan Singh, the father of defendants 9 and 10. On partition, property D fell to the share of Sojan Singh exclusively, while Chanchal Singh was declared to be the sole owner of properties A and C. It was conceded by the learned counsel for the appellant that in view of the circumstances mentioned above, he would have no right to enforce his charge against property D unless the principles underlying S. 41, T. P. Act, were held to be applicable to the facts of the present case. It was contended by the learned counsel that property D was purchased in 1889 in the name of Chanchal Singh only, that it continued to be shown as the property of Chanchal Singh in the revenue records till 4th June 1918, and that as an equitable mortgage was created in respect of this property in January 1918, and as the Bank had no knowledge that this property was jointly owned by Sojan Singh and Chanchal Singh, the mortgage in favour of the Bank could not be avoided on the ground that the mortgagor was not authorized to make it. The present suit was instituted by the Bank on 2nd December 1930. The Bank admittedly came to know in 1926, that property D had fallen to the share of Sojan Singh by means of a partition. It was, therefore, incumbent on the plaintiff to state in the plaint that the mortgage made by Chanchal Singh in respect of property D was valid as Chanchal Singh was the ostensible owner of the property. If this point had been raised by the appellant in the trial Court it would have been open to Sobha Singh and Ujjal Singh to prove that Chanchal Singh owned a large amount of other property in 1926, when the Bank admittedly got to know of the partition, and that the Bank was, therefore, not entitled to claim a charge on the property which had fallen to the share of Sojan Singh by means of the partition. Moreover, it would have been open to defendants 9 and 10 to prove that in January 1918, the Bank knew that Chanchal Singh was not the exclusive owner of property D but that it was owned in equal shares by Chanchal Singh and Sojan Singh. We are, therefore, of the opinion that the appellant is not entitled to raise this point for the first time in appeal, as the

decision of this point would necessitate the production of further evidence by the defendants. The suit of the appellant with respect to property D must, therefore, stand dismissed.

The trial Court has held that property D was released by the Bank on 23rd August 1926, by the acceptance of properties B and C as security for the entire amount due from Chanchal Singh. The learned counsel for the appellant argued this point at great length and referred us to the entire correspondence between the Bank on one side and Chanchal Singh and Ujjal Singh on the other. After a consideration of the entire evidence we are of the opinion that the finding of the lower Court that property D was released by the Bank is erroneous. The correspondence alluded to above makes it perfectly clear that the only security that was released by the Bank was the factory at Sargodha which fell to the share of Kartar Singh, and that properties B and C were accepted as security in lieu of the Sargodha factory. The land at Kotla Mir Baz was never released by the Bank at the time of the acceptance of properties B and C as security for the loan. It is, however, unnecessary to deal with this point in greater detail as we are of the opinion that the suit of the Bank with respect to property D is liable to dismissal on the ground already mentioned. For the reasons given above, we accept this appeal in part and in modification of the decree of the trial Court, award the plaintiff a preliminary decree for Rs. 1,92,893-9-9 by sale of properties A, B and C. All the parties will bear their own costs in this Court.

P.R./A.L.

Order accordingly.

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AGHA HAIDER, J.

Sher Dil — Defendant — Appellant.

v.

Shah Nawaz and others, Plaintiffs and
others, Defendants—Respondents.

Second Appeal No. 1911 of 1935, Decided on 20th February 1936, from decree of Dist. Judge, Attock, D/- 12th July 1935.

Punjab Tenancy Act (16 of 1887), S. 59— Brothers shown to have been in possession as occupancy tenants in 1842 and then in 1882 — Presumption arises that land was acquired from father.

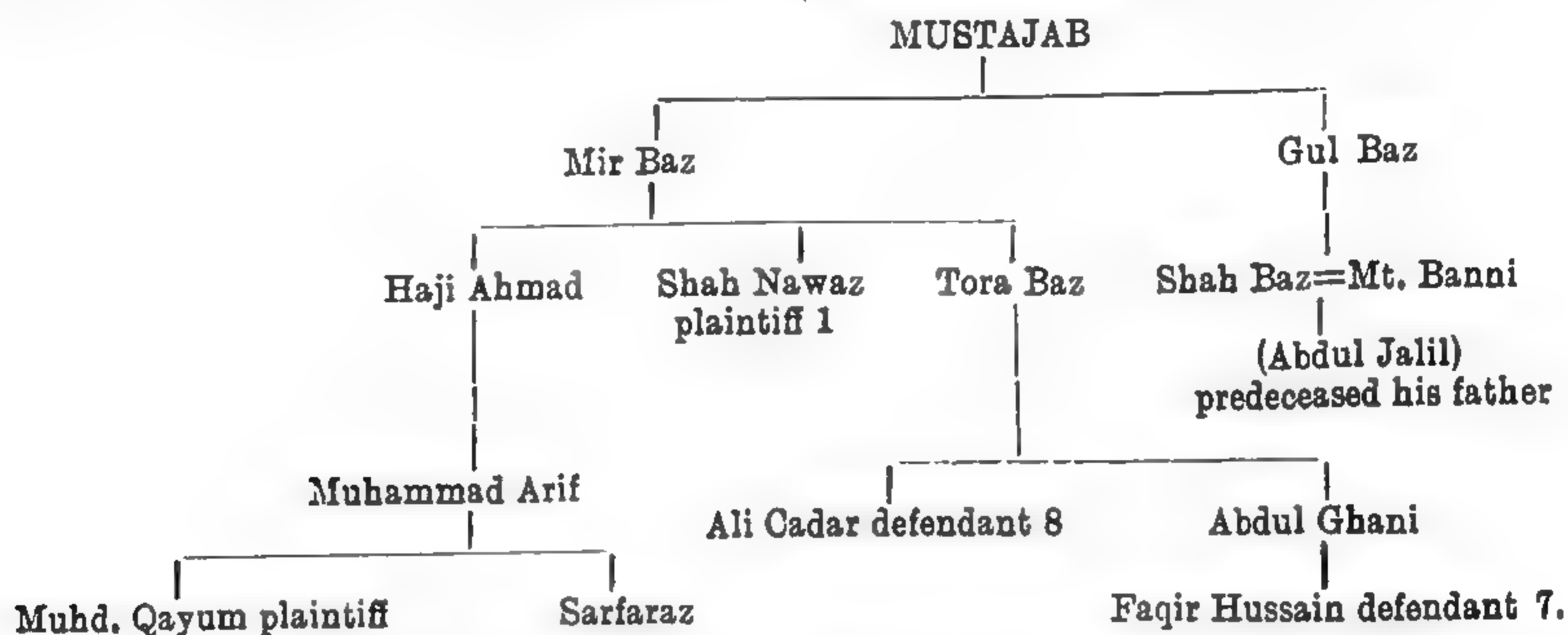
Where one of the two brothers whose rights were identical has been shown to have been in possession as an occupancy tenant in 1842 and then in 1882, a fair presumption arises that the land was acquired by the brothers from their father : *Case law discussed.* [P 144 C 1, 2]

Barkat Ali and Mohammad Amin—for Appellant.

Shamair Chand — for Respondents (Plaintiffs).

Judgment. — This is a defendant's appeal arising out of a suit for a declaration that certain plots of land are in the occupancy tenancy of the plaintiffs and

did not revert to the defendants landlords under the provisions of S. 59, Punjab Tenancy Act. The trial Court decreed the plaintiffs' claim. On appeal the decision of the trial Court was affirmed by the District Judge. The defendant Sher Dil has come up to this Court in second appeal and I am indebted to the able and thorough manner in which the learned counsel for the parties have presented their respective cases in this Court. The following pedigree-table shows the relationship between the parties:



Mt. Banni died in the year 1930. On her death, mutation of the occupancy rights which she had been holding in succession to her husband, Shah Baz, was effected in favour of the properties. Thereupon, Shah Nawaz and Muhammad Arif, the descendants of Mir Baz, instituted the present suit for the declaration noted above, impleading Ali Qadar and Faqir Hussain as pro forma defendants. The District Judge has referred to the second Regular Settlement of 1882 where Mustajab is shown as the father of Gul Baz and Mir Baz and has drawn the inference that he must have been taken to be in occupation of the land as otherwise there was no occasion of mentioning his name in the pedigree-table. This last observation of the learned Judge is not perhaps quite accurate as it stands. In the muatikhib asamiwar (Ex. P-1) of the year 1862 Gul Baz, son of Mustajab, is entered as an occupancy tenant of the land in suit. In the naqsha mudakhlat of 1862 (Ex. P-2) we find that Gul Baz, son of Mustajab, is shown as non-occupancy tenant. The learned counsel for the appellant has admitted that Gul Baz must be taken to have been an occupancy tenant and that the entry showing the non-occupancy nature of his tenancy is not quite accurate. In the shajra nazab muzarian maurusi for

the year 1882 (Ex. P-3) Mustajab is clearly shown as the father of Gul Baz and Mir Baz. In the Fard Badar (Ex. P-4, some kind of corrigendum) for the year 1882 we have the report of the Patwari that Gul Baz, who had hitherto been entered as the occupancy tenant, had a co-sharer in the person of his brother, Mir Baz, and that Gul Baz has certified that Mir Baz was his co-sharer and that they were occupying the land separately and in different parcels.

The sole question for determination is whether under the provisions of S. 59, Punjab Tenancy Act, the plaintiffs, on whom the onus lay, have been able to prove that their common ancestor, Mustajab, was occupying the land in suit. It is difficult in the ordinary circumstances to prove the physical act of occupation which took place somewhere about the middle of the last century if not earlier and the party who has to prove that act is placed at a very great disadvantage. Time has removed the ordinary vehicles of proving the factum of occupation by a man who lived perhaps about 100 years ago, and sitting here in the year 1936 we have to decide who was occupying some lands at a remote period in the history of an obscure village in the plains of the Punjab.

The learned counsel for the parties have referred to a volume of case law on the subject and I fully appreciate the difficulty with which the learned Judges had to wrestle in order to do substantial justice between the parties in deciding the question of occupation of the land by the common ancestor. Mr. Barkat Ali, the learned counsel for the appellant, has relied upon 8 Lah 584.¹ This was a case relating to ordinary agricultural land the succession to which was contested between the parties; and the learned Judges, referring to the genealogical table, observed that it merely indicated the relationship of the parties and was not intended to be a record of the acquisition of land held by persons whose names appeared in it. They further observed that the pedigree-table showed two persons as descended from a common ancestor and from the entries in the footnote of the kaifiyat dehi and other parts of the settlement record, it appeared that the land, now held by one of them, was acquired or was at one time held by the common ancestor, and a presumption might arise that it had descended from him and was ancestral. But in the absence of any such entries as to the acquisition or descent of the land no presumption arises as to the nature of the land held by any proprietor from the mere circumstance that the name of the common ancestor of himself and certain other persons is shown in the pedigree-table.

This is no doubt a correct statement of law so far as it goes. It does not however touch the question involved in the present case where we have to decide the question of the occupation of an occupancy holding by the admitted ancestor of Gul Baz and Mir Baz. To the same effect is 13 Lah 404,² where 8 Lah 585¹ was followed. In 14 Lah 396,³ a Division Bench, of which I was a member, held that the mere mention of the name of the common ancestor in the settlement pedigree-table is insufficient to raise the presumption that the property had descended from him. This case also followed 8 Lah 584.¹ The two last mentioned

cases relate to succession to ordinary agricultural land. To the same effect is the case reported in A I R 1933 Lah 1054⁴; *vide also* 96 I C 349⁵; 74 I C 685.⁶ Mr. Barkat Ali also cited 37 P L R 282⁷ and A I R 1935 Lah 658⁸ which lay down that it is for the persons who claim to succeed to certain lands on the ground that they are descendants from a common ancestor to exclude every possibility of the land having been acquired independently of any succession from the ancestor through whom they claim. Mr. Barkat Ali cited a decision reported in 44 I C 433.⁹ This was undoubtedly a case of succession to occupancy tenancy under S. 59, Punjab Tenancy Act, in which Shadi Lal, J., as he then was, held that, where on the death of an occupancy tenant his collaterals claim to succeed to the tenancy, the onus lies on them to establish affirmatively that the common ancestor occupied the land and that in such cases conjecture cannot be accepted as a substitute for proof.

In this case the Privy Council judgment, 42 P R 1910,¹⁰ is quoted in support of the concluding words of the headnote which I have reproduced above. That is perfectly true so far as it goes, but Courts of justice have to make presumptions of fact when dealing with oral and documentary evidence. Presumptions allowed by law are not conjectures. In fact, the Evidence Act itself recognises presumptions both of fact and of law. The peculiarity of the case 44 I C 433⁹ is that it does not refer to a single reported decision dealing with S. 59, Punjab Tenancy Act. This being so, it loses a good deal of its value as an authority, when dealing with the question which has to be determined in the present case. No doubt this case was followed in 80 I C 329,¹¹ but this does not carry the matter any further since there is no discussion of any case law on the subject.

4. Dewa Singh v. Mt. Kishno, A I R 1933 Lah 1054=147 I C 696.

5. Sandhi v. Mt. Dani, (1926) 96 I C 349.

6. Kartar Singh v. Labh Singh, A I R 1923 Lah 355=74 I C 685.

7. Inayat Ali v. Muhammad Hussain, A I R 1936 Lah 346=162 I C 42=37 P L R 282.

8. Shib Singh v. Suba Singh, A I R 1935 Lah 658=159 I C 837.

9. Bhagwan Das v. Shamsher Singh, A I R 1918 Lah 135=44 I C 433=33 P L R 1918.

10. Atar Singh v. Thakar Singh, (1910) 42 P R 1910=6 IC 721=35 IA 206=35 Cal 1039(PC).

11. Mt. Basanti v. Kabul Singh, A I R 1924 Lah 465=80 I C 329.

1. Chanda Singh v. Mt. Banto, A I R 1927 Lah 477=102 I C 313=8 Lah 584=28 P L R 643.

2. Rahmat Ali Khan v. Mt. Sadiq-ul-nisa, A I R 1932 Lah 353=138 I C 280=13 Lah 404=33 P L R 117.

3. Hasan Mohammad v. Mt. Bahishtan, A I R 1933 Lah 273=144 I C 99=14 Lah 396=34 P L R 810.

Mr. Shamair Chand, the learned counsel for the respondents, has invited my attention to a case reported in 18 P R 1876.¹² That case no doubt is an authority for the proposition already conceded before me. The onus lies on the collaterals who claimed the occupancy tenancy to prove that their common ancestor was in occupation. In 187 P R 1882¹³ a Division Bench of the late Chief Court of the Punjab had to deal with a case which may be stated as follows: A suit was brought for possession of an occupancy holding by the nephews of one A, who claimed to succeed on the ground that the land in suit was acquired by their grandfather, the common ancestor of A, and the plaintiff's father M. It appeared from the entries in the settlement papers that the said land had been in A's family for 60 years at the date of his widow's death in 1878, and had been occupied successively by A, his son, and lastly by his widow. It further appeared that A's father was alive when the land was first acquired. It was held that under the above circumstances a fair presumption arose that A who was recorded as in possession for 40 years in 1859 acquired it from his father, and that the onus was therefore on the defendant to rebut the presumption arising in plaintiff's favour from the facts mentioned above. In the present case, we find that Gul Baz whose rights were identical with those of his brother was an occupancy tenant as long ago as the year 1842. We find him again in the year 1882, and therefore according to the ruling just cited the presumption arises that the land was acquired by Gul Baz and Mir Baz from their father Mustajab. To the same effect is 154 P R 1883.¹⁴ In this case a Division Bench after referring to 18 P R 1876¹² and 62 P R 1882¹⁵ observed as follows:

Doubtless when possession has been traced a long way back through generations, it may be fairly presumed that the last person, whose occupation is proved, obtained his right from his father.

56 P R 1906¹⁶ and 101 P R 1908¹⁷ are important because both of them deal with S. 59, Punjab Tenancy Act. In the earlier

case one Tota Singh at the time of the regular settlement was recorded as a maurusi tenant with his brother, but it appeared that at the summary settlement the deceased tenant was also entered as an owner jointly with his brothers. It was held that under the circumstances there was strong presumption that the land in dispute, held by the tenant at the time of the regular settlement and of which he was recorded a maurusi, was inherited by him from his father and that therefore the defendants who were his collaterals had a better claim than the plaintiffs landlords. These two cases were followed by a learned Single Judge of this Court in a case reported in 32 P L R 601.¹⁸ In my opinion, there is a very respectable body of case law in support of the respondent's contention, and I have no hesitation in accepting the finding of the Courts below, which after all is based upon presumptions of fact, that in the circumstances of the present case the common ancestor, Mustajab, must be taken to have been in the occupation of the land before it came down to Gul Baz and Mir Baz.

Mr. Shamair Chand has cited a number of cases: 28 P L R 72,¹⁹ A I R 1928 Lah 964,²⁰ A I R 1930 Lah 793,²¹ A I R 1931 Lah 266,²² A I R 1931 Lah 599²³ and A I R 1933 Lah 443.²⁴ These cases indicate that there is a difference of opinion in this Court even as to the presumption in respect of succession to ordinary agricultural land as distinct from occupancy rights. It is not necessary to discuss these cases because Mr. Shamair Chand has quoted authorities which have a direct bearing upon the present case under S. 59, Punjab Tenancy Act. I therefore accept the finding of the lower appellate Court and dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

18. Sohan Singh v. Rahmat Ullah, (1931) 134 I C 791=32 P L R 601.

19. Palo v Bawa, A I R 1927 Lah 847 = 100 I C 108=28 P L R 72.

20. Fateh Nur v. Jiwan, A I R 1928 Lah 964 = 116 I C 315.

21. Bagga Mal v. Bashesar Lal-Mithan Lal, A I R 1930 Lah 793=126 I C 443.

22. Bakhsh v. Muhammad Khan, A I R 1931 Lah 266 = 134 I C 831 = 12 Lah 525=32 P L R 770.

23. Bhan Singh v. Ram Singh, A I R 1931 Lah 599=131 I C 634=32 P L R 510.

24. Mt. Umran v. Khushi, A I R 1933 Lah 443=144 I C 287=34 P L R 258.

12. Ballhu v. Charat Sing (1876) 18 P R 1876.

13. Hayat Khan v. Karm. (1882) 187 P R 1882.

14. Girdhari v. Pirthi Singh, (1883) 154 P R 1883.

15. Paltu v. Mahammad Husain, (1882) 62 P R 1882.

16. Sobha Singh v. Nand Singh, (1906) 56 P R 1906=101 P L R 1906.

17. Sipadar Khan v. Kadheru, (1908) 101 P R 1908=4 I C 691=11 P L R 1909.

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AGHA HAIDAR, J.

Kinad Dev and another — Decree-holders—Appellants.

v.

Partap Singh and another, Judgment-debtors and *another*, Decree-holder — Respondents.

Misc. First Appeal No. 56 of 1936, Decided on 13th May 1936, from order of Senior Sub-Judge, Gujranwala, D/- 3rd January 1936.

Civil P. C. (1908), S. 47; O. 21, R. 95—Application under O. 21, R. 95 by decree-holder auction-purchaser — Order on such application is one under S. 47 and is appealable.

An order passed on an application under O. 21, R. 95, Civil P. C., by an auction-purchaser, who is also the decree-holder, is an order under S. 47, Civil P. C., and appealable as such : *A I R 1926 Cal 798 (F B), Foll.; A I R 1935 Lah 144, Rel. on.* [P 146 C 1]

Shamair Chand—for Appellants.

J. L. Kapur—for Respondents.

Judgment.—Shankar Das and Hakam Rai obtained a money decree for a sum of Rs. 5,000 against Partap Singh and Kundan Singh, judgment-debtors. The decree-holders applied for the execution of the decree and a certain house belonging to the judgment-debtors was attached and sold. It was purchased by the decree-holders themselves. The sale certificate was granted to the decree-holders auction-purchasers in the usual manner. An application was made to the executing Court by the decree-holders auction-purchasers for being put into possession of the property which they had purchased. While this application was pending Shankar Das, one of the decree-holders auction-purchasers, died on 30th January 1935 leaving him surviving a son Kinad Dev and a widow Mt. Raj Devi. On 15th March 1935 Kinad Dev, describing himself as the son of Shankar Das, made an application to the executing Court. In the heading it is clearly mentioned that the application was under S. 49, Civil P. C., for the purpose of representation. In the body of the application it is stated that Shankar Das having died on 30th January 1935, the applicant Kinad Dev, on his death, was his sole heir and in possession of his property and entitled to realize the amount due to the deceased on being appointed his legal representative. It is further stated that the applicant, who is the son of the

deceased decree-holder, should be treated as his legal representative. On the same date the Court made a brief order in the absence of the parties. It is to the following effect :

The applicant claims to be the son of auction-purchaser, and is not, as such, competent to apply as he has done. S. 49, Civil P. C., has no application here. File.

On 27th March 1935 Kinad Dev associated his mother Mt. Raj Devi with himself and made an application which purports to be under O. 21, R. 95; S. 47; S. 151 and S. 146, Civil P. C. In this application they prayed that in the place of Lala Shankar Das, the names of the applicants as auction-purchasers may be entered and the applicants along with other joint decree-holders auction-purchasers be given possession over the house. In the alternative it was prayed that this application may be treated as a new application made in continuance of the previous proceedings connected with the delivery of possession. This application was dismissed on 3rd January 1935 by the Subordinate Judge who seems to have been under the impression that he was precluded from entertaining it in view of the order dated 15th March 1935. Kinad Dev and Mt. Raj Devi, the son and the widow respectively of Shankar Das deceased, have come up in appeal to this Court.

Mr. Shamair Chand for the appellants has argued that the previous application, dated 15th March 1935, was not really an application for the appointment of the applicant as a legal representative but was in fact an application in which the applicant was only desirous of being accepted by the Court as the legal representative of the deceased Shankar Das in the matter of execution which was already pending in Court. Section 49, Civil P. C. obviously had nothing whatsoever to do with the application which was rejected because the learned Judge rightly held that S. 49 could not be invoked in aid by the applicant. I do not see any reason why the present application should not be entertained by the Court. There was no order by the Court that the applicant Kinad Dev was not the legal representative of the deceased Shankar Das and therefore had no *locus standi*. The application, as already pointed out, was wrongly labelled and the Judge rightly pointed out that on this label the applicant could not succeed in his application. Mr. J. L. Kapur, the learned counsel

for the respondents, argued that the previous order operated as *res judicata*. I am not prepared to accept this contention. There is no decision whatsoever as regards the status of the applicant Kinad Dev as the legal representative of Shankar Das.

The application was thrown out on the technical ground that it did not come within the ambit of S. 49, Civil P. C. Mr. J. L. Kapur had also raised a preliminary objection that no appeal lies. In my opinion an appeal did lie, and if any authority were needed for this proposition, 53 Cal 781¹ is in point wherein the majority of the learned Judges held that an order passed on an application under O. 21, R. 95, Civil P. C., by an auction-purchaser, who is also the decree-holder, is an order under S. 47, Civil P. C., and appealable as such. I may also observe that a learned Judge of this Court in A I R 1935 Lah 144² sitting singly followed the law as laid down by the majority of the Court in 53 Cal 781.¹ In my opinion the Court below was in error in dismissing this application. I therefore allow the appeal, set aside the order of the Court below and direct the Court to dispose of the application and deal with it according to law. No order as to costs.

R.W./D.S.

Appeal allowed.

1. Kailash Chandra Tara/dar v. Gopal Chandra Poddar, A I R 1926 Cal 798=95 I C 494=53 Cal 781=48 C L J 345 (F B).

2. Gurdit Singh v. Kanshi Ram, A I R 1935 Lah 144=153 I C 85=87 P L R 116.

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BHIDE, J.

Hashu—Defendant—Appellant.

v.

Chaudhri Hakim Ali — Plaintiff—Respondent.

Second Appeal No. 2192 of 1935, Decided on 3rd March 1936, from decree of Dist. Judge, Lyallpur, D/- 22nd August 1935.

(a) Punjab Colonization of Government Lands Act (5 of 1912), S. 19—Letter by Commissioner authorizing "Collector of District" to sanction sales, authorises only Deputy Commissioner of District and not Settlement Officer.

A letter by Commissioner authorizing "Collector of the District" to grant sanction for sales under S. 19, Punjab Colonization of Lands Act, 5 of 1912, can only be taken to authorize the Deputy Commissioner of the District as defined in Punjab Land Revenue Act, 17 of 1887, S. 6(2), and sanction given by any other officer such as Settlement Officer is not valid. [P 146 C 2; P 147 C 1]

(b) Contract Act (1872), S. 20—Contract found to be void owing to mutual mistake of fact—Party suffering under contract not claiming alternative relief in suit—His relief lies in separate suit.

Where both the parties laboured under a common mistake of fact and thus the contract becomes void when the mistake is discovered, the party who has suffered under it is not entitled to a refund of money he has paid under it where he has not claimed an alternative relief in the suit. He may be granted relief on grounds of mistake, but his remedy lies in a separate suit: A I R 1928 Lah 609, *Disting.* [P 147 C 2]

Abdul Karim—for Appellant.

Abdul Majid—for Respondent.

Judgment.—This second appeal arises out of a suit for possession of 53 kanals and 8 marlas of land on the basis of a sale deed executed by the defendant in the plaintiff's favour. The defendant resisted the suit *inter alia* on the ground that the sale was void as he was a Government tenant governed by the Punjab Colonization of Lands Act and no sanction had been obtained for the sale as required by S. 19 of that Act. The plaintiff contended that the defendant had already acquired proprietary rights and that in any case necessary sanction had also been obtained. The trial Court dismissed the suit, but on appeal the learned District Judge granted the plaintiff the decree prayed for. From this decision the defendant has preferred a second appeal.

The main contention urged by the learned counsel for the appellant was that according to S. 19, Punjab Colonization of Lands Act, it was necessary to obtain the sanction of the Commissioner or of some officer authorized by him to accord sanction under that section. The sanction in the present case is alleged to have been given by Mr. Penny, who was a Settlement Officer. The learned counsel contended that Mr. Penny had not been authorized by the Commissioner to grant sanction for sales under S. 19, Punjab Colonization of Lands Act. It appears from a letter issued by the Commissioner in this respect that he had authorized "the Collector of the District" to sanction sales under S. 19. The learned District Judge has held that Mr. Penny who had been empowered as a Collector in the Lyallpur District came within the scope of the Commissioner's letter. The learned counsel for the appellant contends that this view is erroneous as the expression "Collector of the District" is defined in the Punjab Land Revenue Act and means the

Deputy Commissioner of the District. The learned counsel for the respondent urged that the expression "Collector of the District" should be interpreted with reference to the definition in S. 3, Punjab Colonization of Lands Act, but that section also makes a clear distinction between "the Collector of the District" and other officers invested with the powers of a Collector. It seems to me that the contention of the learned counsel for the appellant in this respect is correct and that the letter of the Commissioner which is relied on by the plaintiff, can only be taken to authorize the Deputy Commissioner of the District to sanction sales under S. 19, Punjab Colonization of Lands Act.

The learned counsel for the respondent tried to support the decree of the learned District Judge on the ground that the defendant had already acquired proprietary rights when the sale took place. The Courts below have, however, found that no such rights had been acquired at the time and there seems to be no good ground for interfering with his finding of fact in second appeal. The learned counsel for the respondent contended that the plaintiff had paid all the malkana dues before the sale took place and, therefore, he should be considered to have become owner *ipso facto* although he had not yet been recognized as such by the Government. In support of this contention he relied on 32 P L R 1917¹ and 195 P L R 1915.² The former ruling appears to be based on the special conditions applicable to the tenancy in that case, while in the latter case there is merely an expression of opinion to the effect that on payment of the necessary sums to the Government the tenant becomes *ipso facto* owner. The plaintiff in this case has not placed on the record the statement of conditions which were applicable to the tenancy. He has referred me to the statements of conditions printed at pages 168 to 186 of Vol. II, Punjab Colony Manual, but it is not clear which of these conditions were applicable to the defendants when he acquired the tenancy. Condition No. 24, at p. 179, is merely to the effect that on payment of the sums

due to the Government within the prescribed period the tenants become entitled to the proprietary rights. In the present instance the defendant was not yet recognized as a tenant by the Government and the presumption is that all the necessary conditions were not fulfilled. In the absence of any definite evidence to show what conditions were applicable to the tenancy in the present case and whether they were all fully complied with, the finding of the learned District Judge in this respect cannot be disturbed.

The learned counsel urged next that even if there was no valid sanction for the sale under S. 19, Punjab Colonization of Lands Act, the sale would be binding on the parties and its validity could, at the most, be challenged by the Government. In support of this contention reliance was placed on 13 P R 1913,³ and 58 P R 1913,⁴ but these cases were under the old Government Tenants (Punjab) Act III of 1893. S. 19, Punjab Colonization of Lands Act, which governs the present case clearly lays down that any sale effected without the necessary sanction, will be void. In view of my finding that the necessary sanction was not obtained in the present case the sale must be held to be void.

The last contention urged by the learned counsel for the respondent was that, even if the sale was void, the respondent should at least be allowed refund of the money paid by him. The respondent, however, did not sue for any alternative relief to this effect or pay court-fees thereon. It was urged that he should be allowed refund of the purchase money on the principle laid down in 9 Lah 701.⁵ But in that case equitable relief was granted on the ground of fraud. In the present case no such fraud has been established. It seems to me that the plaintiff would be entitled to relief on the ground that the contract has been discovered to be void owing to a mistake of fact under which both parties were apparently labouring, viz., that Mr. Penny was duly authorized to sanction transfers under S. 19, Punjab Colonization of Lands Act, whereas he was not, as found above. In my opinion, his

1. *Guru Dutt v. Kartar Singh*, A I R 1916 Lah 102=36 I C 601=3 P R 1917=32 P L R 1917.

2. *Malap Kuer v. Hakim Singh*, A I R 1914 Lah 509=28 I C 441=8 P R 1915=195 P L R 1915.

3. *Ali Mardan v. Bakar Khan*, (1913) 13 P R 1913=17 I C 680=27 P L R 1913.

4. *Hussain Khan v. Jahan Khan*, (1913) 58 P R 1913=18 I C 5=48 P L R 1913.

5. *Khan Gul v. Lakha Singh*, A I R 1928 Lah 609=111 I C 175=9 Lah 701=30 P L R 60 (F B).

remedy now lies in a separate suit. I accept the appeal and dismiss the suit, but, in view of all the circumstances, leave the parties to bear their costs.

K.B./D.S.

Appeal allowed.

*** A. I. R. 1937 Lahore 148**

FULL BENCH

ADDISON, COLDSTREAM AND ABDUL RASHID, JJ.

Ranjit Singh — Judgment-debtor — Appellant.

v.

Maghi Mal—Decree-holder and others — Respondents.

Execution First Appeal No. 124 of 1936, Decided on 20th November 1936, from order of Senior Sub-Judge, Ferozepur, D/- 14th October 1935.

*** Custom (Punjab)—Ancestral property—Attachability—Riwaj-i-am of Ferozepur District—Debt not charge on property—Ordinary rule of custom is that such property cannot be attached—Question 32 in Riwaj-i-am merely states power of guardian and is not against ordinary rule : 14 Lah 365=A I R 1933 Lah 593=141 I C 483, Overruled.**

The ordinary rule of custom is that ancestral property of a male proprietor in the possession of the next holder is not liable for the former's debt unless it is expressly charged on such property. The answer to question 32 in the customary law of Ferozepore District merely expresses the principle that a minor is liable for his father's debts and implies that his guardian can do what he himself could have done had he reached majority. It does not lay down that the ancestral property can be attached in execution of a decree against the last male holder. The answer therefore is not evidence of any custom antagonistic to the ordinary rule of custom. The property therefore in the possession of sons cannot be attached for their father's debts in execution of a decree: *A I R 1936 Lah 21*; *A I R 1935 Lah 855*; *A I R 1919 Lah 145*; *4 P R 1913* and *A I R 1936 Lah 167, Rel. on*; *A I R 1931 Lah 7* and *A I R 1934 Lah 727, Disting.*; *14 Lah 365=A I R 1933 Lah 593=141 I C 483, Overruled.*

[P 148 C 2; P 149 C 2; P 150 C 2; P 151 C 1]

Shamair Chand—for Appellant.

C. L. Aggarwal—for Respondents.

*** Coldstream, J.**—One Maghi Mal obtained a money decree against the estate of Lachhman Singh, a Jat Sikh of Kulgarhi a revenue estate in Ferozepore District. He proceeded to execute the decree by attaching land and houses which had been the judgment-debtor's property and were then in possession of his sons. The sons objected, pleading that the land and

houses were their ancestral property which, under the rule of custom which they followed, could not be attached, relying on the Full Bench judgment of the Punjab Chief Court in 17 P R 1919.¹ In that judgment it was decided, following 4 P R 1913,² that when a male proprietor governed by customary rules has contracted a just debt and dies leaving ancestral property, such property is not liable in the hands of the next holder in respect of such debt unless the debt has been expressly charged on the property but that this rule does not cover cases in which the creditor can prove that by special custom the person in possession of the ancestral property which it is sought to attach is the legal representative of the deceased debtor and that the property is deemed to be the property of the said debtor. In reply to this plea the decree-holder contended that under the custom prevailing in Ferozepore District the ancestral property of the objectors was liable to attachment in satisfaction of the decree against their father's estate. In support of this contention the decree-holder relied solely upon the answer to question 32 in the Customary law, commonly referred to as the Riwaj-i-am of the Ferozepur District, compiled by the Settlement Officer in 1915, producing no other evidence of custom. Question 32 in the Ferozepore Riwaj-i-am is :

Is a minor whose father is dead and who has inherited the father's estate liable for the father's debts? If such debts are not payable till the minor comes of age, can the property inherited be alienated in the interval ?

The answer is :

All tribes admit that the minor is liable, his liability being, of course, limited to the estate he inherits.

The executing Court (the Senior Subordinate Judge) held that this answer proved the special custom alleged by the decree-holder and dismissed the objection of Lachhman Singh's sons in respect of both the houses, which he found to be non-ancestral and of the land which was admittedly ancestral property. Against this decision Ranjit Singh, one of the sons, lodged an appeal to this Court which came before Dalip Singh, J., who, finding some conflict of opinion regarding the correct interpretation of similarly worded state-

1. *Mt. Mikor v. Chajju Ram*, *A I R 1919 Lah 145=49 I C 281=17 P R 1919 (F B)*.

2. *Jagdeep Singh v. Narain Singh*, (1913) *4 P R 1913=15 I C 866=173 P L R 1912*.

ments of custom in the *Riwaj-i-am* of other districts, suggested that the appeal should be laid before a Full Bench or a Division Bench. It is with this appeal that we have now to deal. Appellant's counsel has limited his argument to the matter of the ancestral property alone. The decision in 4 P R 1913² that ancestral property of a male proprietor governed by customary rules who has contracted a debt is not liable in the hands of the next holder in respect of that debt unless it has been expressly charged on the property followed of necessity the acceptance of the principle laid down in that judgment that the person for the time being in possession of ancestral landed property which has devolved upon him in accordance with the Customary law is not a full owner having the sole interest in the property and the power to dispose of it so as to defeat the expectations of those who are deemed to have a residuary interest but that such property is inherited, not from the last full owner but from the common ancestor of the last holder and the person who inherits his interest in it. That this principle was rightly held to govern all land inherited by agriculturists following Customary law in the matter of succession to property, unless a contrary custom applicable to the property concerned in any particular case is proved, has never been questioned since the decision of the Full Bench of the Punjab Chief Court in 17 P R 1919¹ where the decision in 4 P R 1913² was held to be a perfectly correct exposition of the nature of the present holder's title in ancestral property inherited in accordance with custom.

The only question for decision is whether the answer to question 32 in the Customary law of the Ferozepore District is proof of a special custom in accordance with which the ancestral land of the sons of Lachhman Singh can be attached by a Court in executing a simple money decree, the debt not having been made a charge on the property. Now if the answer to question 32 in the Customary law of the Ferozepur District does in fact record a custom contrary to the principle accepted in 4 P R 1913² and held in 17 P R 1919¹ to have been rightly held to be a general rule, that document would no doubt be strong evidence of the existence of that custom even without the proof of instances in which it had been followed. But I am unable to see that any such custom is

described in the answer to question 32. The question and answer are in S. 4 of the book, which section deals with customs relating to the guardianship and minority. The answer makes it clear that a guardian may sell a minor's property to pay the debts of the latter's father, that is to say, that the guardian is in the same position as the minor would have been had he attained the majority. This was the manner in which the answer was interpreted by my learned brother Abdul Rashid, J., in A I R 1936 Lah 167,³ and in deciding the present case I would have no hesitation in following that decision.

It is true that similarly worded answers in the Customary law of other districts in the Province have been differently interpreted by this Court in the cases to which Dalip Singh, J. has referred in his judgment. In one of these, A I R 1931 Lah 7⁴, there was a good deal of evidence, apart from that of the *Riwaj-i-am* accepted as reliable by the learned Judge who decided the case. In another, A I R 1934 Lah 727,⁵ there was no dispute regarding the meaning of the answer given in the *Riwaj-i-am* (that case was of Kangra District), the question in appeal being simply whether the evidence of ten witnesses called by the judgment-debtor proved that in Kangra District ancestral property in the possession of the successor of the last male proprietor could be attached in execution of a decree against the latter's estate. It was apparently not denied that the statement in the *Riwaj-i-am* :

All the tribes give the very reasonable reply that a minor who inherits his father's property is liable for the debts of his deceased father,

meant that ancestral property could be so attached and my learned brother Abdul Rashid, J., who decided the case found that the judgment-debtor had failed to discharge the onus of proving that in Kangra it could not. Only one of the judgments cited by Dalip Singh, J. is by a Division Bench. That is 14 Lah 365⁶ which dealt with a case from Sonapat Tahsil in Roh-tak District, in the Customary law of

3. Lal Mohammad v. Khem Chand Radha Kishen, A I R 1936 Lah 167.

4. Chiragh Shah v. Ganesh Das, A I R 1931 Lah 7=130 I C 404.

5. Fateh Chand v. Sri Pal Singh, A I R 1934 Lah 727=150 I C 329.

6. Ram Chandra v. Daryoo Singh, A I R 1933 Lah 593=141 I C 483=14 Lah 365=34 P L R 168.

which district the answer to question 37 under the heading 'powers of minors' records that among all tribes a minor whose father is dead and who has inherited the father's estate is liable for the father's debts in the properties he has inherited from the estate, that such debts are not payable until the minor attains majority and that the property inherited cannot be alienated in the interval although sometime immovable property is alienated by the guardian permanently or for the period of minority. We are not at present concerned with custom in the Rohtak District, but if the judgment in 14 Lah 365⁶ was intended to rule that where the Customary law mentions that a minor is liable for the father's debts it must be presumed that ancestral land in his possession can be attached in execution of a decree against his father's estate, then with all respect I am unable to concur in the view taken by the learned Judges who decided that case. In deciding A I R 1936 Lah 167,⁷ to which reference has been made above, my learned brother found support for his interpretation of the answer to question 32 in the Ferozepur Riway-i-am in the Division Bench judgment in 17 Lah 133,⁷ a case where the correct meaning of the corresponding entry in S. 4 of the Shahpur District Riway-i-am relating to guardianship was in dispute. The answer to question 10 in that section given by the tribe to which the judgment-debtor in that case belonged is, like the answer to question 32 in the Ferozepur Riway-i-am, that a minor who has inherited his father's estate is liable for his father's debts. In disposing of the decree-holder's contention that this was proof of a custom contrary to the general rule laid down in 17 P R 1919¹ my learned brother Addison, J., remarked:

It seems to me that what this answer means is that the guardian of a minor can, just as the minor can, when he attains majority, pay his father's debts and sell the ancestral land which came to him through his father in order to do so. It does not mean that he succeeds his father as his legal representative. Although for the most part in the Punjab ancestral land is not liable under custom for the debts of the last holder, it is frequently the case that these debts are met by the sons selling such land, though they cannot be compelled to do so. The answer to the question means that the guardian has the same power in this respect as the son when he attains majority.

It seems to me that it is impossible to carry the answer in question further than I have done. Nowhere is it said that a reversioner of even a major son is liable to pay the debts of the last holder out of the ancestral land which came to him through the common ancestor and that such land can be attached and sold in their hands to meet those debts. Surely a distant reversioner and major son ought to be liable if a minor son is. In the present case, the son is a major. This shows in a convincing way that the reply relied upon is merely a reply stating the power of guardians and not showing that ancestral land is liable to attachment and sale to pay the debts of the last holder thereof.

The same Bench in 17 Lah 139⁸ put the same interpretation on the statement in the Riway-i-am of the Pakpattan and Dipalpur Tahsils of the Montgomery District (answer to question 32) that a minor who has inherited his father's estate is liable for the payment of his father's debts, pointing out that it would be a ridiculous state of affairs if it were that ancestral land in the hands of a minor son can be attached to pay the debts of the last male holder although such land in possession of a major son or distant reversioner cannot be so attached. With great respect I am in complete agreement with the conclusions of the Bench who decided these two cases. They appear to me to put the proper interpretation of answer 32 of the Ferozepur Riway-i-am beyond all doubt. That answer is not evidence of any custom antagonistic to the principle enunciated in 4 P R 1913² and 17 P R 1919.¹ It merely expresses the principle that a minor is liable for his father's debts and implies that his guardian can do what he himself could have done had he reached majority. It does not say that ancestral property belonging to a family following the Customary law in matters of succession is inherited, not from the common ancestor, but from the last male holder with full power to dispose of it to the detriment of reversioners, nor that ancestral property can be attached in execution of a decree against the last male holder or his estate. It does not purport to describe the nature of a minor's title in ancestral property in his possession. That land which has come to a minor through his father can be sold by his guardian to pay just debts has never been doubted, but it is equally certain that a guardian cannot alienate the minor's ancestral property to pay debts incurred without necessity or consideration although the answer to

7 Narain Singh v. Ahmad Yar Khan, A I R 1936 Lah 21=162 I O 374=17 Lah 133=38 P L R 472.

8. Mohammad Nawaz Shah v. Ram Dayal, A I R 1935 Lah 855=159 I O 1024=17 Lah 139.

principal and interest was Rs. 7,000 which the defendants refused to pay. The defendants opposed the application to sue in forma pauperis. After recording the evidence of the parties, the trial Court held that Mt. Gappi had failed to establish that she was a pauper. Her application to sue as a pauper was accordingly rejected on 8th July 1931. At the end of his order rejecting the application the learned Senior Sub-Judge made a remark to the effect that Mt. Gappi was at liberty to prosecute the suit on payment of the necessary court-fees.

On 21st July 1931, Mt. Gappi presented an application, stating that she had arranged to pay the entire court-fee amounting to Rs. 532.8.0 and that the Court may be pleased to allow her to deposit the court-fees. The Court thereupon passed an order to the effect that :

The court-fees should be paid on that very day, that the file be sent for, and the case should come up on 6th August 1931.

On 6th August it was ordered by the Court that the case be registered and summonses for settlement of issues be issued to the defendants for 3rd November. On 8th December the defendants presented an application, stating that as the petition to sue in forma pauperis had been rejected on 8th July 1931 and as no suit had been instituted thereafter, there was no regular plaint before the Court. On 13th February 1932, the defendants put in a complete written statement. It was pleaded, inter alia, that the suit was barred by limitation, that after the rejection of the application to sue in forma pauperis on 8th July 1931 no regular plaint was before the Court and the entire proceedings terminated. On the merits, it was pleaded that Kura Mal, the husband of the plaintiff, from time to time deposited certain sums with the firm Banarsi Das-Daya Shankar in the name of her sons and daughters, that this money was transferred by Chuha Mal from the account books of Banarsi Das-Daya Shankar into his own note book in 1901, that thereafter Chuha Mal performed the marriage of Bibi Ladli, the daughter of Kura Mal, and that the sums deposited by Kura Mal were spent in meeting the expenses of the marriage by Chuha Mal. It was further stated that after the death of Kura Mal, his sons Sham Sundar and Madan Gopal, carried on piece goods business in agreement with the firm Banarsi Das-Daya Shankar belonging to the defen-

dants, and that it was agreed that the amount that was still left in the khata of Mt. Gappi be pledged with the defendants as security for any losses that might accrue to Sham Sundar and Madan Gopal. Disputes arose between the firm Banarsi Das-Daya Shankar on the one side and Sham Sundar and Madan Gopal on the other. These disputes were referred to arbitrators who gave their award according to which a decree was passed for Rs. 47,000 in favour of the defendants against Sham Sundar and Madan Gopal, sons of the plaintiff. It was claimed that the defendants were entitled to appropriate the amount available in the khata of Mt. Gappi towards these losses.

The trial Court held that the suit was not barred by limitation as it must be taken to have been instituted on 8th October 1930, that is, the day on which application for leave to sue in forma pauperis was made under O. 33, R. 2. It was further held that the amounts credited in the plaintiff's account in the defendants' books were the property of the plaintiff and that in accordance with these accounts Rs. 7,000 were due to Mt. Gappi on 8th October 1930. The trial Court was of the opinion that it had not been established that there was any agreement between the plaintiff and the defendants to the effect that the money due to the plaintiff would be adjusted against losses incurred by Sham Sundar and Madan Gopal in the piece goods business. On these findings a decree for Rs. 7,000 was passed in favour of the plaintiff. Against this decision, the defendants have preferred an appeal to this Court.

It has been amply established on the record that Mt. Gappi made a written demand for the amount in dispute on 9th October 1927. This point was not contested by the learned counsel for the respondent. It is common ground between the parties that if the suit be taken to have been instituted on the day when the application to sue in forma pauperis was presented, i. e., on 8th October 1930, the claim would be within time, and that if the suit be taken to have been instituted on 21st July 1931, it would be barred by limitation. O. 33, R. 2, Civil P. C., lays down that:

Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits.

Rule 5 entitles the Court to reject an application for permission to sue as a pauper on various grounds. R. 6 is to the effect that :

Where the Court sees no reason to reject the application on any of the grounds stated in R. 5, it shall fix a day for receiving such evidence as the parties may adduce on the question of pauperism.

Rule 8 of O. 33, is of the utmost importance and runs in the following terms :

Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court-fee in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

The language employed in R. 8 makes it perfectly clear that the application to sue in forma pauperis cannot be deemed to be a plaint until and unless it is granted. If the application is rejected, the proceedings under O. 33 terminate and there is no document which can be deemed to be a plaint under the Code of Civil Procedure. The rejection of an application to sue in forma pauperis takes place under R. 5 or R. 7 of O. 33 and the provisions of R. 8 do not become applicable at all. In other words, the application to sue in forma pauperis is a potential plaint. If it is rejected under R. 5 or R. 7, it never ripens into a plaint. If the application ripens into a plaint, then the date of the institution of the suit shall relate back to the date of the filing of the application to sue in forma pauperis. If on the other hand, such an application is rejected, it cannot be deemed to be a plaint, and the payment of the court-fee after the application to sue in forma pauperis has been rejected cannot revive a potential plaint which ceased to exist when the application for leave to sue in forma pauperis was rejected. A reference may be made in this connection to 20 Bom 508.¹ In that case, the plaintiff applied for leave to sue in forma pauperis on 2nd February 1890. After investigation the Court on 15th July 1890 refused leave, but on the plaintiff's application granted him time to pay the court-fees. He paid the fees on 12th August 1890. At this date the suit was barred and the defendant pleaded limitation. The plaintiff contended that the suit should be taken to have been instituted at the date of his application for leave to sue as a pauper.

It was held that the plaintiff's application to sue as a pauper having been disposed of under S. 409, Civil P. C. (Act 14 of 1882) there was no proceeding pending which could be continued and kept alive by the payment of court-fees. On the rejection of an application for leave to sue as a pauper the only course open to the applicant is that declared in S. 413, viz., to institute a suit and the date of the institution of that suit for the purposes of limitation is the actual date thereof. It was held by a Division Bench of the Calcutta High Court in 24 Cal 889² that where an application for permission to sue in forma pauperis is rejected, and a full court-fee is paid for a suit for the same relief, the suit must be considered for the purposes of limitation to have been instituted only after the payment of the court-fee, and not at the date of presentation of the petition to sue as a pauper.

In the present case, it was contended by the learned counsel for the respondent that the trial Court at the time of rejecting the application for leave to sue in forma pauperis observed in its order that the plaintiff shall be at liberty to prosecute the suit on payment of the necessary court-fees, and that this showed that the Court had granted a reasonable time for the payment of court-fees under S. 149, Civil P. C., and that upon the payment of court-fees the plaint must be held to have the same force and effect as if court-fee had been paid in the first instance. In our opinion, this contention is without any force. O. 33, R. 15 lays down that an order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right. The Court had obviously in mind the provisions of R. 15 when it remarked that the plaintiff will be entitled to prosecute the suit on payment of the necessary court-fee. It was laid down in A I R 1933 Nag 237³ that it is essential for the granting of permission to pay court-fees that there should be a pending proceeding before the Court. Where, therefore, an application for leave to sue in forma pauperis is

1. Keshav Ramchandra v. Krishnarao Venkatesh, (1896) 20 Bom 508.

2. Abhoya Churn Dey v. Bissesswari, (1897) 24 Cal 889.

3. Pratapchand v. Atmaram, A I R 1933 Nag 237=147 I C 732.

rejected under O. 33, R. 7, there is no proceeding before the Court and the plaint cannot be said to remain, and an order granting the plaintiffs permission to pay court-fees cannot be deemed to be one under S. 149, and the suit must be held to have been instituted on the day on which the court-fee is paid. The cases dealing with applications for leave to appeal in forma pauperis stand on an entirely different footing from an application for leave to sue in forma pauperis, and the distinction between the two proceedings has been emphasized in 3 Lah 35⁴ and 40 Mad 687⁵ at p. 696. The learned counsel for the respondent principally relied on 62 Cal 711⁶ where the following observations occur :

The document mentioned as an application for permission to sue as a pauper in O. 33, R. 2, Civil P. C., which contains all the particulars that the law requires to be given in a plaint, and in addition a prayer that the plaintiff might be allowed to sue as a pauper is a plaint required to be filed in a suit, and the refusal by the Court to grant the prayer of the plaintiff to sue as a pauper and termination of the proceedings in the matter of granting or refusing leave to sue as a pauper, does not amount to rejection of plaint. If the position under the law is, as it must be held to be the case, that the plaint was before the Court, and it was a document, on which proper court-fees had not been paid by virtue of a refusal of the prayer of the plaintiff for leave to sue as a pauper, the provisions of S. 149, Civil P. C., could come to the assistance of the plaintiff.

This ruling is based on the observations of their Lordships of the Privy Council in 2 All 241.⁷ It was held by their Lordships that where a person being at the time a pauper, petitions under the provisions of the Civil Procedure Code for leave to sue as a pauper, but subsequently, pending an enquiry into his pauperism, obtains funds which enable him to pay the court-fees, and his petition is allowed upon such payment to be numbered and registered as a plaint, his suit shall be deemed to have been instituted from the date when he filed his pauper petition, and limitation runs against him only up to that time. The facts of the case dealt with by their Lordships of the Privy

Council were clearly distinguishable from the facts of the present case. In the reported case, the application for leave to sue in forma pauperis had not been dismissed under Rr. 5 and 7 of O. 33 before the payment of the court-fees. The application was still pending and this application could be granted under the provisions of R. 8 of O. 33 and could thus be deemed to be a plaint in the suit. It is only the rejection of the application which terminates the proceedings and as the application in the reported case had not been rejected, the proceedings never terminated. 28 I C 504⁸ was also relied upon by the learned counsel for the respondent. It is a very brief judgment and does not show whether the application to sue in forma pauperis had actually been rejected before time was granted for the payment of the court-fee. The explanation to S. 3, Lim. Act, is also of no assistance to the respondent, as in our opinion the pauper in that explanation means a "declared pauper" and not a person whose application to sue in forma pauperis has been rejected by the trial Court. On a consideration of the authorities referred to above and the provisions of Rr. 8 and 15 of O. 33, Civil P. C., we are of the opinion that in the present case it cannot be held that the plaintiff's suit was instituted on 8th October 1930. It must be taken to have been instituted only on 21st July 1931, and was, therefore, obviously barred by time.

Our finding on the question of limitation makes it unnecessary to deal with the case on the merits in detail. The principal argument addressed by the learned counsel for the appellants was that the money deposited by Mt. Gappi was spent by Chuha Mal in meeting the marriage expenses of Mt. Ladli. Mt. Ladli's marriage took place in 1903. Kura Mal, the husband of Mt. Gappi, died in 1902. Mt. Gappi had, therefore, become a widow before her daughter's marriage was celebrated. It is not uncommon amongst Indian families for a grandfather to celebrate the marriage of his grand-daughter, specially if his daughter happens to be a widow. The account book of Chuha Mal shows that he continued to credit Mt. Gappi with the interest on her deposits till 18th February 1904, though Mt. Ladli had been married

4. Dial Das v. Sundar Das, A I R 1922 Lah 225 = 65 I C 741 = 3 Lah 35.

5. Nellavadiu Ammal v. Subramania Pillai, A I R 1918 Mad 1039 = 38 I C 617 = 40 Mad 687 = 31 M L J 269.

6. Jagadeeshwaree Debee v. Tinkarhi Bibi, A I R 1936 Cal 28 = 160 I C 586 = 62 Cal 711.

7. Stuart Skinner v. William Orde, (1878-80) 2 All 241 = 6 I A 126 = 3 Sar 31 = 3 Suther 627 (P C).

8. Maria Thangathammal v. Iravatheswara Iyer, A I R 1916 Mad 685 = 28 I C 504.

in 1903. This shows that Chuha Mal did not debit the expenses of the marriage of Mt. Ladli in the account of Mt. Gappi. Chuha Mal died in 1906. He, therefore, lived for three years after the marriage of Mt. Ladli, and even during that period he never debited the expenses of the marriage in the account of his daughter. These considerations make it obvious that Chuha Mal paid the expenses of the marriage of Mt. Ladli from his own pocket. Chuha Mal throughout his lifetime looked upon the deposit made by his daughter as belonging to her. After his death, his sons Murli Dhar and Alopri Prashad started their account books in 1906, and they continued to show these deposits as belonging to Mt. Gappi. These entries continued up to the year 1924. No accounts subsequent to 1924 have been placed on the record of the present case. In these circumstances we are of the opinion that the amounts shown in the name of Mt. Gappi in the account book of Chuha Mal are her property.

There is no dispute between the parties regarding the amount due, it being admitted that the amounts standing in the name of Mt. Gappi together with interest thereon up to 8th October 1930, amount to Rs. 7,000. On the merits, therefore, we are in agreement with the finding of the trial Court. For the reasons given above, we accept this appeal, set aside the judgment and the decree of the Court below, and dismiss the plaintiff's suit as being barred by limitation. In view of all the circumstances, we leave the parties to bear their own costs throughout.

D.S./R.K.

*Appeal accepted.***A. I. R. 1937 Lahore 155**

SKEMP, J.

Prabhu Ram—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1561 of 1935, Decided on 7th February 1936, from order of Sub-Divisional Magistrate, Rupar, D/- 19th September 1935.

(a) Punjab District Boards Act (20 of 1883), S. 57—Map signed by the Executive Engineer and Sub-Divisional Officer, P. W. D., at time of transfer of road to District Board—Blue print and measurements on map are admissible.

A plan of a road prepared by the officers of the Public Works Department and signed by the

Executive Engineer and Sub-Divisional Officer of the P. W. D. when transferring the land to the District Board must be presumed to be accurate under S. 83, Evidence Act for the purposes of prosecution under S. 57, Punjab District Boards Act, and the measurements therein are admissible under S. 36, Evidence Act, and a blue print is secondary evidence under S. 63 (2), Evidence Act.

[P 156 C 1]

(b) Punjab District Boards Act (20 of 1883), S. 57, Regns. 2 and 8 District Board Notification—Further fine for continuing breach at time of adjudication of offence under Regn. 8 and at same trial is illegal

Imposition of future continuing fine at the time of the adjudication of the offence under Regn. 8 is illegal. For imposing further fine for continuing breach, a separate prosecution for a distinct offence, a prosecution in which a charge must be laid for a specific contravention for a specific number of days is necessary: 16 *Mad* 230; 22 *Bom* 766; 24 *All* 309; *A I R* 1918 *All* 266; 27 *Cal* 565; 37 *Cal* 671 and *A I R* 1926 *Lah* 248, *Rel. on.*

[P 156 C 2]

Manohar Lal Mehra—for Petitioner.

R. C. Soni for District Board and *Mohammad Amin Malik*—for the Crown.

Order.—Prabhu Ram, petitioner, has been convicted under S. 57, Punjab District Boards Act, and sentenced to a fine of Rs. 25 and a continuing fine of Rs. 2 a day until the obstruction complained of is removed. This order was passed by the Tehsildar of Rupar, Magistrate, 2nd Class, and confirmed on appeal by the Sub-Divisional Magistrate of Rupar.

The complaint was made by the District Board, Ambala, that the petitioner had encroached on the public road managed by the District Board running from Sarhind to Rupar, thereby infringing Regn. 2 of the Board published with Punjab Government Notification No. 26010 in the Punjab Gazette dated 19th August 1931. The penalty is given in Regn. 8 in the said notification. Prabhu Ram contended that the land in dispute on which he had built a shop did not belong to the District Board, and alleged that he had bought it from one Sadhu Singh by deeds dated 29th and 30th December 1933. The trial and the appellate Magistrates, both of whom inspected the spot, based their convictions on the plan of the road prepared by officers of the Public Works Department in the year 1910, a blue print of which was handed to the officers of the District Board when the road was transferred from the Public Works Department to the District Board. That plan shows the road as 57 feet wide at milestone 15 which is close to the spot in question. The Magistrates found that the edge of the peti-

tioner's shop was only about 24 feet from the centre of the road instead of about 28 feet as it ought to be. In addition to the map, the Magistrates relied on applications submitted by Jati Ram and Kartar Chand in the year 1932 seeking the plot in question on lease from the District Board. Jati Ram and Kartar Chand are the sons of Prabhu Ram, petitioner. Further, in December 1932, Jati Ram and Ram Partap (the petitioner in petition No. 1577 of 1935) executed an agreement to pay rent to the District Board for the plot of the land now in dispute and the adjacent plot in dispute in Ram Partap's case. The petitioner's counsel urged that the Sub-Divisional Magistrate had found that the map was not reliable. I do not agree with this argument. The Sub-Divisional Magistrate's finding is based on the width of the road as drawn on the blue print, which may possibly be slightly out of scale and on a pardonable misreading of the figure at the 15th mile-stone. It is actually 57 feet and not 59 feet as the Magistrate thought. The Magistrate found that the width of the road at the shop of Prabhu Ram should be about 56 feet. It is shown on the plan as 57 feet. This is sufficiently accurate.

In my opinion, the plan which is signed by the Executive Engineer and Sub-Divisional Officer of the P. W. D., in the year 1910 must be presumed to be accurate under S. 83, Evidence Act, and the measurements thereon are admissible under S. 36 of the Act. The blue print is secondary evidence under S. 63 (2). It was also contended by the petitioner's counsel that the admissions of Prabhu Ram's sons did not bind him. This is correct. The legal position as to the applications of 1932 and the lease is that these are transactions whereby the right of the District Board to the land was recognized, and as such are admissible under S. 13, Evidence Act. The distinction is of little practical importance in this case. The petitioner was, therefore, rightly convicted. But the order of a continuing fine is illegal. This has been repeatedly laid down, but as the reasons have never been given in detail in published judgments of this Court, it will be well to state them. Regn. 8 of the District Board Notification No. 26010, dated 21st August 1931, runs as follows:

8. Any person who commits a breach of any of these regulations shall, on conviction by a Magistrate, be punishable with fine which may extend

to Rs. 50 and, if the breach, if a continuing breach, with further fine which may extend to five rupees for every day after the first during which such breach continues, and in default of payment of fine with simple imprisonment for a term which may extend to eight days.

In 16 Mad 230,¹ Best, J. held that a further fine under the District Municipalities Act could not be imposed prospectively. In 22 Bom 766,² a Division Bench set aside the future continuing fine imposed in a case under S. 471, Bombay Municipal Act, which is similar to Regn. 8 and said:

Clearly this necessitates a separate prosecution for a distinct offence—a prosecution in which a charge must be laid for a specific contravention, for a specific number of days, and for which charge, if proved, the Magistrate is to impose a daily fine of an amount which is left to him in his discretion to determine. The orders in the present cases are bad as being convictions and punishments for offences which the accused persons had not committed, and with which they were not and could not have been charged at the time the sentences were passed. The effect of such orders would be to deprive the accused persons of the opportunity to deny the commission of the offence or plead extenuating circumstances, and to take away from the Magistrate, who might have afterwards to levy the fine, the discretionary power vested in him by law to determine the amount that should be inflicted after investigation of the case.

In 24 All 309,³ at p. 311, in a similar case, it was said in the referring order that the order for the payment of the daily fine was illegal, inasmuch as it was an adjudication in respect of an offence which had not been committed when the order was passed. From this it would appear that the Municipal Board, if they want to have the applicant subjected to a daily fine for persisting in his omission to comply with the condition of the permission, will have to wait for a reasonable time, and then institute a fresh prosecution with this object. In 40 All 569,⁴ at p. 570, it was said:

The liability to a daily fine in the event of a continuing breach has been imposed by the legislature in order that a person contumaciously disobeying an order lawfully issued by a Municipal Board may not claim to have purged his offence once and for all by payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability will require to be

1. Queen-Empress v. Verammal, (1893) 16 Mad 230=1 Weir 733.

2. *In re* Limbaji Tulsiram, (1898) 22 Bom 766.

3. Emperor v. Vazir Ahmad, (1902) 24 All 309=1902 A W N 70.

4. Amir Hasan Khan v. Emperor, A I R 1918 All 266=46 I O 150=19 Cr L J 694=40 All 569=16 A L J 527.

enforced, as often as the Municipal Board may consider necessary, by institution of a second prosecution, in which the questions for consideration will be, how many days have elapsed from the date of the first conviction under the same section during which the offender is proved to have persisted in the offence, and, secondly, the appropriate amount of the daily fine to be imposed under the circumstances of the case, subject to the prescribed maximum of Rs. 5 per diem.

27 Cal 565⁵ and 37 Cal 671⁶ are also in point; and the principle has been followed in the Chief Court in 7 Lah 168.⁷ Mr. Mehra who represented the petitioner laid particular stress on the possibility that on a second prosecution an accused person though guilty might be able to plead extenuating circumstances. For these reasons while maintaining the conviction and the fine of Rs. 25, I must accept the revision so far as to set aside the order imposing a future fine of Rs. 2 a day.

V.B.B./R.K. *Revision partly allowed.*

5. Ram Krishna Biswas v. Mohindra Nath, (1900) 27 Cal 565.

6. Nilmani Ghatak v. Emperor, (1910) 37 Cal 671=7 I C 931=11 Cr L J 540.

7. Aisha v. Emperor, A I R 1926 Lah 248=93 I C 689=27 Cr L J 465=7 Lah 168=27 P L R 188.

A. I. R. 1937 Lahore 157

ADDISON AND ABDUL RASHID, JJ.

Sukh Dial and *another* — Decree-holders—Appellants.

v.

Nazir Ahmad and *others* — Judgment-debtors—Respondents.

Letters Patent Appeal No. 1 of 1936, Decided on 17th March 1936, from order of Agha Haidar, J., D./ 16th October 1935.

Custom (Punjab)—Debts — Ancestral property — Decree passed against ancestor — Ancestral property attached and sold in his lifetime—Death of ancestor — His grandsons can challenge sale on ground of want of consideration and necessity or of immorality or of objections under Civil P. C.—They cannot do so merely on ground that property is ancestral.

Under customary law those who succeed to the last holder of ancestral property do not do so as legal representatives but derive their title from the common ancestor. Hence ancestral land or house property which has not been attached or sold in the lifetime of the judgment-debtor cannot be attached and sold except in the hands of the widow after his death in execution of a simple money decree against him. But where such property has been attached and sold during his

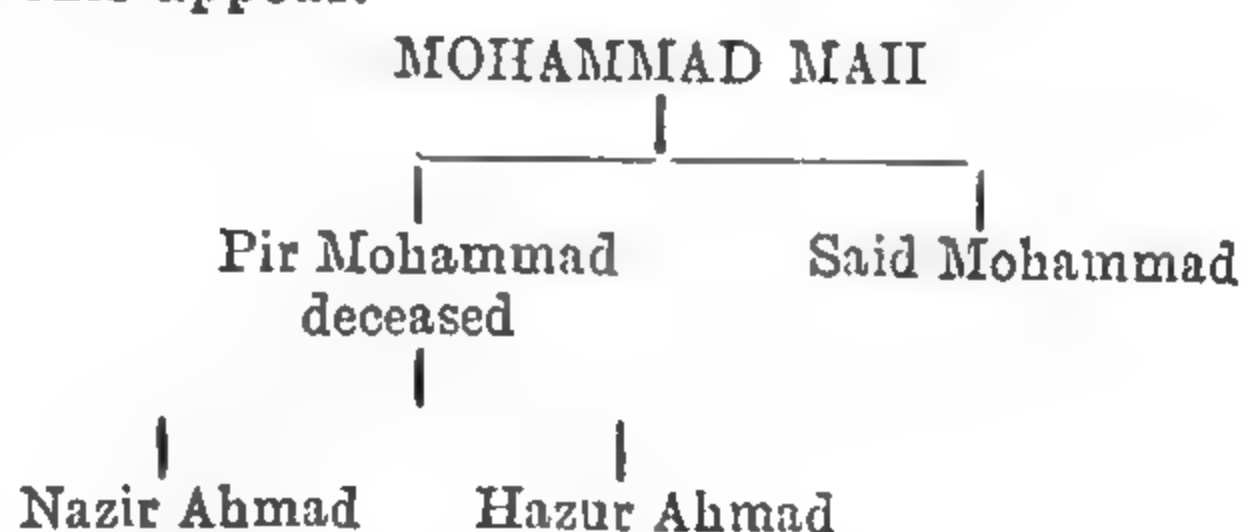
lifetime itself, his grandsons who succeed him cannot challenge the sale merely on the ground that the property is ancestral. They may be entitled to challenge the sale only on ground of want of consideration and necessity or of immorality as in the case of a private alienation by their grandfather in addition to objections which can be raised under Civil P. C. : 4 P R 1913 (F B), *Expl. & Disting.*; 5 Cal 148, *Expl.*

[P 158 C 1, 2; P 159 1; P 160 C 2]

Shamair Chand—for Appellants.

Barkat Ali and *Mohammad Amin*—for Respondents.

Addison, J.—The following pedigree table is necessary in order to understand this appeal:



Sukh Dial obtained a money decree against Mohammad Mah and Said Mohammad; Narain Das obtained another money decree against the same two persons. Both the decree-holders proceeded to execute their decrees and certain house property was attached on 2nd April 1933 and sold on 21st November 1933. On 18th December 1933, Mohammad Mah and Said Mohammad, judgment-debtors, put in certain objections to the execution of the decree under S. 60, Civil P. C., and also objected to the sale under O. 21, R. 90, Civil P. C. While these objections were being considered Mohammad Mah died on 12th February 1934, and on 2nd March 1934, his grandsons, Nazir Ahmad and Hazur Ahmad, were brought on the record as some of his legal representatives, Said Mohammad, the other legal representative, being already on the record as a judgment-debtor. The two grandsons, Nazir Ahmad and Hazur Ahmad, in addition to continuing the other objections, also pleaded that, the house being ancestral, their half-share could not under custom be sold in execution of a simple money decree against their grandfather after his death, and for this proposition they relied upon the Full Bench decision 4 P R 1913.¹ The executing Court found that there was no force in the original objections under S. 60 and O. 21, R. 90, Civil P. C., but, purporting to follow 4 P R 1913,¹ held that the half-share of the

1. Jagdish Singh v. Narayan Singh, (1912) 4 P R 1913=15 I C 866=173 P L R 1912.

two grandsons was not liable to attachment and sale by reason of the death of Mohammad Mah.

There was an appeal to the District Judge who held that it had been established that by custom the house could be sold in execution of a money decree even after the death of Mohammad Mah. The Single Judge of this Court, who heard the second appeal, held that the grandsons had not been given a proper opportunity in the executing Court to prove that the custom was otherwise and he accordingly remanded the following issue to the lower appellate Court under O. 41, R. 25, Civil P. C.:

Whether there was a special custom under which the grandsons were precluded from raising the plea that on the death of their ancestor the ancestral property was not liable to attachment and sale in execution of a money decree obtained against him.

The finding on remand was that the custom set up by the decree-holders had not been proved. This finding was accepted by the single Judge who thereafter accepted the two appeals before him and the sale of a half-share of the house was set aside. There were two appeals because there were two executing decree-holders who were both affected by the result. Against this decision the decree-holders have preferred separate appeals under the Letters Patent which may be conveniently disposed of together. There is no dispute that it has been held by a Full Bench in 4 P R 1913¹ that where a male proprietor, governed by customary rules, has contracted a just debt and dies leaving ancestral property, such property is not liable in the hands of the next holder in respect of such debt, unless the debt had been charged on the property and that a person who has obtained a simple money decree for such a debt against the debtor himself or his representatives, has no right to execute it against the ancestral land (or house property), once in the debtor's possession, which has passed into the hands of the next holder under customary law. But in this Full Bench case there had been no attachment or sale in the lifetime of the judgment-debtor; while in the present case not only attachment but sale had taken place in his lifetime. It was pointed out in the Full Bench judgment that the reversionary heir of the customary law bears a resemblance to the tenant-in-tail, such reversioner not inheriting from the last owner but from the

common ancestor. In the course of that judgment also occur the following remarks:

In these circumstances can a creditor by obtaining a simple money decree either against the debtor himself in his lifetime or after his death against the persons who are the legal representatives *pro tanto* of the deceased debtor execute his decree after the death of the debtor, by attachment of the landed ancestral property which was at one time in the possession of the deceased? It may perhaps be conceded that such attachment is permissible during the lifetime of the debtor, but with that aspect of the question, we are not at present concerned.

It is clear from the last sentence that such a case as the present was not meant to be decided by the Full Bench and indeed the judgment indicates that attachment during the lifetime of the debtor would take the case outside the decision given by the Full Bench though a final decision was not given on the question. These cases under customary law are in fact very similar to cases of joint families under Hindu law. In Hindu law in the case of a joint family there is no legal representative of a deceased member thereof, the others succeeding by survivorship. Under customary law also, those who succeed to the last holder of ancestral property do not do so as legal representatives, but derive their title from the common ancestor and that is why ancestral land or house property, which has not been attached or sold in the lifetime of the judgment-debtor, cannot be attached and sold except in the hands of the widow, after his death in execution of a simple money decree obtained against him. Now in the case of co-parceners under Hindu law it has been held that the undivided interest of a co-parcener if it is attached in his lifetime may be sold after his death whether the order for sale is made in his lifetime or after his death; but of course even under Hindu law it cannot be attached after his death, for it then has ceased to be his interest and has passed to the other co-parceners by survivorship. Similarly under customary law it is not disputed that if the sale had been confirmed before the death of Mohammad Mah it would have been a valid sale, although of course the grandsons might be entitled to attack the sale on the ground of want of consideration and necessity or of immorality on the part of the judgment-debtor, as the property is ancestral. The holder for the time being of ancestral property under custom can sell it but such a sale is subject to attack by the reversioners on the grounds already

stated. Similarly a sale in execution of a decree of Court might possibly be attacked in the same way as all that can be sold by the Court is the interest of the judgment-debtor.

There is a decision of their Lordships of the Privy Council under Hindu law reported in 5 Cal 148.² It was held in that case that the property having been attached for the debt of a co-sharer during his lifetime the sale was good for his share, but that as it appeared on the evidence in the suit that the debt was one for which according to Hindu law the other co-sharers could not be made liable the sale was not good for their shares. This decision has been followed in 23 All 106³ and 48 All 4.⁴ In 62 I C 905,⁵ a decision of the Patna High Court, it was held that a decree against a Hindu judgment-debtor can be executed against his son to the extent of the ancestral property which is liable for the debt covered by the decree passed against the father and the proper procedure was for the decree-holder to bring the son on the record as a legal representative of the deceased father. The son, it was held, could raise the plea in execution of the decree that the debt of his father was tainted with immorality but, if he failed to make this out, he was bound to pay out of the joint property all the debts of his ancestor not incurred for immoral or illegal purposes including a judgment-debt. Similarly in the present case it was no doubt open to the two grandsons to raise the plea that the property was not liable to be sold as the debt was incurred for immoral purposes or was without necessity as already remarked, but these pleas were not taken. The grandsons must be allowed to take these pleas in the execution proceedings as having been brought on the record, a separate suit probably would not lie by virtue of S. 47, Civil P. C., but there is no question of this in the present case. All that the grandsons alleged was that the property being ancestral *qua* them could not be sold in execution of a decree against their grandfather after his death. On behalf of the grandsons certain other deci-

sions have been relied upon. The first is 25 Cal 179,⁶ where it was held that attachment merely prevented alienation and did not give title. This is undoubtedly true and in no way affects the decision of their Lordships in 5 Cal 148² at p. 174 where their Lordships remarked as follows :

They think that, at the time of Adit Sahai's death, the execution proceedings under which the mouza had been attached and ordered to be sold had gone so far as to constitute in favour of the judgment-creditor a valid charge upon the land, to the extent of Adit Sahai's undivided share and interest therein, which could not be defeated by his death before the actual sale.

Another case relied upon was 42 Cal 72⁷ where it was said that an attachment in execution of a money decree on a mortgage of land followed by an order for sale of the interest of the judgment-debtor does not create any charge on the land. The facts of this case are of a special nature and must be briefly stated : A colliery leased to the judgment-debtors was attached under a mortgage decree by judgment-creditors and an order for sale on 5th September 1904, was made, but the sale was postponed until the 10th at the request of the judgment-debtors. On 8th September the judgment-debtors filed their petition in the Insolvency Court at Calcutta and the usual vesting order was made the same day. On 12th September the execution proceedings were stayed. After issue of notice, on the application of the judgment-creditors to the Official Assignee to show cause why he should not be substituted in place of the judgment-debtors the Subordinate Judge on 10th January 1905, finding that notice had been duly served, made the order for substitution and fixed the sale for 6th March 1905, and had the property sold on that day. It was purchased by the judgment-creditors who were put in possession in June. Meanwhile, on 23rd May 1905, the Official Assignee with leave from the Insolvency Court in, March 1905, sold the property to a purchaser who, on 24th June 1908, sold it to the plaintiffs by whom, on 16th July, the suit before their Lordships was brought for possession of the colliery. It was held by the Privy Council that the notice calling on the Official Assignee to show cause why he should not be substituted for the judg-

2. Suraj Bansi Kuer v. Sheo Pershad Singh, (1880) 5 Cal 148=6 I A 88=4 Sar 1 (P C).

3. Bithal Das v. Nand Kishore, (1901) 23 All 106.

4. Fakir Chand v. Santlal, A I R 1926 All 157=89 I C 291=48 All 4=23 A L J 877.

5. Karoo Sheik v. Rameshwar Sao, A I R 1923 Pat 143=62 I C 905=6 P L J 451=3 P L T 43.

6. Motilal v. Karabuldin, (1898) 25 Cal 179=24 I A 170=7 Sar 222=1 C W N 639 (P C).

7. Raghunath Das v. Sundar Das Khetri, A I R. 1914 P C 129=24 I C 304=41 I A 251=42 Cal 72 (P C).

ment-debtors was not a proper notice, but it was further held that, assuming the notice to have been duly served, the sale was altogether irregular and inoperative. The property having vested in the Official Assignee it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place it was held that the Official Assignee not having been properly brought before the Court was not bound by anything which had been done. In the third place it was held that the judgment-debtors had, at the time of the sale, no right, title or interest which could be sold to or vested in the purchaser as the judgment-debtors' rights had then vested in the Official Assignee. What, therefore, this amounts to is that an attachment prevents a private alienation but does not invalidate an alienation by operation of law such as is effected by a vesting order under the Indian Insolvency Act, and that an order for sale, though it binds the parties, does not confer title. This authority appears to go against the grandsons for, here there has been an alienation by operation of law by means of the Court auction in the lifetime of the grandfather.

Reference was made also to 13 Lah 524⁸ and similar authorities to the effect that a mere attachment infringes the rights only of the judgment-debtor and has the effect of placing the property attached in *custodia legis*. It does not amount to an infringement of the rights of his reversioners and cannot furnish the latter with a cause of action for a suit for a declaration that the attachment shall not affect their reversionary rights. These decisions do not help towards the decision of the present case.

Reference has also been made to S. 65, Civil P. C., which enacts that where immoveable property is sold in execution of a decree and such sale has become absolute the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. Under O. 21, R. 90 an application may be made to set aside the sale, but if such an application is not made or is made and

disallowed then the Court shall make an order under O. 21, R. 92 confirming the sale and thereupon the sale shall become absolute with effect, by virtue of S. 65, from the date of the sale. In the present case the sale took place in the lifetime of Mohammad Mah. Objections could be taken under O. 21, R. 90 and were taken and disallowed. Further the grandsons could take such objections to the sale, which took place in their grandfather's lifetime, as they would be entitled to do under customary law in the case of a private alienation by their grandfather, but it seems to us that they could not take the objection merely that the land was ancestral and that the sale should be set aside on that ground; for the sale was effected in the lifetime of their grandfather and could not be attacked merely on the ground that the property was ancestral but only on the grounds already stated. It is not necessary in the present case to decide as to whether attachment in the grandfather's lifetime was sufficient to create such a charge as was held to be created by their Lordships of the Privy Council in 5 Cal 148,² but it is quite clear that where attachment and sale have taken place the only objections of the reversioners are those open to them in an ordinary suit against a private alienation of the last holder of the property in addition, of course, to the objections which can be raised under the Civil Procedure Code.

For the reasons given we accept these appeals, set aside the decisions of the single Judge and confirm the sale in toto. The decree-holders will have their costs throughout against the grandsons.

B.D./R.K.

Appeals allowed.

A. I. R. 1937 Lahore 160

SKEMP, J.

A. F. G. Price — Convict — Petitioner.
v.

Emperor — Opposite Party.

Criminal Revn. No. 1526 of 1935, Decided on 11th January 1936, from order of Sess. Judge, Lahore, D/- 16th October 1935.

(a) Bankers' Books Evidence Act (1891)—
'Evidence.'

'Evidence' in the Act has same meaning as defined in the Evidence Act. [P 162 O 1]

⁸ S. Natha v. Ganesh Singh, A I R 1932 Lah 179
=136 I C 265=13 Lah 524=33 P L R 46.

(b) Bankers' Books Evidence Act (1891), S. 2 (4) — Proceedings before police officer during investigation are not 'legal proceedings'—Police officer investigating into charge against customer of Bank is entitled to inspection of his accounts in Bank under S. 94, Criminal P. C.

The statements before a police officer during investigation lack many of the characteristics of evidence, and as evidence is not given before a police officer, proceedings before a police officer during an investigation of a charge are not legal proceedings as defined in the Act. [P 162 C 2]

Where a police officer investigating a charge under S. 420, Penal Code, against a customer of the Bank asks for inspection of his accounts in the Bank he is entitled to such inspection as the proceedings before him during investigation are not 'legal proceedings' within the meaning of S. 5 of the Act. [P 161 C 1]

(c) Criminal P. C. (1898), S. 4 (1)—Interpretation—'Collection of evidence conducted by police officer'—Meaning of.

The expression 'collection of evidence conducted by a police officer' in S. 4 (1) of the Code is a short way of saying 'collection of material to be used as evidence conducted by a police officer,' inasmuch as the expression 'giving or taking evidence' is nowhere used in the Code in reference to police officers. [P 162 C 1]

Sleem and M. A. Majid—for Petitioner.

Diwan Ram Lal—for the Crown.

Order.—A police officer investigating a charge under S. 420, I. P. C., against a customer of the Imperial Bank of India, Lahore Branch, approached Mr. Price, Accountant of that Bank, and asked to inspect the accounts of the Bank in so far as they concerned that customer. Mr. Price refused to show the accounts, relying on S. 5, Bankers' Books Evidence Act. There was some correspondence between the police and Mr. Price who asked for the order of a Court or a Judge. Ultimately the police officer in question, the officer in charge of the police lines, Lahore, served a formal order under S. 94, Criminal P. C., on Mr. Price to produce the books required at the civil lines police station. The order was not complied with. Mr. Price was prosecuted under S. 175, I. P. C., found guilty and action taken under S. 562 (1-A), Criminal P. C. The City Magistrate, who tried the case, and the learned Sessions Judge, Lahore, before whom the matter was brought on appeal, both took the view that S. 5, Bankers' Books Evidence Act does not prevent the police from inspection of the books of the Bank even without the order of a Court, for reasons with which I am in agreement, but which, as this is understood to be a test case, I will re-state in

my own words. S. 5, Bankers' Books Evidence Act, runs as follows :

No officer of a Bank shall in any legal proceeding to which the Bank is not a party be compellable to produce any Banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the Court or a Judge made for special cause.

'Legal proceeding' is defined in S. 2 (4) of the Act :

'Legal proceeding' means any proceeding or enquiry in which evidence is or may be given and includes an arbitration.

Thus the test is whether the police investigation was a proceeding or enquiry in which evidence was to be given. Evidence is defined in the Evidence Act, S. 3, as follows :

Evidence means and includes; (1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry : such statements are called oral evidence ; (2) all documents produced for the inspection of the Court : such documents are called documentary evidence.

The lower Courts found that 'evidence' in the definition of 'legal proceeding' in the Bankers' Books Evidence Act, means evidence as defined in the Evidence Act, and Mr. Sleem for the Bank admits that if this is so the case is at an end; but in the course of an ingenious and able argument he suggested that evidence in the Bankers' Books Evidence Act has a wider significance and should be taken in its dictionary sense. There are two main points in support of this: (1) 'Legal proceeding' in the Bankers' Book Evidence Act, includes an arbitration while the Evidence Act does not apply to proceedings before an arbitrator (S. 1 of that Act). (2) S. 4 (1), Criminal P. C., defines 'investigation' and says:

'Investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

As to the first point, the Evidence Act excludes proceedings before an arbitrator, because the arbitrator may be a person without legal training, and it is considered desirable that statements before an arbitrator need not be subject to the law of Evidence. On the other hand the objections to the production of Bankers' Books before a Court apply equally to their production in arbitration proceedings. This is the explanation of the difference on this point between the Evidence Act and the Bankers' Books Evidence Act, and no inference can be drawn as to the meaning of 'evidence.'

With reference to S. 4 (1), Criminal P. C., the expression is "collection of evidence conducted by a police officer;" whereas in the very next sub-s. "judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath. I think 'collection of evidence conducted by a police officer' is a short way of saying collection of material to be used as evidence conducted by a police officer. The expression "giving or taking evidence" is nowhere used in reference to police officers.

Finally Mr. Sleem referred to the documentary meaning of evidence. Reference was made to Murray's New Oxford Dictionary and it was found that various meanings of evidence are given including the legal meaning. I think it is the legal meaning which must be adopted. Otherwise how is one to draw a line and exclude evidence in a theological or scientific sense? The learned Government Advocate argued the case for the Crown very ably. His argument is that the preamble of the Evidence Act 1 of 1872, is: "Where it is expedient to consolidate, define and amend the law of Evidence." The preamble of the Bankers' Books Evidence Act, 18 of 1891 is "Whereas it is expedient to amend the Law of Evidence with respect to Bankers' Books." Therefore it is clear that the word "evidence" must be used in the Bankers' Books Evidence Act with the same meaning as in the Evidence Act. The preamble of the Code of Criminal Procedure, Act 5 of 1898, is "Whereas it is expedient to consolidate and amend the law relating to Criminal Procedure." It was then, subsequent to the date of 18 of 1891, the intention of the legislature to take stock of the whole existing law of Criminal Procedure, to certify and amend it. Nevertheless the Legislature enacted S. 94 in the following terms:

(1) Whenever any Court, or, in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a police station, considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be requiring him to attend and produce it, or to produce it at the time and place stated in the summons or order. (2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition, if he causes such document or thing to be produced instead of at-

tending personally to produce the same. (3) Nothing in this section shall be deemed to affect the Evidence Act, 1872, Ss. 123 and 124, or to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authorities.

He draws particular attention to sub-s. (3) and urges that if the Legislature had intended to exempt Bankers' books from production before the police, they could have done so as well as the postal articles. With this argument I am in agreement. Thus I am of opinion that 'evidence' in the Bankers' Books Evidence Act has the same meaning as in the Evidence Act, and that as evidence is not given before a police officer, proceedings before him are not a 'legal proceeding' as defined in that Act. In fact statements made by persons during investigation to a police officer are not made on oath; they need not be signed; they need not be made in the presence of the accused; and they are not subject to cross-examination; i. e., they lack many of the characteristics of evidence. They can only be used as evidence within narrowly restricted limits. This is sufficient to dispose of the matter; but I wish to refer to one or two other matters which arose in the course of arguments. (1) It was said that the Bank owes a fiduciary duty to its customers not to disclose their affairs or accounts. No doubt this is so, but this duty is no answer to an express provision of a statute. (2) It was also said that it would be a matter of great inconvenience to take the books of the Bank to a police station. This is true, but inconvenience also is no answer to an express provision of a statute. Further in this case all that the police officer originally wished to do was to see the books of the Bank at the Bank and this would be the normal and proper procedure unless the books themselves were required for special reasons. I reject this revision.

W.D./A.L. *Application rejected.*

A. I. R. 1937 Lahore 162

TEK CHAND, J.

Kishan Singh—Plaintiff—Petitioner.

v.

*Sardar Ali and another—Defendants—
—Opposite Parties.*

Civil Revn. No. 178 of 1936, Decided on 5th June 1936, from decree of Judge, Sm. C. Court, Sialkot, D/- 10th December 1935.

Limitation—Acknowledgment of liability—“Period prescribed” means period prescribed in Schedule read with S. 4, Limitation Act.

An acknowledgment of liability to be valid and effective under S. 19, Limitation Act, need not be made within the period prescribed in the Schedule but can be made within the period prescribed by law, i. e., within the period prescribed by Schedule read with S. 4, Limitation Act : 19 I C 820; A I R 1930 Lah 978; A I R 1928 Nag 192; A I R 1927 All 114 and A I R 1927 All 577, Foll.; 26 Bom 782; A I R 1928 Bom 319 and A I R 1931 Cal 785, Dissent.; A I R 1935 P C 85, Dissenting. [P 163 C 2]

Anant Ram Khosla and Muhammad Din Jan for Anant Ram Khosla — for Petitioner.

*Muhammad Amin—*for Opposite Parties.

Order.—On 24th September 1929, the defendants executed a bond for Rupees 143.4.0 in favour of the plaintiff. On 19th June 1930, the defendants repaid R. 80. On the back of the bond this payment was entered, but the entry was not signed or thumb-marked by any of the defendants. On 25th September 1932 another sum of Rs. 34 was paid, and an entry to this effect was made on the back of the bond and was thumb-marked by both the defendants. On 9th October 1935, (the first day of the re-opening of the Courts after the vacation) the plaintiff instituted the present suit for recovery of the balance due on foot of the bond. The defendants pleaded that the suit was barred by limitation. The plaintiff's counsel admitted that the entry as to the payment of Rs. 80, dated 19th June 1930, was not an acknowledgment within S. 19, Limitation Act, and, therefore, could not save time. He, however, urged that the entry as to the second payment of Rs. 34, dated 25th September 1932, which was duly thumb-marked by the defendants, extended limitation under S. 19. It was admitted that this entry was made one day beyond the period of three years from the date of the bond, but it was pointed out that that period expired during the month of September, when the civil Courts were closed for the vacation and the acknowledgment had been made before the date on which the Courts re-opened.

It was, therefore, contended that it was a valid acknowledgment within S. 19 of the Act, and gave another period of three years, in which the plaintiff could sue to recover the amount due. The trial Court repelled this contention and dismissed the suit as time-barred. S. 19 of Limitation

Act, so far as it is relevant to the point involved, runs as follows :

Where before the expiration of the period prescribed for a suit in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party

It will be noticed that S. 19 does not say in so many words that the acknowledgment of liability should be before the expiration of the period prescribed for a suit in the Schedule. It merely says the “period prescribed” for the suit. The question for consideration is whether these words mean the “period prescribed in the Schedule alone or the period prescribed by law”. The matter has been considered in several rulings of the High Courts, and there appears to be a conflict of opinion on the point. In 49 All 726,¹ it was held that the expression “period prescribed” should not be limited to the period prescribed in the Schedule alone, but that expression means the period prescribed by law, i. e., the period prescribed by the whole body of the Limitation Act; in other words, the period prescribed by the Schedule read with S. 4. The same view was taken by Beaman, J. of the Bombay High Court in 15 Bom L R 348.² The learned Judge observed that S. 3, Limitation Act, advisedly makes the whole of Sch. 1 applicable subject to the provisions of Ss. 4 to 25, and S. 4 provides that where the period prescribed in Sch. 1 ends on a day on which the Court is closed, the suit shall be still within time if it is filed on the first day thereafter on which the Court re-opened. The combined effect of these sections is to extend the period prescribed in Sch. 1 in the special circumstances contemplated in S. 4.

In 129 I C 125,³ Jai Lal, J., sitting in Single Bench, after an independent examination of the question reached the same conclusion. He held that the “period prescribed for the suit”, referred to in S. 19 is not necessarily limited to the period prescribed in the Schedule to the Limitation Act, but means the period within which a suit could be instituted. The Nagpur Judicial Commissioner in A I R 1928 Nag 192,⁴ has followed the Allaha-

1. Abdul Ghani v. Chiranji Lal, A I R 1927 All 577=102 I C 111=49 All 726=25 A L J 589.

2. Visram Vasudeo Thakoor v. Tabaji Balaji Wagh, (1913) 15 Bom L R 348=19 I C 820.

3. Buta Singh v. Bhan Singh, A I R 1930 Lah 978=129 I C 125.

4. Jhanaklal v. Gulab Chand, A I R 1928 Nag 192=110 I C 76=24 N L R 83=11 N L J 87.

bad ruling. There are observations in 49 All 67,⁵ which also support the same view. A contrary view, however, has been taken in 26 Bom 782⁶ which was followed in 52 Bom 521,⁷ and 58 Cal 1148,⁸ where it has been laid down that an acknowledgment of liability to be valid and effective under S. 19, must be made before the expiration of the period prescribed in the Schedule and that special provisions made applicable to suit under S. 4 cannot be made applicable to acknowledgments. After considering the arguments for both sides, I see no reason to put a narrow interpretation upon the words "period prescribed" and with all respect, express my respectful agreement with the view taken in the former set of rulings. The reasons given by Beaman, J. of the Bombay High Court and by Mukerji, J. of the Allahabad Court seem to me unanswerable, and I see no reason to differ from the conclusion reached by Jai Lal, J. in the case cited above.

Mr. Muhammad Amin referred me to 57 All 242,⁹ but I do not see anything in that case which has a bearing on the point before me. No question of interpretation of S. 19, Limitation Act, arose in that case. There the appellant sought to exclude a certain period under S. 14. On the facts proved, their Lordships accepted the contention and excluded that period. It was found, however, that even after the exclusion of that period under S. 14, time expired on a date which did not fall within the Court vacation. Consequently, the plaintiffs were held not entitled to the benefit of S. 4. The case does not assist the respondents. Indeed, the observations at p. 248 of their Lordships' judgment which, so far as they go, appear to support the plaintiff's contention. I accordingly hold that the suit was within time and was wrongly dismissed. I accept the petition for revision, set aside the judgment and decree of the Court below, and pass a decree for the sum claimed in favour of

the plaintiff against the defendant with costs in both Courts.

B.D./R.K.

Revision allowed.

* A. I. R. 1937 Lahore 164

ADDISON AND ABDUL RASHID, JJ.

Hari Chand and another—Plaintiffs—
Petitioners.

v.

Dina Nath — Defendant — Opposite
Party.

Civil Revn. No. 758 of 1935, Decided on 15th April 1936, from Sub-Judge, 4th Class, Amritsar, D/- 11th July 1935.

* Abatement—Preliminary and final decree—Preliminary decree determining right of action—Final decree is matter of procedure—Plaintiff dying after preliminary decree—Representative applying to be brought on record after three months of death of decree-holder—Provisions of O. 22, Rr. 3 and 4, Civil P. C. have no application to such case.

"Action" means "right of action" and the right of action is determined at the time of the passing of the preliminary decree in a mortgage suit and the final decree is only by way of working out in detail the principles laid down and determined in the preliminary decree. The provisions of Rr. 3 and 4 of O. 22, Civil P. C., therefore, have no applicability to a case where the plaintiff dies after securing a preliminary mortgage decree and before the passing of the final decree in a mortgage suit and his representatives apply to be brought on record after three months of the plaintiff's death : *A I R 1928 Mad 914 (F B)*; *A I R 1924 P C 198*; *A I R 1929 Cal 430*; *A I R 1933 Rang 318*; *A I R 1929 Nag 142 (F B)* and *A I R 1927 Oudh 561, Foll.*; *A I R 1930 All 779* and *A I R 1926 Sind 20, Dissent.*

[P 165 C 2; P 166 C 2]

Amar Nath Chopra—for Petitioners.

Jhanda Singh—for Opposite Party.

Order of Reference.

Jai Lal, J.—A preliminary decree for sale of mortgaged property was passed in favour of Gian Chand, but before a final decree could be passed Gian Chand died and his legal representative was not brought on the record for about nine months after his death. The question involved in this petition for revision is whether the legal representative of Gian Chand should have been brought on the record within the time prescribed for substituting legal representatives under O. 22, Rr. 3 and 4, or whether these rules have no application to cases where the plaintiff dies after the preliminary decree. The decision of this question will probably depend upon whether the proceedings after the preliminary decree till the passing of the final decree

5. Sheo Partab Singh v. Tajammal Husain. A I R 1927 All 114=98 I C 1005=49 All 67=24 A L J 1039.

6. Bai Hemkore v. Masamally, (1902) 26 Bom 782=4 Bom L R 608.

7. Maganlal Harjibhai v. Amichand Gulabji, A I R 1928 Bom 319=112 I C 24=52 Bom 521=30 Bom L R 733.

8. Anisuddin Ahmad v. Kalipada Rai Chaudhury, A I R 1931 Cal 785=134 I C 1132=58 Cal 1148=35 C W N 370.

9. Maqbul Ahmad v. Partab Narain Singh, A I R 1935 P C 85=155 I C 205=62 I A 80=57 All 242 (P C).

are a continuation of the suit. It is contended on behalf of the petitioner that they are not and that an application for bringing on record the legal representative of a deceased plaintiff in such a case is governed by Art. 181, Limitation Act, and that O. 22 has no application to such cases.

The cases discussed before me are those mentioned in the judgment of the learned Subordinate Judge. It appears from them that there is a sharp conflict of opinion between the various High Courts. The Allahabad High Court supports the view of the learned Subordinate Judge while the majority of the other High Courts have taken the opposite view. No case fully applicable to the facts of the present case decided by this Court has been cited at the Bar. I consider that, under the circumstances, it is desirable that there should be a more authoritative pronouncement on this subject by this Court. I accordingly send this case to a Division Bench for decision. I may note here that no objection has been raised to the substitution of the legal representatives of Bhagat Ram, petitioner, who had applied to be substituted in place of Gian Chand and who also has in the meantime died.

Order of Division Bench

Abdul Rashid, J.—On 10th May 1932, a preliminary mortgage decree was passed in favour of Gian Chand, but before a final decree could be passed Gian Chand died and no application to bring his legal representatives on the record was made for about 14 months after his death. On 9th January 1935, an application was made by Bhagat Ram to the effect that he was the adopted son of Gian Chand, and that his name may be brought on the record as the legal representative of the deceased plaintiff. This application was opposed by the defendant. One of the objections of the defendant was that as no application had been made by the legal representative of Gian Chand, deceased, within a period of three months the suit had abated. The learned Subordinate Judge held that as no application under O. 22, R. 3, Civil P. C., was filed within the prescribed period by any of the legal representatives of Gian Chand the suit had abated. Against this decision Bhagat Ram has preferred a petition for revision to this Court.

The main contention urged on behalf of the petitioner was that Rr. 3 and 4 of O. 22 have no application to cases where the

plaintiff dies after a preliminary decree in a mortgage suit has been passed in his favour, and that an application for bringing on the record the legal representative of a deceased plaintiff in such a case is governed by Art. 181, Limitation Act. Reliance was placed in this connection on a ruling of their Lordships of the Privy Council reported as 4 Pat 61.¹ In the case referred to above the High Court on appeal had made an order by consent for partition in certain terms and had remitted the suit to the Subordinate Judge for disposal under the decree. Upon the plaintiff failing to appear on the day appointed by the Subordinate Judge for the matter to be proceeded with, he made an order dismissing the suit under O. 17, R. 2, Civil P. C. It was observed by their Lordships that after a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside. After a decree any party can apply to have it enforced. It was further held that in dismissing the suit under O. 17, R. 2, Civil P. C., the Subordinate Judge passed an order which he had no jurisdiction to make and that the High Court was, therefore, justified in the exercise of its powers of revision under S. 115, Civil P. C., in reversing such an order.

A Full Bench of the Madras High Court held in 51 Mad 701² that Rr. 3 and 4 of O. 22, Civil P. C., do not apply to cases of death of parties after the passing of a preliminary decree in a mortgage suit. It was observed in the judgment that "action" means "right of action" and that if that is the true way of looking at the matter the right of action is determined at the time of the passing of the preliminary decree in a mortgage suit, and that the final decree is only by way of working out in detail the principles laid down and determined in the preliminary decree. It was held in 57 Cal 285³ that no abatement of the suit takes place when a plaintiff dies after the preliminary decree is

1. *Lachmi Narain v. Balmukand*, A I R 1924 P C 198=81 I C 747=51 I A 321=4 Pat 61 (P C).

2. *Perumal Pillai v. Perumal Chetty*, A I R 1928 Mad 914=112 I C 116=51 Mad 701=55 M L J 253 (F B).

3. *Nazir Ahmed v. Tamizaddi Ahmed*, A I R 1929 Cal 430=122 I C 303=57 Cal 285.

passed in a mortgage suit and no application for substitution of his heirs is made within the time limited by law. O. 22, R. 3, Civil P. C., has no application in such cases. Reliance was placed in the Calcutta case chiefly on the ruling of their Lordships of the Privy Council in 4 Pat 61.¹ It was pointed out that the observations of their Lordships are applicable in principle to a mortgage suit where the plaintiff dies after securing a preliminary decree in his favour. It was held in 11 Rang 446⁴ that where a preliminary decree has been passed and no application has been made within 90 days from the date of the death of a defendant who had died after the passing of the preliminary decree to bring his legal representatives on the record the suit does not abate as against the deceased defendant. O. 22, R. 4, Civil P. C., has no application in such a case. Similar observations were made in A I R 1930 Lah 329,⁵ A I R 1929 Nag 142⁶ and A I R 1927 Oudh 561.⁷

A contrary view was expressed by a Division Bench of the Allahabad High Court in 52 All 910.⁸ It was held in that case that a mortgage suit does not terminate by the passing of a preliminary decree but continues till it is finally and completely disposed of by the passing of the final decree. It was further observed that in these circumstances the death of a party after the passing of the preliminary decree may cause an abatement of the suit under O. 22, R. 4, Civil P. C. The Privy Council ruling reported as 4 Pat 61¹ was distinguished on the ground that it was not absolutely essential in a partition suit to pass a preliminary decree before passing a final decree, and that it was not apparent from the decision of their Lordships whether they regarded the consent decree passed in that case as a preliminary decree or a final decree.

With all respect we are of opinion that the Allahabad view is not in accordance with the law as laid down by their Lord-

ships of the Privy Council. The case dealt with by their Lordships was remitted to the Subordinate Judge by the High Court so that necessary steps for effecting the partition be taken. The compromise decree was, therefore, undoubtedly a preliminary decree and the partition by metes and bounds was to be carried out before a final decree could be passed. There is no distinction in principle between a decree such as the one in 4 Pat 61¹ and a preliminary decree for sale in a mortgage suit. In either case a preliminary decree determines the rights of the parties and the subsequent proceedings are merely of a subsidiary character. The Sind Court has taken the same view as the Allahabad High Court in A I R 1926 Sind 20⁹ in respect of the point involved in the present petition. The Privy Council case 4 Pat 61,¹ has not been referred to in the Sind ruling. We are of opinion that the principle of law enunciated by their Lordships of the Privy Council in 4 Pat 61¹ is fully applicable to the facts of the present case and that the provisions of Rr. 3 and 4, O. 22, Civil P. C., have no applicability to a case where the plaintiff dies after securing a preliminary decree and before the passing of the final decree in a mortgage suit. We respectfully agree with the view expressed by the Calcutta, Madras, Rangoon and the Lahore High Courts and Nagpur and Oudh Courts in this respect, and with all respect dissent from the view expressed by the Allahabad High Court and the Sind Court.

For the reasons given above we accept this petition for revision, set aside the order of the trial Court dated 11th July 1935, to the effect that the suit had abated, and remit the case to the learned Subordinate Judge with the direction that he will proceed to dispose of the application presented by Bhagat Ram, appellant, in the light of the observations made above. Parties will bear their own costs in this Court.

B.D./R.K.

Revision allowed.

4. Muthiah Chettiar v. Tha Zan Hla, A I R 1933 Rang 318=147 I C 730=11 Rang 446.

5. Rahim Baksh v. Walaiti Ram, A I R 1930 Lah 329=122 I C 227.

6. Bapu v. Gulab Chand, A I R 1929 Nag 142=116 I C 657 (F B).

7. Kalu Ram v. Gaya Din, A I R 1927 Oudh 561=106 I C 832=4 O W N 1002.

8. Anmol Singh v. Hari Shankarlal, A I R 1930 All 779=126 I C 20=1930 A L J 825=52 All 910.

9. Tulsidas v. Ramzan Abdulla, A I R 1926 Sind 20=89 I C 238.

* A. I. R. 1937 Lahore 167

AGHA HAIDAR, J.

Miran Bakhsh, Defendant, Vendee — Appellant.

v.

Mohammad Akram Khan, Plaintiff and another, Vendor — Respondents.

Second Appeal No. 336 of 1936, Decided on 5th June 1936, from decree of Dist. Judge, Campbellpore, D/- 17th December 1935.

(a) *Res judicata* — Case finally decided by appellate Court on one point — Findings of lower Court on other points not dealt with by superior Court are not *res judicata*.

When a suit is 'finally decided' on a particular point by the appellate Court any finding recorded by the Courts below which has not been dealt with by the Court of appeal would not have the binding force of *res judicata* : 8 Cal 631 ; 24 Cal 616 (P C) and A I R 1917 P C 201, *Rel. on*.

[P 167 C 2]

* (b) *Pre-emption* — Custom of *pre-emption* established in one town—Custom applies to extended town.

Where the custom of *pre-emption* prevailed in a particular town and the same town expands in the ordinary course of things, the custom of *pre-emption* would also be enforceable in the extended boundaries of the original town where the custom had prevailed.

[P 168 C 1]

Qabul Chand and *Shamair Chand* — for Appellant.

Ghulam Mohy-ud-Din Khan and *Abdul Aziz Khan*—for Respondents.

Judgment.—These are two connected appeals arising out of two *pre-emption* cases. The learned District Judge had disposed of the two appeals before him by one judgment and I propose to do the same.

On 21st January 1933, Mohar Chand, defendant 1, sold the property in suit to Miran Bakhsh, defendant 2. The land in suit is situated in "urban area Urtak," Tehsil Attock. On 16th January 1934, the plaintiff Mohammad Akram Khan brought the present suit for *pre-emption* on the ground that he was a joint owner and, therefore, had a superior right of *pre-emption*. He further alleged that there was a custom of *pre-emption* prevailing in the "urban area Urtak." With the question of price we are not concerned because it is concluded by the concurrent findings of fact arrived at by the two Courts below. The defendant vendee pleaded that no custom of *pre-emption* prevailed in the "urban area Urtak" and that the matter was concluded by a previous judgment,

Ex. D-10, which operated as *res judicata*. The trial Court has held that the plaintiff had a superior right because he was a joint owner. It further held that no custom of *pre-emption* was proved to exist in the area in suit which was urban immoveable property. It accordingly dismissed the plaintiff's suit. The plaintiff went up in appeal. The learned District Judge has held that the previous suit between the parties did not operate as *res judicata*. He also recorded a finding that "urban area Urtak" was a part of Urtak and was not a new sub-division, and as the custom of *pre-emption* admittedly prevailed in Urtak Hazro and Urtak Proper, it may be taken to prevail in "urban area Urtak" also, which was a part of the same sub-division. He accordingly allowed the plaintiff's appeal and decreed the claim. The defendant vendee has come up to this Court in second appeal.

Mr. Qabul Chand, the learned Counsel for the defendant-appellant, has strongly relied upon Ex. D-10. This is a judgment *inter partes* and no doubt it was held by Mehta Lekh Raj, Munsif, First Class, on 31st March 1919, that the area in dispute in that suit was an out-growth of mohalla Urtak and was not agricultural land, and, therefore, no custom of *pre-emption* existed in the locality. The matter, however, did not rest there but ultimately came up to the High Court in second appeal (No. 2591 of 1919) which was decided by a Division Bench of the Lahore High Court on 31st January 1923. The learned Judges formulated the following point for their determination :

The question then remains whether the plaintiff at the time of the sale, in respect of which he claims to *pre-empt*, was a co-sharer in the undivided holding.

And they came to the conclusion that the plaintiff was not such a co-sharer and had no such right. On this ground alone the plaintiff's suit was thrown out and the question as to whether the custom of *pre-emption* prevailed in the locality was left open and was not gone into. Now, it has been established by a series of decisions of the High Courts in India and of their Lordships of the Privy Council that when a suit is "finally decided" on a particular point by a superior Court any finding recorded by the Courts below, which has not been dealt with by the Court of appeal would not have the binding effect of *res judicata*. If any authori-

ties were needed in support of this proposition, reference may be made to 8 Cal 631,¹ 24 Cal 616² and also to 45 Cal 442.³ The judgment, Ex. D-10, therefore, cannot be treated as *res judicata* in view of the final decision of the case by this Court.

It was admitted before the lower appellate Court that the custom of pre-emption prevailed in Urtak Hazro and Urtak Proper and it has been held by the learned District Judge that the "urban area Urtak" was a part of the same sub-division and was, in fact, an expansion of the same. This is a finding of fact, which in second appeal cannot be challenged. Accepting this finding, it follows, as a matter of course, that if the custom of pre-emption prevailed in a particular town and the same town expanded in the ordinary course of things, the custom of pre-emption would also be enforceable in the extended boundaries of the original town where the custom had prevailed. We know that many towns are extending their boundaries from various causes and it does not stand to reason that simply because those towns have expanded, the right of pre-emption would not be available to people living in the outer fringe of the enlarged town and must be confined to the older and narrower limits which at one time indicated the particular geographical unit.

In my opinion, the judgment of the learned District Judge, having regard to the finding recorded by him, is correct. I, therefore, affirm the same and dismiss the appeal with costs. It is admitted by the parties that this decision would govern the decision in the connected appeal No. 337 of 1936, which is also dismissed with costs.

B.D./R.K.

Appeals dismissed.

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1. Chunder Coomar Mittar v. Sib Sundari Dassee, (1882) 8 Cal 631=11 C L R 22.
 2. Sheosagar Singh v. Sitaram Singh, (1897) 24 Cal 616=24 I A 50=7 Sar 124 (P C).
 3. Abdullah Asghar Ali Khan v. Ganesh Das, A I R 1917 P C 201=42 I C 959=44 I A 213=45 Cal 412 (P C).
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A. I. R. 1937 Lahore 168

BHIDE, J.

Nazir Mohammad Khan—Petitioner.

v.

Abdul Ghani—Opposite Party.

Civil Revn. Petn. No. 243 of 1936, Decided on 1st July 1936, from order of Judge, Sm. C. C., Simla, D/- 3rd December 1935.

Evidence Act (1872), S. 92—S. 92 does not govern decrees—Decree based on an award ambiguous—Court can examine arbitrator to interpret decree.

Section 92, Evidence Act, does not govern decrees; so where a decree based on an award is ambiguous in its terms, it is open to the Court to examine the arbitrator for interpreting the decree and on the basis of his statements direct execution to proceed: *A I R 1935 Mad 860; A I R 1931 Sind 42* and *A I R 1934 Lah 181, Rel. on.* [P 168 C 2]

Mohsin Shah—for Petitioner.*Muhammad Munir*—for Opposite Party.

Order.—This is a petition for revision of an order of the Small Cause Judge, Simla, directing execution of a decree to proceed against the petitioner. The decree was based on an award, which was certainly ambiguous in its terms. The learned Judge examined the arbitrator and on the basis of his statement directed execution to proceed. It is contended on behalf of the petitioner that such evidence was not admissible for the purpose of interpreting the decree, and 10 Cal 1092¹ is cited as an authority. The learned counsel for petitioner relied on S. 92, Evidence Act, but it was held by a Full Bench of the Madras Court in 158 I C 187,² that, that section does not govern decrees. In *A I R 1931 Sind 42*,³ a similar view was taken. In *A I R 1934 Lah 181*,⁴ evidence was allowed to be taken for interpreting the intention of a decree. Besides, the petitioner never objected to the arbitrator being examined in the Court below. I see no reason to interfere in revision and dismiss the petition with costs.

P.R./D.S.

Petition dismissed.

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1. Muddiyar Chand Shaba v. Gobind Chunder Guha, (1884) 10 Cal 1092.
 2. Papamma v. Venkayya, *A I R 1935 Mad 860*=158 I C 187=69 M L J 451=58 Mad 994 (F B).
 3. Hotchand Tolaram v. Premchand, *A I R 1931 Sind 42*=131 I C 710=25 S L R 279.
 4. Allah Bakhsh v. Punjab and Sind Bank, *A I R 1934 Lah 181*=147 I C 23=35 P L R 20.
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* A. I. R. 1937 Lahore 169

BHIDE, J.

Parma Nand—Plaintiff—Appellant.

v.

Tharu Lal and others — Defendants — Respondents.

Second Appeal No. 2188 of 1935, Decided on 27th February 1936, from decree of Dist. Judge, Mianwali, D/- 30th August 1935.

(a) Civil P. C. (1908), O. 21, Rr. 58 and 63 — Attachment — Order dismissing objections under R. 58—Subsequent setting aside of attachment—Order of dismissal of objections also is vacated.

Where order dismissing objections to attachment under R. 58 has been made and subsequently the attachment itself is set aside and the property in question is not sold, the order of dismissal of objections is vacated and hence the failure of the judgment-debtor to institute a suit under R. 63 cannot make the order dismissing objections final: *A I R 1922 Lah 108*; *A I R 1931 Lah 74*; *A I R 1934 All 267*; *A I R 1921 Bom 35* and *A I R 1924 Cal 744*, *Rel. on.*

[P 170 C 1]

* (b) Civil P. C. (1908), O. 21, R. 55 — Attachment in execution of decree—Reversal of decree and consequent order removing attachment — Subsequent decree, after remand, in favour of decree-holder—Original attachment cannot revive and alienation between removal of original attachment and subsequent attachment is not void.

The object of attachment is to give notice to the judgment-debtor and the public about the creditor's claim and to prohibit a private alienation of the property attached. The prohibition, however, operates only against an alienation which is contrary to the particular attachment and no other.

[P 171 C 1]

An attachment in execution of decree was made and money due to the judgment-debtor by A was attached. The decree subsequently was reversed and consequently an order removing attachment was made and case was remanded. After removal of attachment A on instructions by the judgment-debtor paid the money to B. Subsequently a decree was made in decree-holder's favour after remand:

Held: that the attachment did not revive and relate back to the date of original attachment and the payment of money between the removal of original attachment and the subsequent attachment was not void but valid: *9 C W N 601 (P C)*; *A I R 1926 All 734*; *33 Cal 1158* and *A I R 1922 Mad 176*, *Disting.*; *A I R 1918 Oudh 275* and *A I R 1922 Nag 138*, *Dissent.*; *A I R 1934 Lah 395*; *A I R 1924 Lah 645* and *A I R 1934 All 165*, *Rel. on.* [P 170 C 2; P 171 C 2]

(c) Civil P. C. (1908), S. 144 — Restitution cannot be granted when rights of third party intervene.

Section 144 only permits restitution 'as far as may be' and does not justify restitution when rights of third parties intervene. [P 170 C 2]

Where after reversal of a decree the attachment of certain money was removed and the judgment-debtor paid the money to A and subsequently there was a second decree after remand in decree-holder's favour:

Held: A could not be made to restore money paid to him. [P 170 C 2]

Chiranjiva Lal Aggarwal and Mela Ram—for Appellant.

Jiwan Lal Kapur—for Respondents.

Judgment.—The material facts of the case for the purposes of this second appeal may be shortly stated as follows: On 2nd April 1928, Neb Raj (defendant 3) obtained an ex parte money decree against Punnu Lal (defendant 2) and his father Ganesh Das, now deceased. Ganesh Das who was a contractor had some money due by the District Board, Mianwali. He assigned the bill on which the money was due to him to Tharu Lal (defendant 1) by application to the District Board, dated 8th April 1928, and the Chairman, District Board, ordered accordingly that the cheque on account of the bill should be prepared in the name of Tharu Lal. In the meantime Punnu Ram and Ganesh Das had taken steps to get the ex parte decree set aside, but it was again confirmed after hearing their objections on 1st October 1928. On 2nd January 1929, Neb Raj took out execution and got the debt due to Ganesh Das by the District Board, Mianwali, attached in execution. Tharu Lal, to whom the debt has been assigned as stated above, raised objections under O. 21, R. 58, but the objections were dismissed. In the meantime, Punnu Lal and Ganesh Das had gone to the High Court on the revision side and got the decree against them set aside and the case was remanded for re-decision on 2nd May 1929. Thereupon the learned Subordinate Judge directed the execution application of Neb Raj to be struck off and refused to continue the attachment of the debt pending final decision as prayed for by him. On a reference from the District Board, the Subordinate Judge intimated that the attachment had been withdrawn and the debt due to Ganesh Das was thereon paid to Tharu Lal according to his instructions, on 11th May 1929. After remand, the case was once more decreed in plaintiff's favour on 15th February 1932.

Neb Raj put in a second application for execution on 16th February 1932, and prayed that a sum of Rs. 896,

which had been paid to Tharu Lal, be attached. He alleged that the assignment in favour of Tharu Lal was fictitious and fraudulent and that no debt was really due from Ganesh Das to Tharu Lal. Notice was issued to Tharu Lal but he failed to appear. The money was then treated as a debt due to Ganesh Das and auctioned, and was purchased by Parma Nand, the present plaintiff for Rs. 200 on 28th July 1932. Parma Nand then instituted the present suit for recovery of the amount from Tharu Lal, defendant. Plaintiff's pleas were: (i) that the assignment in favour of Tharu Lal was fraudulent, there being no debt due to him by Ganesh Das; (ii) that the objections of Tharu Lal under O. 21, R. 58, Civil P. C., having been dismissed and he having failed to institute a suit to establish his title as required by O. 21, R. 63, Civil P. C., the order became final; (iii) that the assignment should be deemed to have been made during the pendency of the attachment: for although the attachment was once removed when the decree was set aside by the High Court it revived, when a decree was passed once more after remand and related back to the date of the original assignment; (iv) that in any case as Tharu Lal failed to appear when notice was issued to him in the proceedings on the second application for execution, he should be deemed to have admitted the decree-holder's claim to attach the debt and the matter should be held to be *res judicata* constructively; (v) that the suit was time barred. The trial Court dismissed the suit and the decision was confirmed on appeal. The plaintiff has now come up in second appeal.

The learned District Judge has found that the assignment of the debt by Ganesh Das in favour of Tharu Lal was made for a valid consideration and this finding of fact is no longer open to question in second appeal. The contention that Tharu Lal having failed to institute a suit under O. 21, R. 63, Civil P. C., the dismissal of his objections has become final has also little force. For, there is ample authority for the proposition, that the summary order of dismissal of objections, is vacated if the attachment itself is set aside and the property in question is not sold, as it happened in the present case: *vide* 3 Lah 7;¹

1. Fateh Din v. Qutab Din, A I R 1922 Lah 108 = 67 I C 543 = 3 Lah 7.

A I R 1931 Lah 74;² 56 All 537;³ 45 Bom 561;⁴ 51 Cal 548,⁵ etc.

The next contention that the attachment should be deemed to have revived on the passing of the decree after remand also does not appear to me to be sound. The learned counsel relied mainly on 48 I C 386,⁶ 65 I C 220,⁷ A I R 1926 All 734⁸ and 27 All 334⁹ in support of this contention. I do not think the Privy Counsel ruling, 27 All 334,⁹ is of any help because in that case no final order had been passed at all in the previous execution proceedings and it was therefore held that those proceedings were only revived on a subsequent application. A I R 1926 All 734⁸ is also easily distinguishable as the Court had merely consigned the case to the record room to suit its convenience and the first attachment had not been withdrawn at all. The other two cases, which are Single Bench rulings of the Judicial Commissioners of Oudh and Nagpur, lend some support to the learned counsel's contention; but with all respect for the learned Judge's views, I must say that I see no good reason why the previous attachment which could not legally continue after the reversal of the first decree on 2nd May 1929, and was actually removed on 6th May 1929 should be deemed to have revived and to relate back to the date of the original attachment when a decree was passed in plaintiff's favour for the second time on 15th February 1932. The learned Judges have relied on the provisions of S. 144, Civil P. C., by way of analogy, but that section only permits restitution 'as far as may be.' I do not think it is intended to justify restitution when third parties' rights intervene. For instance, it has been held

2. Chet Singh v. Gujar Singh, A I R 1931 Lah 74 = 131 I C 225.

3. Habib Ullah v. Mahmood, A I R 1934 All 267 = 148 I C 676 = 1934 A L J 19 = 56 All 537 (F B).

4. Manilal Girdhar v. Nathalal Mahasukhram, A I R 1921 Bom 35 = 59 I C 774 = 45 Bom 561.

5. Najim-un-Nissa Bibi v. Nachar-ud-Din Sardar, A I R 1924 Cal 744 = 83 I C 233 = 51 Cal 548 = 39 C L J 418.

6. Parmeshar Din v. Debi Prasad, A I R 1918 Oudh 275 = 48 I C 386 = 5 O L J 647.

7. Bhuria v. Baliram, A I R 1922 Nag 138 = 65 I C 220 = 4 N L J 213.

8. Bijai Saran Sahi v. Deo Kishen Prasad, A I R 1926 All 734 = 97 I C 102 = 24 A L J 901 = 48 All 698.

9. Qamar-ud-Din Ahmad v. Jawahir Lal, (1905) 27 All 334 = 32 I A 102 = 8 Sar 810 (P O).

that when a stranger purchases property at an auction sale he does not lose his rights merely because the decree is subsequently reversed: 26 Cal 734.¹⁰

I am aware that there are certain reported cases in which it has been held that the order of attachment revives when a suit brought under O. 21, R. 63, to set aside its release succeeds. But the decision in these cases (*vide* 33 Cal 1158¹¹ and 45 Mad 84¹²) is clearly based on the wording of O. 21, R. 63, Civil P. C., which says that the order under O. 21, R. 58, Civil P. C. is conclusive subject to the result of the suit instituted under that rule. If therefore the suit challenging the release of attachment succeeds, it is possible to hold that the order releasing the property is *ipso facto* set aside and consequently the original attachment revives. But there is no provision of this kind applicable to the release from attachment in the present case. The attachment was released in the present case owing to the reversal of the decree and the case falls therefore under O. 21, R. 55, which says that in such cases the attachment shall be deemed to be withdrawn. It will thus appear that even if no order of release had been passed this result would automatically have followed. In the present instance not only a specific order was passed, but the money was paid to Tharu Lal after reference to the Court. The parties concerned were thus led to think by the Court itself, that the payment to Tharu Lal was valid and open to no legal objection. To hold that the first attachment revived on the revival of the decree is not only not supported by any distinct provision of law, but would in the circumstances of this case be obviously inequitable and prejudicial to the rights of innocent third parties. The object of attachment is to give notice to the judgment-debtor and the public about the creditor's claim and to prohibit a private alienation of the property attached. The prohibition however operates only against an alienation which is contrary to the particular attachment and no other: *vide* S. 64, Civil P. C. In the present case, when the first attach-

ment was removed there was no bar left to any alienation until the second attachment took place. It may be noticed in this connexion that when execution proceedings commenced for the second time, the decree-holder himself asked for a fresh attachment and not merely for the revival of any old attachment. As the old attachment had been removed, this was obviously the only course open to him.

It has been held with reference to O. 21, R. 57, Civil P. C., that when the previous attachment closes, no fresh sale can take place without a fresh attachment and that an alienation between the cessation of the first attachment and the effecting of the second, is not void: *see* A I R 1934 Lah 395¹³ and A I R 1924 Lah 645.¹⁴ The same principle would in my opinion apply to the cessation of attachment under O. 21, R. 55, Civil P. C. The learned counsel of the appellant urged that the wording used in O. 21, R. 55, is 'that the attachment shall be deemed to be withdrawn,' while in O. 21, R. 57, the wording is 'that the attachment shall cease.' I do not think this difference in wording is of significance so far as the point under consideration is concerned. In A I R 1934 All 165,¹⁵ property had been attached before judgment but as a result of the dismissal of the suit the attachment ceased. On appeal, the suit was decreed, but it was held that this had not the effect of reviving the old attachment. The present case appears to stand on the same footing. For all the reasons stated above, I hold that the first attachment did not revive in the circumstances of this case, and the payment made by the District Board to Tharu Lal, defendant 1, was valid.

The next point for consideration is whether the matter can be looked upon as *res judicata* owing to Tharu Lal's failure to appear and object in the course of the second execution proceedings which were commenced on 16th February 1932. The learned counsel relies mainly on the provisions of O. 21, R. 63-A as framed by this Court. The learned District Judge has remarked that this rule came into force only after the present suit was lodged. The learned counsel points out

10. Mukhode Dassi v. Gopal Chandra Dutta, (1899) 26 Cal 734.

11. Ram Chandra v. Mudeshwar Singh, (1906) 33 Cal 1158=10 C W N 978.

12. Anthaiya Hegade v. Manjaiya Shetty, A I R 1922 Mad 176=69 I C 642=45 Mad 84=41 M L J 393.

13. Daim Shah v. Vir Bhan, A I R 1934 Lah 395=150 I C 1053=36 P L R 241.

14. Lakhpatt Rai v. Mayya Mal, A I R 1924 Lah 645=75 I C 824.

15. Dular Singh v. Ram Chander, A I R 1934 All 165=147 I C 509=1933 A L J 1501.

that this is not correct and that, as a matter of fact, the rule came into force on 5th May 1932. Notice was however admittedly issued to Tharu Lal before this date and not with reference to this rule. Under the circumstances, I do not see how this rule can help the appellant at all. It was next urged that the matter should be held to be constructively *res judicata*. But Explan. 6, S. 11, Civil P. C., cannot apply as there was no 'former suit' within the meaning of that section. On the above findings, it is unnecessary to consider the question of limitation. For, if there was a valid payment to Tharu Lal as held above, the plaintiff cannot recover the amount from him. However even if it is supposed that the payment was not valid, it seems to me that the cause of action accrued when the payment was made on 11th May 1929. The plaintiff could only purchase the right, title and interest of the judgment-debtor at the auction sale. According to the plaintiff's case, the money was illegally paid to Tharu Lal on the above date and hence must I think be looked upon as a debt, which became due to the judgment-debtor from the above date. Art. 62 appears to be applicable as the "money must be considered to have been received by Tharu Lal on behalf of the judgment-debtor." The claim was therefore time-barred even at the date of auction. I do not think this could be properly treated as a case of money lying in trust with defendant 1, on behalf of Ganesh Dass. I dismiss the appeal with costs.

D.S./R.K. *Appeal dismissed.*

*** A. I. R. 1937 Lahore 172**

SPECIAL BENCH

JAI LAL, MONROE AND ABDUL RASHID, JJ.

Messrs. Mittar Chand-Lakhmi Das—Assessee—Petitioners.

v.

Commissioner of Income-tax, Lahore—Opposite Party.

Civil Ref. No. 11 of 1936, Decided on 23rd November 1936, from Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, D/- 18th March 1936.

*** Income-tax Act (1922), S. 25-A and 26—Applicability—Joint Hindu family—Disruption and consequent partition—S. 25-A applies when there is no continuance of business of**

family on contractual basis—S. 26 applies when the business is continued on contractual basis—In latter case shares of parties are not to be included in assessment on family.

S. 25-A covers a case of joint Hindu family in which there has been a disruption and consequent partition but no continuance of the business either by the members of the joint Hindu family on contractual basis or by some of them alone or jointly with others or even by strangers. Where the business has been discontinued S. 25-A will apply but where it is continued S. 26 will apply. In cases under S. 26 the shares of partners are not to be included in the assessment on the family : *A I R 1935 Lah 275, Rel. on.*

[P 172 C 2; P 174 C 1, 2]

*Kirpa Ram Bajaj—*for Petitioners.

*Jagan Nath Aggarwal and S. M. Sikri—*for Opposite Party.

Order.—Two questions have been referred to this Court under S. 66 (2), Income-Tax Act, by the Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces. They are : (1) When it is found that at the time of assessment the members of a Hindu undivided family have changed their natural family relationship to a contractual relationship or partnership, is that partnership chargeable under S. 26 in respect of business which was carried on by the family in the "previous year" ? (2) If the partnership be so chargeable, are the shares of the partners to be included in the assessment upon the family under S. 25-A (2) ?
Messrs. Mittar Chand-Lakhmi Das of Rawalpindi contested their assessment for the year 1935-36 which had been made by the Income-tax Officer on the basis of their income during the accounting period from 13th April 1934 to the 13th April 1935. It appears that Mittar Chand and his three sons, Lakmi Das, Mangal Sain and Chanan Mall, constituted a Hindu undivided family and carried on business as produce merchants in the name of Mittar Chand Lakhmi Das. They also owned a family residential house. Their income was assessed to income-tax as on a joint Hindu family. On the 7th February 1935 there was disruption of the joint Hindu family and consequent partition of the co-parcenary property. A deed was executed by the parties on the 10th March 1935 reciting this disruption and partition and on the same day a deed of partnership was executed whereby the four persons mentioned above agreed to continue the business on contractual basis with a capital of Rupees

15,000 which was deemed to have been contributed by each party. It was also recited that the family residential house had been divided into four portions and assigned to each partner separately. On these facts the learned Commissioner of Income-tax has accepted the contention of the assessee that there has been a disruption of the joint Hindu family and a partition of the family property among the various members thereof.

The contention of the assessee is that it should be assumed that from the 7th February 1935 a firm has been newly constituted within the meaning of S. 26 (1), Income-tax Act. The contention raised on behalf of the Commissioner is that assessment of the income for the year 1935-36 should be made under S. 25-A (2), Income-tax Act, and not under S. 26 as claimed by the assessee.

It is desirable at this stage to read the two sections referred to above. S. 25-A is:

Where, at the time of making an assessment under S. 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and, if he is satisfied that a separation of the members of the family has taken place and that the joint family property has been partitioned among the various members or groups of members in definite portions, he shall record an order to that effect:

Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.

(2) Where such an order has been passed, the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no separation or partition had taken place, and each member or group of members shall in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-section (1) of S. 14 be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it; and the Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of S. 23 :

Provided that all the separated members and groups of members shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such.

Section 26 (1) is :

Where, at the time of making an assessment under S. 23, it is found that a change has occurred in the constitution of a firm or that a firm has been newly constituted, the assessments on the firm and on the members thereof shall, subject to the provisions of this Act, be made as if the firm had been constituted throughout the previous year as it is constituted at the time of making the

assessment, and as if each member had received a share of the profits of that year proportionate to his interest in the firm at the time of making the assessment.

(2) Where, at the time of making an assessment under S. 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year.

Ss. 25-A and 26, in their present form, were enacted in 1928. Previously there was no section corresponding to S. 25-A but S. 26 read as follows :

Where any change occurs in the constitution of a firm or where any person has succeeded to any business, profession or vocation, the assessment shall be made on the firm as constituted, or on the person engaged in the business, profession or vocation, as the case may be, at the time of the making of the assessment.

It is conceded at the bar that this section as now enacted has merely clarified the legal position as it existed previous to the amendment in 1928 and that it has neither extended nor restricted the scope of the provisions of the previous section. It is also conceded on behalf of the Income-tax Commissioner that but for S. 25-A the income in question of the assessee would have been assessable under S. 26. It is however contended that as according to the canons relating to the interpretation of statutes a special provision in a statute excludes the operation of the general provision, therefore, S. 26 does not govern the present case because it is covered by the special section, that is, S. 25-A. The argument of the learned counsel is that as S. 25-A applies to the income of a joint Hindu family which has disrupted and partition of the joint family property has taken place, therefore that section fully covers the present case. But, in my opinion, in this case there is a further circumstance which is not contemplated in S. 25-A and that is, that the members of the joint Hindu family after partition have continued the former business on a contractual basis, and this additional circumstance, in my opinion, brings S. 26 into operation. It must be assumed that a firm has been newly constituted in this case and there it is proposed to assess that firm on the basis of the income of the person whose business the firm has continued.

Now, I must make it clear that if S. 26 were to apply merely to a firm which has been newly constituted and has not

succeeded to any business which was previously carried on by another person, then legally no assessment can be made on it in advance, because there is no accounting period the income whereof can be taken as a guide for the assessment. In the case of an entirely new business started by a newly constituted firm, no assessment, it is conceded, can be made during the first year. It is during the second year that an assessment can be made on the basis of the income of the first year. S. 26, therefore, applies to the case of a business which was done during the previous year but which has been continued during the year of assessment by different persons. Sub-s. (1) applies to firms and sub-s. (2) applies to persons and not to firms, but the same principle runs through the two sub-sections. In my opinion, therefore, S. 25-A would cover the case of a joint Hindu family in which there has been a disruption and consequent partition but no continuance of the business either by the members of the joint Hindu family on contractual basis or by some of them alone or jointly with others or even by strangers. Where the business has been discontinued, S. 25-A will apply; but where it is continued S. 26 will apply. This view is supported by the judgment in Case No. 608 of 1934 (8 I T C 380)¹, in which a Division Bench of this Court took a similar view under similar circumstances with the exception that in that case the disruption of the family had taken place after the expiry of the accounting period and within the year of assessment, the disruption in the present case having taken place within the accounting period i. e., before the commencement of the year of assessment. This, in my opinion, makes no difference because S. 26 does not make any reference to the time of disruption. It only takes into account the factum of disruption.

A further ground of distinction, it is alleged, is that in the previous case only some of the members of the joint Hindu family had continued the business on contractual basis while in this case all the former members of the family have constituted themselves as a firm on contractual basis. This again, in my opinion, makes no difference because the business which

was carried on by a joint family is now continued by a firm which has been newly constituted and the requirements of S. 26 have been fulfilled. The two facts mentioned above therefore are no ground for distinguishing this case from the case decided by the Division Bench. I would, therefore, answer the first question in the affirmative and the second in the negative and would direct the Commissioner to pay the costs of the assessee of this reference which I would fix at Rs. 75 and would further direct the Commissioner to refund the deposit of Rs. 100 to the assessee.

Monroe, J.—I agree.

Abdul Rashid, J.—I agree.

K.B./A.L.

Order accordingly.

A. I. R. 1937 Lahore 174

COLDSTREAM, J.

Chetan Lal—Judgment-debtor—Appellant.

v.

Jagat Prasad and others—Decree-holders—Respondents.

Second Appeal No. 1723 of 1935, Decided on 18th February 1936, against decree of Dist. Judge, Ambala, D/- 22nd May 1935.

Execution—Transfer of decree—Provisions of O. 21, R. 5, Civil P. C. not strictly followed—Transferee Court's proceedings are not without jurisdiction and do not become nullity—Party allowing Court to exercise jurisdiction in wrong way cannot afterwards turn round and challenge legality of proceedings.

There is no provision in the Civil Procedure Code justifying the view that if the mode of transfer laid down in O. 21, R. 5 is not strictly followed, the proceedings of the Court to which the decree had been transferred must of necessity be without jurisdiction and become a nullity. Where jurisdiction over the subject matter existed requiring only to be invoked in the right way, the party, who had allowed the Court to exercise it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation and negligence: *A I R 1933 Lah 839*; *A I R 1919 Pat 324* and *22 Cal 764*, *Not foll.*; *A I R 1919 Lah 27*; *A I R 1928 P C 162*; *Pisani v. Attorney-General, Gibraltar, (1874) 5 P C 516* and *Ex parte Pratt, (1884) 12 Q B D 334, Rel. on.* [P 175 O 2; P 176 O 1]

Indar Dev for Achhru Ram—for Appellant.

Asa Ram—for Respondents.

Judgment—Jaini Lal and Jagat Parshad obtained a decree against Dhum Singh, Lekh Raj and Chetan Lal on

1. *Beli Ram & Bros. v. Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, A I R 1935 Lah 275=156 I C 893=8 I T C 380.*

16th April 1929, in Deoband in the Saharanpur District. Jaini Lal applied for the decree to be transferred for execution to the Court of the Sub-Judge at Jagadhri in Ambala District and a certificate of transfer was granted on the same day. Several applications for execution were made to the Jagadhri Court which resulted in no relief. The last application was made on 31st August 1932, and a warrant was issued by the Sub-Judge, Jagadhri, for the attachment of a sum deposited by Chetan Lal in the Court of the Senior Sub-Judge, Ambala. The warrant for some reason or other was not executed until 31st July 1933, when the money was attached. Jaini Lal died and on 15th November 1933, an application was put in to have his legal representatives brought upon the record as decree-holders. Notice of this application was served upon Lekh Raj and Dhum Singh; Chetan Lal was already before the Court. The Sub-Judge, Jagadhri, struck issues, heard evidence and dismissed Chetan Lal's petition on 13th March 1934. On 24th November 1934, the sum attached was paid to the decree-holders, against the decision that the decree had not been adjusted, alleged by Chetan Lal. Chetan Lal lodged an appeal in the Court of the District Judge. This appeal was dismissed.

On 6th January 1935, Dhum Singh filed an objection in the executing Court alleging that he had come to know of the transfer of the decree to Jagadhri only when he was served with the notice in connexion with the decree-holders' application to bring Jaini Lal's legal representatives on the record and that the Sub-Judge, Jagadhri, had no jurisdiction to proceed with the execution as the decree had not been transferred to him through the District Judge of Ambala but direct by the Deo Band Court. He raised various other objections with which, however, we are not now concerned. The Sub-Judge, Jagadhri, upheld the objection that he had no jurisdiction and dismissed the application for execution. Against this dismissal the decree-holders appealed to the District Judge of Ambala who accepted the appeal and remanded the execution application to the Sub-Judge, Jagadhri, for disposal according to law. It is against this order of remand that the present appeal has been instituted. Out of the judgment-debtors only Chetan Lal has appealed. A preliminary objection has

been raised by the respondents' counsel that the appeal as framed cannot proceed as the judgment-debtor Dhum Singh has not been made a party to it. I do not however think that the appeal cannot proceed without joining Dhum Singh. Its acceptance would merely result in this that the decree-holders could proceed in Jagadhri to execute their decree against only Dhum Singh. I overrule this objection. The counsel for the appellant relies upon A I R 1933 Lah 839¹; 49 I C 374² and 22 Cal 764.³ The Patna ruling² clearly supports his contention that the Sub-Judge, Jagadhri, has no jurisdiction in the case, and so does the Calcutta judgment. The Lahore ruling is that of a Single Bench. In that case the Senior Sub-Judge of Gurgaon had transferred a decree for execution to the Senior Sub-Judge of Delhi and the Senior Sub-Judge of Delhi had transferred it to the Sub-Judge, First Class. The judgment-debtors objected to the jurisdiction of the Sub-Judge, First Class, and the Sub-Judge allowed this objection. The decree-holders appealed to this Court and the appeal was dismissed by Dalip Singh, J. From his judgment I understand that his decision was based on the fact that the Senior Subordinate Judge had no power to transfer the decree to the Subordinate Judge, First Class, but it is not clear that he would have decided the present appeal in the same manner : *see* p. 841, Col. 1 in the report.

In the present case the Subordinate Judge at Jagadhri would have had jurisdiction had the decree been transferred to him through the District Judge. He was not incompetent to deal with the proceedings. Indeed, once the Deo Band Court had decided to transfer the decree as requested by the decree-holder it was only the Subordinate Judge at Jagadhri who could have dealt with the case. I do not find any provision in the Code of Civil Procedure justifying the view that if the mode of transfer laid down in O. 21, R. 5, is not strictly followed the proceedings of the Court to which the decree had been transferred must of necessity be without jurisdiction and become a nullity. I find

1. Pearay Lal Debi Sahai v. Nanna Mal Panna Lal, A I R 1933 Lah 839=147 I C 584.
2. Kunja Behari Singh v Tarapada Mitra, A I R 1919 Pat 324=49 I C 374=4 P L J 49.
3. Debi Dayal Sahu v. Moharaj Singh, (1895) 22 Cal 764.

support for this view in 1 Lah 158.⁴ The facts there were not exactly as they are here but there is an analogy. There is good authority for the proposition that there is a distinction between elements which are essential for the foundation of jurisdiction and the mode in which such jurisdiction has to be assumed and exercised. See for instance (1874) 5 P C 516,⁵ where their Lordships of the Judicial Committee observed, that where there is jurisdiction over the subject matter but non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived. Here, in the present case jurisdiction over the subject matter existed requiring only to be invoked in the right way, and the party, who had allowed the Court to exercise it in a wrong way, cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation and negligence: *vide* (1884) 12 Q B D 334.⁶ It appears to me that the omission to transfer the decree through the Court of the District Judge in this case is an irregularity in procedure which could be waived and was waived.

Another authority which seems to me to support my view is the Privy Council ruling in 7 Luck 314.⁷ The facts of that case were that a decree had been transferred to a Court at Hardoi for execution. Upon the death of the judgment-debtor that Court after notice ordered the execution to proceed against one Jang Bahadur. Jang Bahadur objected that under S. 50, sub-s. (1), Civil P. C., the order could be made only by the Court which had made the decree. The Subordinate Judge dismissed the application on the ground that the applicant having made several applications to the Hardoi Court in the proceedings had waived the objection. Jang Bahadur appealed to the Court of the Judicial Commissioner, Oudh, who held that the omission to make an application to the Court which gave the decree at Lucknow was merely an irregularity, and that the defect had been waived. Their Lordships of the Privy Council held that:

4. Krishen Lal v. Jai Lal, A I R 1919 Lah 27=52 I C 352=1 Lah 158=95 P L R 1919.

5. Pisani v. Attorney-General of Gibraltar, (1874) 5 P C 516=30 L T 729=22 W R 900.

6. *Ex parte* Pratt, (1884) 12 Q B D 334=53 L J Ch 613=50 L T 294=1 Morrell 27.

7. Jang Bahadur v. Bank of Upper India, Lucknow, A I R 1928 P C 162=109 I C 417=55 I A 227=3 Luck 314 (P C).

The Hardoi Court had jurisdiction to deal with the matter of the execution transferred to it, that the exercise of such jurisdiction as against the appellant, though irregular in the first instance, was submitted to for a considerable time and that the appellant could not now be allowed to object to the exercise of such jurisdiction and it would be a gross abuse of procedure if he was allowed to do so.

In the present case the appellant Chetan Lal had for long submitted to the jurisdiction of the Jagadhri Court. As already mentioned, he had appealed against the order of that Court to the District Judge. In that appeal he raised no objection to the jurisdiction of the Court at Jagadhri. It was incumbent upon him to bring forward his objection if he proposed to rely upon it at that time and in my opinion this plea is not open to him now: see A I R 1935 Lah 200.⁸ Lastly, in this case if there was any want of jurisdiction in the Jagadhri Court I think it reasonable to hold that it was vested in him when the District Judge of Ambala having decided Chetan Lal's appeal returned the whole of the record to the Sub-Judge for proceeding with the execution of the decree. For the reasons I have indicated, I dismiss this appeal with costs. I may here note that even if the Sub-Judge, Jagadhri, had no jurisdiction to proceed with the execution because the decree had been transferred to him direct, his proper course would have been to address the Court at Hardoi and ask for the error to be rectified.

K.B./D.S.

Appeal dismissed.

8. Prabhu Dayal v. Dewat Ram, A I R 1935 Lah 200=155 I C 286=15 Lah 869=35 P L R 429.

* * A. I. R. 1937 Lahore 176

JAI LAL, J.

Robert Cameron Chamarette—Appellant.
v.

Mrs. Phyllis Ethel Chamarette—Respondent.

First Appeal No. 171 of 1936, Decided on 14th October 1936, from order of Addl. Dist. Judge, Lahore, D/- 25th April 1936.

(a) Divorce Act (1869), S. 55—Proceedings under—Order of Court after hearing arguments of parties—Appeal from such order is competent.

During the proceedings under the Divorce Act, Court passed an order after hearing the arguments of parties. Party affected by order appealed under S. 55. The opposite party contended that appeal was not competent:

Held: that an appeal lay from such order under S. 55 of the Act. [P 177 C 2]

(b) Evidence—Admissibility—Interlocutory order admitting evidence to go on record—Subsequently Court can hold it as inadmissible.

Where the Court passed an interlocutory order that the evidence was admissible, such an order can legally be varied by the Court, though in practice it is not often done. Court therefore can hold the evidence as inadmissible which was formerly held admissible. [P 178 C 1]

*** * (c) Divorce — Legitimacy—Evidence—Neither of the spouses can adduce evidence on non-intercourse after marriage to bastardise a child born in wedlock.**

In a divorce case where the paternity of the infant is in question, neither husband nor wife is permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock: *Russel v. Russel*, (1924) A C 687 and 163 I C 749, *Rel. on*. [P 178 C 1]

Partap Singh — for Appellant.

Norman Edmunds — for Respondent.

Judgment.—This is an appeal by the husband against whom a petition has been filed by the wife for a decree for judicial separation and for orders for the custody and maintenance of children and for other subsidiary reliefs. It appears that one of the pleas of the husband is that two of the children for whose custody and maintenance the petitioner has prayed for suitable order are not his legitimate children. The factum of marriage with the petitioner is admitted and apparently it is not denied that the two children mentioned above were born during wedlock. The husband's allegation, on the other hand, is that he did not cohabit with his wife at any time when the two children could have been begotten. Issues were framed and the burden of proof of illegitimacy of the two children was placed on the husband. The wife produced her evidence as regards the issues the burden of which was on her and reserved her right of rebuttal. The husband then produced his evidence and went into the witness-box in support of his case. In the course of his statement he gave evidence that the two children were not his. This evidence was objected to, but there is no order of the learned Additional District Judge who recorded the evidence whether the objection was allowed or disallowed. The evidence, however, was recorded. When the husband's evidence had been recorded an application was made on behalf of the wife that the evidence given by the husband concerning the illegitimacy of the two children on

the ground that he did not cohabit with his wife at any time when they could have been begotten was inadmissible on the ground that the husband was not a competent witness in the matter. It was contended that the Court must decide this question of inadmissibility before the wife is called upon to produce her evidence. It was indicated that if the evidence of the husband be ruled out as inadmissible there would be no occasion for the wife to produce evidence; otherwise she would have to produce evidence in rebuttal.

The learned Additional District Judge, after hearing arguments, passed an order that the evidence was inadmissible on the ground stated. At the same time the learned Additional District Judge passed an order that the proceedings should be stayed till the husband had paid certain moneys which the Court had directed him to pay to the wife during the pendency of the proceedings and to give security. The husband did not comply with these orders and the proceedings remained pending. When the wife found that she was suffering on account of the delay in the disposal of the proceedings she applied to the Court that the proceedings should go on in spite of the non-payment of the moneys by the husband. I understand that the proceedings are now going on in the Court of the Additional District Judge. In the meantime this appeal has been presented on behalf of the husband attacking the order passed by the learned Additional District Judge holding his evidence relating to the illegitimacy of the two children to be inadmissible.

Two preliminary objections are raised on behalf of the respondent. The first is that no appeal lies. But S. 55, Divorce Act is clear on this question. It provides that all decrees and orders made by the Court in any suit or proceeding under the Act shall be enforced and may be appealed from in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction. There may be some orders of a formal character against which an appeal would not lie, but this is an order which was passed by the Court after hearing the arguments of the parties, and I am inclined to think that this appeal is competent.

The second objection is that the Court having allowed the evidence to go on the record was not competent subsequently to

decide that it was inadmissible. There is no force in this contention. Assuming that there was an order by the Court holding that the evidence was admissible, it was merely an interlocutory order, and such an order can legally be varied by the Court though in practice it is not often done.

On the merits, in my opinion, the order of the learned Additional District Judge is correct. The learned counsel for the appellant relies upon a judgment of the Bombay High Court, A I R 1924 Bom 397,¹ in which one of the learned Judges has held that it is permissible for spouses to deny sexual intercourse when in fact they are living together and to give evidence to that effect. It was remarked that such evidence, though admissible in a Divorce Court, may perhaps be inadmissible in legitimacy proceedings where the paternity of the infants is in question. It is to be observed that in this case the paternity of the infants is in question. This observation of the learned Judge was based on 1923 W N 243,² which was a judgment of the English Court of appeal. This judgment however was reversed on appeal by the House of Lords in (1924) A C 687.³ The majority of their Lordships held that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child born in wedlock and that this rule applies to proceedings instituted in consequence of adultery. It is not necessary to quote in detail from the observation of their Lordships. This case was followed by a Full Bench of the Calcutta High Court in 163 I C 749,⁴ where it was observed that the rule stated above excludes evidence by the husband on the point of non-access, and also evidence of any facts from which non-access might directly be presumed; it was however held that the fact of non-access could be proved *aliunde*. In my opinion therefore the order of the learned Additional District is correct and I dismiss this appeal with costs.

M.D./D.S.

Appeal dismissed.

1. Hewson v. Hewson, A I R 1924 Bom 397=85 I C 774=26 Bom L R 467.

2. Russel v. Russel, 1923 W N 243.

3. Russel v. Russel, (1924) A C 687=93 L J (P) 97=131 L T 482=40 T L R 713=68 S J 682.

4. Joseph Anthony Sweeney v. Mercy Beatrice Sweeney, (1935) 163 I C 749=62 Cal 1080=39 C W N 1047 (F B).

* * A. I. R. 1937 Lahore 178 *

ADDISON AND DIN MOHAMMAD, JJ.

Achhru Mal—Decree-holder — Appellant.

v.

Balwant Singh and another — Judgment-debtors—Respondents.

Letters Patent Appeal No. 122 of 1936, Decided on 12th January 1937, from judgment of Jai Lal, J., D/- 7th April 1936.

* * (a) Civil P. C. (1908), S. 60 (1) (g)—'Pensions' — Meaning of — For finding out the meaning of pensions as used in S. 60 (1) (g) reference to Pensions Act is not proper—Assignment of land revenue in lieu of relinquishment of sovereign rights and for securing alliance and goodwill is 'pensions'.

If an exemption is claimed under Cl. (g) of the proviso to sub-s. (1), S. 60, Civil P. C., it is not permissible to refer to the various provisions of the Pensions Act to find out the true import of the word 'pensions' in the Civil Procedure Code. The word 'pensions' has not been defined in the Pensions Act, nor is it a technical term or a term of art and this being so it clearly follows that the term as employed in the Civil Procedure Code has been employed in its etymological sense. The word 'pensions' therefore as used in Cl. (g) is wide enough to cover all sorts of periodical payments in whatever shape they are made by the Government. [P 179 C 1]

The ancestors of the jagirdar exercised sovereign powers in the locality in which they resided and were granted the right to realise the land revenue in lieu of the relinquishment of the sovereign rights. This privilege was conferred upon them with a view to retain their alliance or good will or to claim their assistance when needed :

Held: that the assignment of land revenue fell within the definition of 'pensions': *Case law discussed.* [P 179 C 2]

(b) Interpretation of Statutes—Rules of.

The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning. [P 179 C 1]

Parkash Chandra and Qabul Chand—for appellant.

Badri Das, Tek Chand and Dina Nath Bhasin—for Respondents.

Din Mohammad, J.—This is a Letters Patent appeal from the judgment of Jai Lal, J. in Civil Appeal No. 2100 of 1935. The only question involved in the case was whether a jagir that was realised in the shape of an assignment of land revenue was a pension within Cl. (g) of the proviso to sub-s. 1, S. 60, Civil P. C., and thus exempt from attachment in execution of a decree of a civil Court. The learned Judge came to the conclusion that the word 'pensions' as

used in Cl. (g) mentioned above covered such jagirs and consequently they were not liable to attachment in execution of a decree of a civil Court. Dissatisfied with this judgment the decree-holder has appealed.

The main contention raised by counsel for the appellant decree-holder is that the jagir in question is a patti-dari jagir and hence not a pension within the meaning of the Pensions Act. He further contends that the word 'pensions' in the Civil Procedure Code is used in the same sense as that in which it is used in the Pensions Act. The arguments advanced by the counsel before us as well as the authorities cited by him have been fully discussed in the judgment under appeal and it is not necessary to cover the same ground again. Suffice it to say that we are disposed to agree with Jai Lal, J. and to hold that the word 'pensions' as used in Cl. (g) is wide enough to cover all sorts of periodical payments in whatever shape they are made by the Government. In some of the authorities cited before us the word 'pensions' was interpreted in the light of the provisions of the Pensions Act, but with all respect we do not consider that this is strictly legal. If an exemption is claimed under Cl. (g) of the proviso to sub-s. 1, S. 60, Civil P. C., we do not think that it is permissible to refer to the various provisions of the Pensions Act to find out the true import of the word 'pensions' in the Civil Procedure Code. The word 'pensions' has not been defined in the Pensions Act, nor is it a technical term or a term of art and this being so it would clearly follow that the term as employed in the Civil Procedure Code has been employed in its etymological sense. We do not intend to exclude the possibility of referring to another enactment to find out the meaning of a technical term or a term of art if both enactments have used that term in the same sense but where this is not the case, we do not think that such a reference would be proper. As observed by Maxwell on "the Interpretation of Statutes":

The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning.

In Murray's Oxford Dictionary 'pension' is said to mean among other things, such a payment made to one who is not a professed servant or employee to retain his alliance, good will, assistance when needed, etc.;

or

an annuity or other periodical payment made by a person or body of persons, now especially by a Government, etc., in consideration of past services or of the relinquishment of rights, claims or emoluments.

Both the history and the nature of the jagir now before us are clearly covered by the alternative definition stated above. It is admitted that the ancestors of the present jagirdar exercised sovereign powers in the locality in which they resided and were granted the right to realise the land revenue in lieu of the relinquishment of the sovereign rights. It is also clear that this privilege was conferred upon them with a view to retain their alliance or good will or to claim their assistance when needed. Whatever view therefore may be taken of the origin of the grant, it clearly falls within the definition given above. In 137 P R 1890¹ in the case of a jagir which was commuted by the Government for the land revenue of certain villages, it was held by Plowden, J. that it was a pension both within the meaning of the Pensions Act and of the Civil Procedure Code. In 96 P R 1906,² the '*khush haisiyati*' income (water advantage rate) was held to be a part of the jagir granted on political considerations. In Civil Appeal No. 835 of 1915, which was a case from Ambala District, an ala jagir granted in consideration of the services in the mutiny was considered to be a political jagir and thus exempt from attachment under the provisions of the Pensions Act. In 86 P R 1914³ it was held by a Division Bench of the Punjab Chief Court that an assignment of land revenue may or may not be a pension within the meaning of S. 11, Pensions Act and that the answer to the question must depend upon the facts of each case. The grant of a fixed sum payable by the assignment of land revenue for political services was held in that case to be a pension within the meaning of the Pensions Act.

In A I R 1930 Lah 904,⁴ 86 P R 1914³ was approved. In that case almost all the cases relied on by the appellant's counsel were discussed and one of the learned

1. Bodh Raj Shah v. Amrikh Singh, (1890) 137 P R 1890.

2. Qamaruddin Khan v. Mani Ram, (1906) 96 P R 1906.

3. Karar Hasan v. Mustafa Hassan, A I R 1914 Lah 345=26 I C 743=86 P R 1914.

4. Atma Ram v. Kehr Singh, A I R 1930 Lah 904=132 I C 12=31 P L R 812.

Judges remarked that 92 P L R 1904⁵ and 61 I C 895⁶ did not lay down good law in this respect. In A I R 1934 Lah 881⁷ an ala jagir was held to be exempt from attachment under the provisions of the Civil Procedure Code. There too, the subject matter of the case was a jagir granted to a petty sovereign of Cis-Sutlej States prior to the British accession in 1849. Counsel for the appellant has mainly relied on A I R 1930 Lah 816⁸ in support of his contention, but we do not consider that that judgment is of any help to the appellant in the determination of the question now before us. In the penultimate paragraph of the judgment of Abdul Qadir, J. with which Sir Shadi Lal, C. J. agreed it has been clearly remarked that the respondent in that case had not discharged the onus that lay upon him to prove that his jagir was a political pension and as the learned Judges were of opinion that this question was to be determined in every case that arose, the authority would not be of general application. It may further be observed that Shadi Lal, J. was a party to the decision in 86 P R 1914.³ It may be remarked that if once it is held that the jagir in question is a pension, there can be no question but that it is political. Agreeing therefore with the learned Judge of this Court that the jagir in question is a political pension we dismiss this appeal but leave the parties to bear their own costs before us.

S.C./D.S.

Appeal dismissed.

5. Jwala Singh v. Dwarka Das, (1904) 92 P L R 1904.
6. Nand Singh v. Kapuria, (1920) 61 I C 895.
7. Shiv Narain Singh v. Muni Lal, A I R 1934 Lah 881=155 I C 540=36 P L R 105.
8. Sham Lal v. Gurbachan Singh, A I R 1930 Lah 806=123 I C 283=31 P L R 201.

* A. I. R. 1937 Lahore 180

ADDISON AND DIN MOHAMMAD, JJ.

Teja Singh and another—Objectors—Appellants.

v.

Kartar Kaur and others—Petitioners—Respondents.

First Appeal No. 48 of 1936, Decided on 8th October 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/. 31st October 1935.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), S. 18—Presumption — Necessary conditions explained.

Presumptions under S. 18 can be availed only if (a) the denial is made by any past or present office holder and (b) that the denial is of a right, title or interest recorded in his name. [P 181 C 2]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), S. 18—Words “his name” denote land being held in capacity of office holder.

The words “his name” in S. 18 connote the idea of the land being held in the capacity of an office holder and not in any other capacity.

[P 182 C 1]

* (c) Civil P. C. (1908), O. 41, R. 20—Provisions apply only in respect of person interested in appeal—Person against whom right of appeal is barred is person not interested in appeal—Declaration granted in favour of many—Appeal against declaratory decree against some of the decree-holders is not competent.

The power conferred on the Court of appeal by O. 41, R. 20 can be used in favour of that person alone who is interested in the result of the appeal and the defendant against whom a suit has been dismissed and as against whom the right of appeal has become barred is not a person interested in the result of the appeal filed by a plaintiff against the other defendants. [P 182 C 2]

In view of the above principle in a case where a declaration has been made jointly in favour of some persons who had claimed the right, title and interest in dispute and one of them had been omitted from the appeal, the appeal could not proceed against the other respondents inasmuch as the declaratory decree had become final in favour of the person omitted: A I R 1927 P C 252 and A I R 1927 Pat 23, Rel. on.

[P 182 C 1, 2]

Charan Singh—for Appellants.

Tirath Ram and Darbari Lal—for Respondents.

Din Mohammad, J.—On the publication of a notification under S. 7, Sikh Gurdwaras Act relating to Gurdwara Manji Sahib, a petition under S. 10, Sikh Gurdwaras Act was presented by Kartar Kaur, widow of Kesho Das, Ganesh Das and Mulk Raj, sons of Bhagwan Das and Surain Das, claiming their right, title and interest in the lands now in suit. This application was resisted by Teja Singh and Attar Singh, but the Gurdwaras Tribunal came to the conclusion that the petitioners were entitled to the declaration prayed for. From the said order of the Tribunal the present appeal has been preferred by the objectors. Counsel for the appellants has confined his argument to a plot of land measuring 244 kanals odd. He contends that this land was originally granted to the Gurdwara for charitable and religious purposes and that the ancestors of the present petitioners held it as office-bearers of the institution and not in their private capacity, and that the petitioners too are in possession of the land on the same account.

He has mainly relied on a statement made by Uttam Das, an ancestor of the present petitioners, on 24th February 1852 as well as on the revenue records relating to the various settlements conducted since. The following pedigree may facilitate the understanding of this case :

```

      MAHI DAS
      |
    Bhagat Heman
      |
    Bhagat Ram Kaver
      |
    Bhagat Bhawani Das
      |
      Sahib Das
      |
      Jodh Ram
      |
    Baba Uttam Das
      |
      Hira Das
  
```

Sahib Das had a brother, Sain Ditta, who had seven sons. Two of his sons, Jodh Ram and Uttam Das, figure in this pedigree. Another son of his Thakar Das was the father of Hira Das who is the predecessor-in-title of the present petitioners. From among these persons Hira Das was the only person to marry or to beget children and on his death the land in suit was mutated in favour of his descendants. Reverting now to the statement of Uttam Das, it is true that he stated that the land was given by one Mehtab Singh to Sahib Das 40 years before, and that it was gifted for charitable purposes, yet both from the order of the Collector dated 30th September 1861, and the report of Naib Tahsildar dated 14th October 1861, it appears that this statement was not in accordance with facts. The Collector held that the land in question was not

muaf for the good of the public or in the name of any religious institution and that it was shown as owned by and under the personal cultivation of Uttam Das, caste Brahmin Muafidar.

This clearly indicates that the statement of Uttam Das was made merely with the object of securing a remission of the land revenue. Moreover it is not consistent with the position taken up by the appellants that the land was gifted to Mahi Das, the founder of the institution. The revenue experts, too, do not advance the case of the appellants any further. Since the time of the British annexation of the Punjab, this land has been shown as owned by one or the other member of the family of the respondents and in none of these documents has it been shown that

the owner of the land was holding it on behalf of the institution. The contention raised by the appellants that the fact that Sahib Das was succeeded in the first instance by Jodh Ram and on his death by Uttam Das to the exclusion of their other brothers clearly shows that the descent of the land was from guru to chela has no force, as the land in suit has all along been shown in the revenue papers as the personal property of every incumbent of the gaddi and was held to be so even in the civil litigation which terminated in the High Court in 1924. It is further significant that on the death of Hira Das which took place about 1884, all his sons succeeded to the land and that on the death of one of his sons, his widow inherited the estate of her deceased husband. This state of affairs was never objected to by any person concerned, until the time the Sikh Gurdwaras Act was enacted. We have no hesitation therefore in holding that the objectors have failed to prove that the land in suit was granted to the institution for any charitable or religious purpose. Counsel for the appellants has next drawn our attention to S. 18, Sikh Gurdwaras Act, and urged that the objectors are entitled to avail themselves of the presumptions provided for in that section. We however do not agree. Those presumptions come into play only if the other requirements laid down in S. 18 are fulfilled. The material portion of that section on which we rely for the purpose of the present case is reproduced below :

In any proceedings before a tribunal, if any past or present office holder denies that a right, title or interest recorded in his name or in that of any person through whom he claims . . . there shall, notwithstanding anything contained in S. 44 of the said Act be a presumption. . . .

Now it is clear that these presumptions can be availed of only if (a) the denial is made by any past or present office holder and (b) that the denial is of a right, title or interest recorded in his name. In this case it is, firstly, doubtful whether the present denial is being made by any past or present office holder and secondly, it is indisputable that the denial that is being made is not of a right, title or interest which is recorded in the name of any such office holder denying it. Counsel for the appellants contends that as Surain Das was admittedly an office holder of the institution and that as he was one of the petitioners, it should be held that the denial was being made of a right that was

recorded in his name, but this contention is not sound, as, not only the land did not stand in the name of Surain Das alone but it was owned by him along with his other brothers not as an office holder of the institution but in his private capacity. We have no doubt that the words "his name" connote the idea of the land being held in the capacity of an office holder and not in any other capacity. On this ground too the appeal fails.

The most serious objection to the appeal, however, lies in the fact that although Surain Das had died during the pendency of the suit, his son Pritam Das was not brought on the record until after the limitation for the appeal to the High Court had long expired. The application made for that purpose was not supported by an affidavit nor was any valid reason urged why Pritam Das had not been brought on the record at the time when the appeal was presented to this Court. Counsel for the appellants has relied on O. 41, R. 20, Civil P. C., which empowers the Court of appeal to implead as a respondent any person who is interested in the result of the appeal and has not been made a party to the appeal. That rule however does not help the appellants. In 6 Rang 29,¹ their Lordships of the Privy Council in a case similar to the present observed that the power conferred on the Court of appeal by that Rule can be used in favour of that person alone who is interested in the result of the appeal and that the defendant against whom a suit has been dismissed and as against whom the right of appeal has become barred is not a person interested in the result of the appeal filed by a plaintiff against the other defendants. A similar question came before the Patna High Court in 5 Pat 755² and a Division Bench of that High Court remarked that an appeal against some of the persons in whose favour a decree had been passed was incompetent and that the appellate Court had no jurisdiction to add the omitted respondents as parties to the appeal.

In the case before us a declaration had been made jointly in favour of all the petitioners who had claimed the right, title and interest in dispute and one of them

had been omitted from the appeal. The appeal could not therefore proceed against the other respondents inasmuch as the declaratory decree had become final in favour of the person omitted. In the light of the observations made in 6 Rang 29¹ this Court is incompetent to implead Pritam Das as a respondent after the expiry of the period of limitation provided for the appeal. On all these considerations therefore we hold that this appeal cannot succeed. We accordingly dismiss it with costs throughout.

B.D./D.S.

Appeal dismissed.

* A. I. R. 1937 Lahore 182

ADDISON AND DIN MOHAMMAD, JJ.

Sheikh Abdul Rahman and another —
Plaintiffs—Appellants.

v.

Khan Sahib Haji Rashid Ahmad and another—Defendants—Respondents.

First Appeal No. 37 of 1936, Decided on 6th January 1937, from decree of Senior Sub-Judge, Delhi, D/- 1st November 1935.

(a) Punjab Pre-emption Act (1 of 1913), S. 3 (2) — Property included in village but subsequently forming part of Delhi Municipality — Land in vicinity vacated and converted into building plots — No village site in existence — Property held not village immoveable property.

The principles for deciding, in what circumstances does a village lose its character if it is included in a municipal area are : (1) That the mere fact that a rural area is included within the limits of a town is not conclusive as to the urban character of the area in question ; (2) that the rural area may lose its pre-existing character and be then absorbed in the urban area ; (3) that the inclusion of a rural area within the municipal limits of a town is an important factor to be considered in determining the character of the area in question ; (4) that each case is to be judged on its own merits. [P 184 C 1]

Certain property formed part of a certain village, but subsequently it was included in Delhi Municipal area. The land in the vicinity of it was vacated and converted into building plots. Quite close to the property factories were in existence and whatever was left of the old village site was occupied by people not belonging to original village community :

Held : that the property was not village immoveable property : *Case law discussed.*

[P 184 C 2]

* (b) Pre-emption—Loss of right — Vendee during pendency of pre-emption suit acquiring another plot in village estate and thus acquiring equal status with pre-emptor — Pre-emptor's right of pre-emption is lost.

Where during the pendency of suit for pre-emption of land in a village the vendee made an

1. Chokalingam Chetty v. Seethai Achi, A I R 1927 P C 252=107 I C 237=6 Rang 29 (P C).

2. Badri Narayan v. E. I. Ry. Co., A I R 1927 Pat 23=98 I C 1003=5 Pat 755=8 P L T 373.

acquisition of another plot of land from the Government and thus acquired a status equal to that of the pre-emptor before the date of the decree :

Held : that the pre-emptor's right of pre-emption was barred : *A I R 1935 Lah 529* and *A I R 1932 P C 57, Rel. on.* [P 184 C 2 ; P 185 C 1]

(c) Punjab Pre-emption Act (1 of 1913), S. 3 (1)—Garden is agricultural land.

Agriculture includes fruit raising and hence land under garden is agricultural land : *Case law discussed.* [P 185 C 2]

Achhru Ram and Indar Dev Dua—for Appellants.

Abdul Haye, Hafiz Abdul Aziz and Mohammad Amin—for Respondents.

Din Mohammad, J. — On 7th June 1932, Khan Sahib Haji Rashid Ahmad purchased 4 bighas and 10 biswas of land forming part of a garden known as Franswala from Mt. Mahumda Sultan Begam, a member of an agricultural tribe in the Province of Delhi, for Rs. 6,000. Again, on 9th June 1932, the same vendee purchased the remaining part of the garden measuring 34 bighas and 4 biswas together with all the appurtenant buildings, etc., from the same vendor for Rs. 54,000. On 6th June 1933, Sheikh Abdur Rahman and Sheikh Abdul Wahab, sons of Sheikh Mohammad Ibrahim, brought a suit for pre-emption claiming a preferential right of purchase as regards the land covered by both the sale deeds mentioned above. The vendee resisted the suit on various grounds. The Subordinate Judge came to the conclusion that the subject matter of the sale in both deeds was agricultural land and as, under the terms of S. 14, Punjab Pre-emption Act, such land could only be pre-empted by a member of an agricultural tribe, to which the plaintiffs admittedly did not belong, he dismissed the plaintiffs' suit. The plaintiffs have appealed.

The main contention of the plaintiffs before us is that the subject matter of the two transactions of sale in question was village immoveable property and that therefore the plaintiffs had a preferential right of purchase on the ground that at the time of these transactions they were the owners of the estate while the vendee was not. The position taken up by the vendee is that the revenue estate called 'Sadhaura Kalan' in which the land in suit was situated formed part of the Municipality of Delhi and it could not consequently be termed a village. The subject matter of the suit being admittedly land under a garden, it could not but be

called agricultural land, and if not so, in view of its location, it could only be described as urban immoveable property. In either case the plaintiffs had no legs to stand on. If it were agricultural land, S. 14, Pre-emption Act, would bar the plaintiffs' suit, and if it were to be treated as urban immoveable property, the plaintiffs would still fail, inasmuch as they have not claimed pre-emption on that basis and also not established any custom of pre-emption in the locality in which the land was situated, as contemplated by S. 7, Pre-emption Act. The plaintiffs admit that since 1909 the estate known as 'Sadhaura Kalan' has been included within the Municipal area of Delhi but urge that that circumstance alone is not sufficient to divest it of its original character and that as a garden is not agricultural land within the meaning of the Punjab Pre-emption Act, the property in suit cannot but be treated as village immoveable property.

The first question that falls to be judged therefore is, in what circumstances does a village lose its original character if it is included within a Municipal area? Various judgments have in this connexion been cited at the Bar on both sides and it may be necessary to refer to them, howsoever briefly, before arriving at our own conclusion in this matter. In 45 I C 887¹ Chevis, J. of the Punjab Chief Court observed as follows :

The mere fact that for certain reasons the Local Government has seen fit to include a part of the Premgarh estate within the Municipal limits of Hoshiarpur city, does not necessarily mean that the locality in question has become a part of the town for purposes of pre-emption.

The learned Judge further added that, although the site in dispute was situated between the Hoshiarpur city and the railway station and shops had sprung in the vicinity, it could not be said that the town had extended to that limit. In 73 I C 200,² the learned Judicial Commissioner of Peshawar remarked :

An administrative act, including a rural area within the limits of a Municipality, does not necessarily operate to destroy the pre-existing character of the area and such administrative action is not in itself sufficient to make the area so included a sub-division of a town for the purposes of pre-emption. At the same time any portion of an agricultural village may lose its character as such and become, by the force of circumstances, a suburb of a town. The inclusion of a rural area within the Municipal limits of a

1. *Salamat Rai v. Kanshi Ram*, A I R 1918 Lah 334=45 I C 887=30 P L R 1918.

2. *Sher Ali v. Kalandar Khan*, (1923) 73 I C 200.

town is strong evidence of the urban character of that area.

The same principle was re-affirmed by the same Judicial Commissioner in 73 I C 855.³ In 78 I C 991⁴ a Division Bench of this Court remarked as follows :

The expression 'village' ordinarily connotes an area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto. When rural areas are occupied by persons who are engaged mainly in commercial pursuits, if situated within the vicinity of a town, they grow into suburbs of towns and are governed by rules applying to urban properties.

In that case the land of which pre-emption was sought was entered in the revenue records as a part of the estate called 'Pira Ghaib' situate near the town of Jhelum and about 3/4ths of the area had been included in a Mohalla called 'Machine Mohalla.' A question arose whether the land situate in that area could be treated as village immoveable property and the learned Judges held that it could not be, and made the remarks quoted above in that connexion. These remarks formed the basis of decision in a later case also reported in 99 I C 1008.⁵ In 2 Lah 83,⁶ a Division Bench of this Court remarked as follows :

It is common ground that neither of these two villages has any village site and it is clear that the site of Pahar Ganj cannot be treated as village immoveable property.

In 87 P R 1890,⁷ in a case in which the land in suit was entered within the boundaries of Mauza Faizpur situate in the suburbs of Batala it was found that the property should be regarded as situated in a town. The principles deducible from these judgments are : (1) that the mere fact that a rural area is included within the limits of a town is not conclusive as to the urban character of the area in question ; (2) that the rural area may lose its pre-existing character and be then absorbed in the urban area ; (3) that the inclusion of a rural area within the Municipal limits of a town is an important factor to be considered in determining the character of the area in question ; (4) that each case is to be judged on its own merits.

Applying these principles to the case before us, we have no hesitation in holding that, whatever the character of the land in suit may have been prior to the transactions in question, at the time of the transactions it had lost its rural character entirely and the revenue estate named 'Sadhaura Kalan', to which it belonged, had, to all intents and purposes, been absorbed into the urban area of Delhi. It is in evidence that what was known before as Patti Sadhaura Kalan is now definitely included in that part of the town of Delhi which is called Sabzi Mandi and that the land in suit is in the vicinity of that Mandi. It is also in evidence that even the other gardens contiguous to the garden in suit have been denuded of trees and the land thus vacated is being converted into building sites. It is further proved that quite close to the area in dispute several factories are in existence, and it is not even denied by the plaintiffs that there is no village site in existence and that whatever is left of the old village is now occupied by pig-breeders and grass-cutters who evidently do not belong to the original community that inhabited the village. In these circumstances, it cannot be contended that the revenue estate known as 'Sadhaura Kalan' is a village within the meaning of the Punjab Pre-emption Act and that any property situated there, which is not agricultural land, is village immoveable property. We hold therefore that the property in suit is not village immoveable property, and that the plaintiffs have no right of pre-emption at all.

The vendee however contends that, even if the land in suit were village immoveable property, the plaintiffs could not succeed inasmuch as during the pendency of the suit the vendee had made an acquisition of another plot of land from the Government and thus acquired a status equal to that of the plaintiffs before the date of the decree. He has relied in this connexion on 16 Lah 921⁸ and A I R 1932 P C 57.⁹ The vendee had no doubt purchased another plot of land situated in the revenue estate of Sadhaura Kalan on 6th August 1934, and become an owner of the estate equally with the plaintiffs before the disposal of

3. Mahomed Ali Khan v. Makhan Singh, (1923) 73 I C 855.

4. Diwan Chand v. Nizam Din, A I R 1924 Lah 662=78 I C 991.

5. Kapuri v. Kanshi Ram, A I R 1927 Lah 799=99 I C 1008.

6. Imperial Oil Soap & General Mills Co. v. Misbahuddin, A I R 1921 Lah 69=61 I C 325=2 Lah 83=70 P L R 1921.

7. Kishen Dial v. Ali Bakhsh, (1890) 87 P R 1890.

8. Hayat Bakhsh v. Mansabdur Khan, A I R 1935 Lah 529=160 I C 826=37 P L R 873=16 Lah 921.

9. Hans Nath v. Ragho Prasad Singh, A I R 1932 P C 57=136 I C 402=59 I A 138=54 All 189 (P C).

the present case and this would also be a clear bar to the plaintiffs' suit. These findings would have been enough to dispose of the present appeal, but we are further disposed to think that the conclusion arrived at, by the Subordinate Judge that the land in suit is agricultural land is also not open to attack. In support of their contention that land under garden is not agricultural land within the meaning of the Punjab Pre-emption Act, the appellants mainly rely on 12 A L J 1080,¹⁰ 11 A L J 236,¹¹ 21 A L J 907,¹² 44 All 19,¹³ at p. 33, and 46 All 831,¹⁴ at p. 837, and the trend of all these judgments is that land held as a grove is not land held for agricultural purposes. But these decisions do not help the appellants, as firstly, they have been given under the Agra Tenancy Act and not, strictly speaking, applicable to the case before us, and, secondly after these judgments were delivered the Legislature amended the Act and in order to nullify the effect of these decisions, expressly included 'grove' within the definition of 'land.'

As long ago as 1890, it was held by a Division Bench of the Punjab Chief Court composed of Plowden and Roe, JJ. in a case reported as 111 P R 1890¹⁵ that a piece of land planted with fruit-bearing trees was land occupied for agricultural purposes within the meaning of both the Punjab Courts Act and the Punjab Tenancy Act. It may be remarked that the Punjab Pre-emption Act has adopted the definition of 'land' given in the Punjab Alienation of Land Act and the definition of 'land' given in the Punjab Alienation of Land Act is exactly the same as that given in the Punjab Tenancy Act with this difference that the definition in the Punjab Alienation of Land Act is much wider in its scope than the definition in the Punjab Tenancy Act.

In 91 P R 1919¹⁶ a question arose whether a tea garden was agricultural land, and the learned Judges who decided that case came to the conclusion that the fields planted with tea bushes were no doubt fields used for agricultural purposes. This case went up on appeal to His Majesty in Council and their Lordships of the Privy Council upheld the judgment of the Chief Court : 5 Lah 50.¹⁷ In 24 Mad 421,¹⁸ a lease of land for cultivation as a betel garden was held to be an agricultural lease. Similarly, in A I R 1922 Mad 351,¹⁹ a lease of land granted for growing casuarina trees was considered to be an agricultural lease. In A I R 1928 Bom 457²⁰ it was observed that the upkeep of a garden is cultivation. It follows therefore that the general trend of authority in India is that land under a garden is agricultural land. In the New Standard Dictionary 'agriculture' is said to mean the cultivation of the soil for food products or any other useful or valuable growths of the field or garden, and includes by extension, farming, including any industry practised by a cultivator of the soil in connexion with such cultivation as forestry, fruit-raising, breeding and rearing of stock, dairying, market-gardening, etc. It may be noted here that the decision in 12 A L J 1080¹⁰ was based, among other things, on an American decision and the definition of 'agriculture' as given in an American Dictionary, and as the New Standard Dictionary is also an American Dictionary, it appears that in America too, the import of the term 'agriculture' has been extended. In the result, we affirm the decision of the Subordinate Judge and dismiss the appeal with costs.

S.C./D.S.

Appeal dismissed.

10. Habib Ullah v. Kalyan Das, A I R 1914 All 428=25 I C 169=12 A L J 1080.
11. Hadi Hasan Khan v. Pati Ram, (1913) 35 All 200=19 I C 416=11 A L J 236.
12. Gulab v. Bhagwan Das, A I R 1924 All 229=79 I C 577=21 A L J 907.
13. Kesho Prasad Singh v. Sheo Pargash Ojha, A I R 1922 All 301=64 I C 248=44 All 19=19 A L J 749 (F B).
14. Kesho Prasad Singh v. Sheo Pragash Ojha, A I R 1924 P C 247=82 I C 962=51 I A 381=46 All 831 (P C).
15. Jhanda Khan v. Fateh Din, (1890) 111 P R 1890.

16. Kaju Mal v. Salig Ram, A I R 1919 Lah 222=52 I C 563=91 P R 1919.
17. Kaju Mal v. Salig Ram, A I R 1924 P C 1=79 I C 946=51 I A 11=5 Lah 50 (P C).
18. Murugesu Chetti v. Chinna Thambi Goundan, (1901) 24 Mad 421.
19. Pavadai Pathan v. Ramaswami Chetti, A I R 1922 Mad 351=70 I C 657=45 Mad 710=43 M L J 191.
20. Kishanlal Ratanlal v. Janmejaya Chhabildas, A I R 1928 Bom 457=118 I C 244=30 Bom L R 992.

* * A. I. R. 1937 Lahore 186

MONROE, J.

on difference between

COLDSTREAM AND JAI LAL, JJ.

R. J. Wood & Co. — Appellants.

v.

Firm Kanshi Ram-Hans Raj —
Plaintiffs and another firm—Respondents.First Appeal No. 788 of 1933, Decided
on 1st June 1936.(a) Injunction—Grant of—Discretion to be
used with equity and good conscience.The grant of an injunction is a matter of dis-
cretion to be decided in accordance with equity
and good conscience. [P 188 C 2](b) Trade Mark—Right to use particular
trade mark is confined to article to which it
is affixed—Still party can establish right to
that mark on allied product.Although in India the exclusive right to use a
particular mark is confined to the article to which
it is affixed, it is open to a party claiming a right
in a particular mark to establish that it has been
so identified and associated with his products that
his name would suggest itself to a purchaser on
seeing it on any other allied product: *A I R 1935*
All 7 and *A I R 1935 Bom 101, Rel. on.*

[P 189 C 1]

(c) Trade Mark — Exclusive ownership —
Association of that mark with goods manu-
factured by person is necessary—That per-
son becomes owner of that mark only with
regard to that description.Nobody has any exclusive right or ownership
in any mark alone, unless that mark is associated
by use with a particular description or species of
goods imported or manufactured by him. In such
a case the person concerned becomes the owner of
that trade mark but only with regard to that
description or species of goods. [P 189 C 2]* * (d) Trade Mark—Infringement of—Use
of certain mark by defendant on piece goods
—Same mark used by plaintiff on his thread
balls—Use of same mark subsequently by
defendant on his yarn—Suit for injunction
by plaintiff—Yarn and piece goods held goods
of same species—Plaintiff's use of mark held
dishonest and no injunction should be
granted.The true test to see as to whether two goods are
of the same species is whether the two sets of
goods are so commonly dealt in by the same trader
that his customers knowing his mark in connec-
tion with one set and seeing it upon the other
would be likely to suppose that it was used upon
them also to indicate that they were his goods.

[P 192 C 1, 2]

Defendants were using certain mark on their
piece goods and plaintiffs used the same for their
balls of thread. Subsequently the defendants used
the same mark for their yarn whereupon plaintiffs
sued for injunction restraining defendants from
using the mark for their yarn:*Held*: that cloth and yarn were goods of the
same species and that the defendants were entitled
to use their trade mark on yarn: [P 192 C 2]*Held also* (Per *Monroe* and *Coldstream, JJ.*;
Jai Lal, J. contra): that *Illus. (w)* to S. 54,
Specific Relief Act, applied to the case as the useof the mark by the plaintiff was not honest and as
such he was not entitled to injunction prayed for.
[P 192 C 2]*Mehr Chand Mahajan* and *Bishen*
Narain—for Appellants.*Kishen Dayal, Bhagwat Dayal, Brij*
Lal (for Plaintiffs) and *Shamair Chand*
(for Defendants)—for Respondents.*Coldstream, J.*—The suit from which
this appeal arises was instituted on 19th
October 1928, by the firm *Kanshi Ram-*
Hans Raj of Delhi, for an injunction to
restrain the defendants *Bishambar Nath*
& Co. and Messrs. *R. J. Wood & Co.* from
selling balls and bundles of balls of cotton
thread under a label bearing the device
D 1 or a device calculated to resemble
the device which the plaintiffs claimed to
be their trade mark. Their case was that
they had been selling balls and bundles of
balls which had been manufactured by
themselves marked with this label for
11 years and that the mark was known
and recognized as distinguishing thread of
their manufacture. In 1926 a firm known
as *Banarsi Das-Prabhu Dial* had started
selling balls of thread and bundles of balls
marked D 1. The plaintiffs had prose-
cuted *Banarsi Das* and *Prabhu Dial* who
was his son and had them convicted and
punished under S. 482, I. P. C. The con-
viction was upheld by the High Court on
16th January 1928. After this *Banarsi*
Das and *Prabhu Dial* with other persons
had started trading as the defendant firm
Bishambar Nath & Co. and had begun 15
days before the institution of the present
suit, to sell balls and bundles bearing labels
marked D 1 and resembling the plaintiffs'
labels with the intention of passing off
their goods as those of the plaintiffs and
leading purchasers to believe that the
goods were those manufactured by the
plaintiffs. This they had done with the
permission of 2nd defendants, *R. J. Wood &*
Co. *Bishambar Nath & Co.* pleaded that
they were agents of *John Boulton & Co.,*
Ltd. of Manchester who had been owners
of the D 1 mark for 50 years and manu-
factured the goods they sold. They denied
that *Prabhu Dial* was a member of this
firm. He was merely an employee.*R. J. Wood & Co.* denied that D 1 was
the plaintiffs' trade mark or that the mark
ever distinguished the plaintiffs' goods.
They themselves were famous importers
of cotton cloth and cotton goods imported
by them had been distinguished by the
mark D 1 for 40 years and no one except

themselves had any right to use the mark on goods of the species of cotton or yarn. It was admitted that they had permitted Bishambar Nath & Co. defendants 1, to use this mark on cotton yarn imported by themselves and sold to defendants 1. It were the plaintiffs who were misleading purchasers with the belief that the yarn they were selling was imported by R. J. Wood & Co.

On the evidence produced by the parties the Subordinate Judge, Delhi, came to the following findings:—1. The mark D 1 on white shirting and 'mulls' (muslins) belonged to R. J. Wood & Co. and was the well known mark of that firm who had used it for the previous 22 or 23 years. 2. It was not proved that R. J. Wood & Co. had been selling yarn under this mark (the allegation in the plaint that defendants 1 had started selling cotton thread labelled D 1 only 15 days before the suit was admitted by R. J. Wood & Co.). 3. The plaintiffs had been selling balls of thread under the label D 1 since 1917 and the mark was a well known trade mark on such balls of the plaintiffs. 4. Cotton yarn and cotton cloth are not goods of the same description of goods. 5. The mark D 1 on the balls sold by defendants 1, was calculated to mislead purchasers into the belief that the balls were goods of the plaintiffs (I may here note that the yarn is imported and 'made up into balls in Delhi by the plaintiffs. The appellants do not make balls of thread but supply yarn in boxes labelled with this mark). 6. Plaintiffs had not proved any loss or damage arising out of the defendants' action.

On these findings the Subordinate Judge granted the plaintiffs an injunction restraining the defendants from using labels on balls of thread and bundles of balls bearing the mark D 1 or any trade mark which may be calculated to resemble the plaintiffs' trade mark D 1. Against this decree the defendant firm R. J. Wood and Co. have appealed. It is contended on their behalf that the lower Court was wrong in restraining them from using on cotton thread balls or on any kind of goods imported by them, a trade mark which had acquired for them a reputation as importers of cotton cloth, that yarn (it is not disputed that yarn includes cotton thread made up in balls) is an article of the same kind as cotton cloth and it was, therefore, the plaintiffs-res-

pondents who had first infringed the appellants' right to use the mark and that on the finding that the appellants had themselves been using the mark on cotton balls no injunction should have been granted.

The following facts are, I think, of some importance in coming to a decision which as there is no statutory law in India applicable to this case, must be based on principles of justice, equity and good conscience. It is proved by plaintiffs' own witness (P. W. 1) that the most important and best known trade mark used on shirtings in Delhi is D 1. In January 1923, nearly five years before the present suit was instituted, R. J. Wood and Co. sued against a firm Nur Ilahi-Maqbul Ilahi of Delhi for a permanent injunction to restrain that firm from using another trade mark, known as the 'cotillon' mark under which the plaintiffs sold their cotton cloth. Nur Ilahi-Maqbul Ilahi had placed this mark upon packages containing cotton yarn made into balls and had been passing off their goods as those of the plaintiffs. The trial Court dismissed the suit which was however decreed on appeal by the District Judge. The case came before this Court which after a remand for an enquiry into the question whether the plaintiffs had abandoned their 'cotillon' mark confirmed the District Judge's decree. The District Judge had held that the cloth and the yarn were goods of the same description. This finding as to the similar nature of cotton goods and yarn was attacked before this Court but the learned Judges did not discuss the point apparently because the finding was considered to be one of fact in 9 Lah 487.¹ The judgment was delivered on 24th November 1927. It had been found by the District Judge that R. J. Wood and Co. had been importing piece goods and thread in skeins (not balls) under the 'cotillon' design for many years but had not imported thread since 1916, i. e., for some seven years. Nur Ilahi-Maqbul Ilahi had obtained yarn and made it up into balls contained in boxes with a design similar to R. J. Wood's 'cotillon' mark.

The respondents' firm started in 1917 and it is in evidence that they copied the

1. Nur Ilahi-Maqbul Ilahi v. R. J. Wood and Co., A I R 1928 Lah 924 = 113 I C 223 = 9 Lah 487=29 P L R 61.

mark D 1 from a piece of white shirting similar to the appellants' goods so marked: see (P. W. 13). In 1923, 1924 and 1925 a European firm of which Gurcharan Das, P. W. 10, was the Delhi agent imported yarn under the mark D 1 for the plaintiffs at the latter's request on an undertaking by them that they would be responsible for any loss consequent upon the use of the mark D 1 to which Mr. Gray, the Delhi agent of R. J. Wood and Co. had objected. Subsequently this European firm stopped importing yarn. According to Mr. Gray (D. W. 2) that firm had at first refused to give up importing yarn under the mark D 1 because R. J. Wood and Co. had lost their case against Nur Ilahi-Maqbul Ilahi. After the decision by this Court on second appeal the firm's representative told Mr. Gray that the firm had given up importing yarn marked D 1. These facts are not disputed.

For the respondents the argument is that whatever may have been their motive for adopting the mark D 1 upon their labels in 1917, the evidence makes it clear that they had used it for more than ten years until a fortnight before they instituted their suit that R. J. Wood and Co. have not shown that they used the mark D 1 upon their yarn before 1927, that by that time the mark D 1 had become well known as distinguishing the respondents' thread and that therefore the use by defendants 1 with the approval of the appellants was an infringement of their right to use the mark. Respondents' counsel referred us to the judgment of this Court by Sir Shadi Lal C. J. and Agha Haidar J. in 9 Lah 487,¹ which upheld on revision the conviction of Banarsi Das and Prabhu Dial under S. 482, I. P. C., at the instance of Hans Raj of the respondents' firm for having sold cotton thread balls marked D 1 so as to deceive purchasers into the belief that they were purchasing from Banarsi Das etc., goods belonging to Hans Raj who had been using the mark D 1 as his trade mark. This judgment which was delivered in January 1926 is not relevant for the purpose of deciding the present case but counsel lays emphasis on the fact that it was this same Prabhu Dial who, if not a partner in defendant 1's firm, is in its employ, a fact which supports the respondents' case that the adoption of the D 1 mark was due to Prabhu Dial's rancour against Hans Raj.

The law to be applied is contained in S. 54, Specific Relief Act for the purpose of which a trade mark is 'property.' The right to this property is in India, acquired only by user. Had the mark D 1 been an invention of the plaintiffs, it is possible that they would have been entitled to an injunction against both the defendants, for according to the evidence, they had used it for some years upon balls and bundles of thread before the appellants authorized Bishambar Nath and Co. to use it. But in every case the grant of an injunction is a matter of discretion to be decided in accordance with equity and good conscience. In respect of trade-marks this is emphasized by the Illus. (w) to the section itself. The illustration is :

A improperly uses the trade mark of B. B may obtain an injunction to restrain the user provided that B's use of the trade mark is honest.

It is obvious therefore that the section does not contemplate the grant of an injunction except where B's use of A's mark is honest and A's use of it is improper. As already made clear the argument for R. J. Wood and Co. is that their use of the mark D 1 was proper in that they had established a firm and wide reputation for cotton goods so marked and could very properly use it on an article of a similar or cognate nature which article they had long been importing and that the plaintiffs' use of the mark was dishonest for they had admittedly copied it from the appellants' cloth in 1917. The letter and numeral D 1 make a peculiar trade mark which was known as distinguishing the plaintiffs' cotton piece goods. There is the strongest presumption that in copying it the plaintiffs hoped to induce people to believe that their cotton thread was imported by R. J. Wood and Co. who were known as importing cloth woven of cotton thread, that is to say their use of it was not in good faith. On the other hand as the mark was certainly the appellants' property so far as its use on cotton piece goods was concerned, its use by the appellants for their cotton thread cannot reasonably be held to have been improper.

It has frequently been observed that the test in such cases is whether the imitation trade mark complained of is such as to be calculated to cause goods to be taken by ordinary purchasers for the goods of the party using the original mark. In the circumstances of this case it seems to be a

proper inference that having regard to the history of the mark D 1, its use by R. J. Wood and Co. on their thread could not be calculated to lead an ordinary purchaser, wary or unwary, to associate with their thread any other firm than themselves. On the contrary the reasonable presumption is that the plaintiffs in using the mark D 1 for their thread were all along infringing R. J. Wood's trade mark.

Although in India the exclusive right to use a particular mark is confined to the article to which it is affixed, it is open to a party claiming a right in a particular mark to establish that it has been so identified and associated with his products that his name would suggest itself to a purchaser on seeing it on any other allied product: *see* in this connection A I R 1935 Bom 101² and A I R 1935 All 7.³ Whether R. J. Wood and Co., would be entitled in the circumstances to restrain others from using their mark on goods other than cotton piece goods may be open to question but the appellants are not seeking any relief. They have not thought it worth while to seek to restrain the plaintiffs, but merely pleaded that the plaintiffs, who appropriated their well known cotton piece goods mark in order to sell the plaintiffs' cotton thread are not entitled to prevent them from using this mark upon their own thread.

My conclusion is that this is not a case in which the plaintiffs are entitled to the injunction granted and I would accept the appeal and dismiss the suit as against the appellants with costs throughout.

Jai Lal, J.—The suit in my opinion has been rightly decreed. It is clear that the only goods in respect of which R. J. Wood and Co. have been using D 1 as their trade mark are shirtings and 'mulls.' They have never used this mark on balls and bundles of balls of cotton thread and have therefore, acquired no right to use this mark in respect of goods of this description. Kanshi Ram-Hans Raj on the other hand have been using this mark since 1917, on the balls and bundles of balls of cotton thread imported or manufactured by them and it has therefore become their property in respect of this description of

goods. Bishambar Nath and Co. is really a name for another person who was convicted for infringing the trade mark of Kanshi Ram-Hans Raj in respect of balls and bundles of balls of cotton thread and the conviction was upheld by this Court. After the conviction Bishambar Nath and Co. approached R. J. Wood and Co. and professed to acquire from them the right to use the trade mark of D 1 on balls and bundles of balls of cotton thread.

Nobody has any exclusive right or ownership in any mark alone unless that mark is associated by use with a particular description or species of goods imported or manufactured by him. In such a case the person concerned becomes the owner of that trade mark but only with regard to that description or species of goods. It is not the case and indeed this was not even argued before us that balls of cotton thread and shirtings and 'mulls' are the same species of goods. Therefore R. J. Wood and Co. were not entitled to use D 1 on balls and bundles of balls of cotton thread imported or manufactured by them after Kanshi Ram-Hans Raj had by long user acquired property in the mark D 1 in respect of such goods. It follows from this that R. J. Wood and Co. could not legally authorize Bishambar Nath and Co. to use the mark D 1 on balls and bundles of balls of cotton thread imported or manufactured by them and that their conduct in conniving at such use amounted to an infringement of the right of Kanshi Ram-Hans Raj.

The use of the mark by Kanshi Ram-Hans Raj being permissible under the law because neither R. J. Wood and Co. nor any other person had the right to use it in respect of the balls and bundles of balls of cotton thread, it cannot be successfully pleaded that their use of the mark was dishonest or 'was not honest' because what a person is entitled legally to do cannot by any stretch of language be styled in law as anything but honest. The confusion in this respect appears to have arisen on account of wrongly using the word "mark" as synonymous with "trade mark." As I have already stated nobody has any property in any mark and a particular mark becomes the property of a person as a trade mark only when associated by use with particular goods manufactured or imported by such person and only so far as it is associated with that species of goods. But he has no right to

2. Anglo Indian Drug and Chemical Co. v. Swastik Oil Mills Co., A I R 1935 Bom 101=155 IC 641=36 Bom L R 1165=59 Bom 373.

3. Thomas Bear & Sons v. Prayag Narayan, AIR 1935 All 7=154 I C 788=1935 A L J 80=57 All 510.

prevent others from using that mark in respect of the goods which are not of the same species.

Illustration (w) of S. 54, Specific Relief Act does not in my opinion cover a case like the present. The cases to which that illustration applies are those in which the plaintiff in a suit for injunction himself is by using a particular trade mark infringing the trade mark of another person. In the present case the plaintiff cannot be said to have infringed the trade mark of R. J. Wood and Co. or any other person. Suppose *A* has acquired ownership of a trade mark in respect of a particular species of goods and *B* in infringement of his right begins to use the same trade mark in respect of the same species of goods and then *C* begins to use the same trade mark in respect of the same species of goods, the illustration contemplates that *B* shall not be granted an injunction to restrain *C* from using the trade mark because *B* himself has infringed that trade mark of *A*. It has no application to a case like the present. In order to deprive the plaintiff of his right to a decree it must be established that the plaintiff himself has infringed the right of another. But I have already stated and I do not think there can be any controversy on that subject that the plaintiff has not infringed the trade mark of R. J. Wood and Co. Another way of looking at the matter is whether R. J. Wood and Co. could in a suit instituted by them successfully obtain an injunction against Kanshi Ram-Hans Raj restraining them from using the mark D 1 on the cotton thread balls imported or manufactured by them. I think not, as in order to succeed in such a suit, they must establish that they had ownership in this mark in respect of this description of goods. In my opinion the use by Kanshi Ram-Hans Raj of this mark on their ball cannot be held to be dishonest or illegal and they are entitled to be protected against the infringement of their right by every other person.

In the present case R. J. Wood & Co. transferred to Bishambar Nath and Co. a mark apart from its association with or use on any goods which they themselves manufactured or imported. The transfer of such a right cannot be sustained in law. In cases where it has been held that a trade mark is capable of being transferred, it is assumed that the transferor has acquired a right to use that trade mark in

respect of a particular species of goods and that he has transferred the right to use the trade mark on or in respect of the same species of goods. He cannot transfer a supposed right to use the mark on every description or every species of goods. Suppose a person begins to use D 1 as his trade mark on bags of cement manufactured or imported by him; it is obvious that R. J. Wood & Co. cannot legally prevent him from doing so and they themselves will be prevented from using this mark on cement manufactured by them after the other person has established his use of the mark on his cement. Consequently they cannot authorise another person to use this mark on bags of cement manufactured by him and thus infringe the trade mark of the first person. It is significant that R. J. Wood & Co. have known for long that Kanshi Ram-Hans Raj have been using D 1 on their balls of cotton thread but they have taken no direct action to prevent them from doing so. The fact that another foreign firm ceased to use this mark on that protest is immaterial for the purposes of this case.

I have already stated that Bishambar Nath & Co. secured the permission of R. J. Wood & Co. to use the mark in order to circumvent the effect of their conviction which was upheld in this Court; the conduct of both these parties was in my opinion improper and should not be supported by any Court. The real appellant before us is Bishambar Nath & Co. as R. J. Wood & Co. are merely acting nominally for them. In this case one further important fact must be borne in mind; R. J. Wood & Co. have been importing cotton thread but neither in the form of balls nor with D 1 as its distinguishing mark but with a different device thereon. There can, therefore, be no question of an infringement of their trade mark by Kanshi Ram-Hans Raj when they placed in the market cotton thread balls and bundles thereof bearing the mark D 1, which had never been used on this description of goods by R. J. Wood & Co. In these circumstances there could be deceit or misrepresentation that the thread balls with D 1 as their distinguishing mark had been manufactured or imported by R. J. Wood & Co. Granting of an injunction is no doubt ordinarily a matter for the discretion of the Court; but the discretion has to be exercised with due regard to the legal rights of the parties.

and on well recognised principles. Moreover it cannot be asserted in this case that the trial Court has exercised its discretion illegally or unjustly or has infringed any principles of law in granting the injunction. On the other hand in my opinion the Court has proceeded on a correct appreciation of the legal position of the parties and there is no good ground for interfering with the exercise of the trial Court's discretion. I would therefore dismiss this appeal with cost.

[In consequence of the difference of opinion between Coldstream, J. and Jai Lal, J., the case was referred to Monroe, J.]

Monroe, J.—This appeal comes before me by reason of a difference of opinion between Jai Lal, J. and Coldstream, J. The question referred is whether in the circumstances of this case the plaintiffs are entitled to restrain by injunction the defendants from using the mark D 1 on their balls and bundles of balls of yarn. It is necessary in the first place to consider the early history of the use of the mark D 1. The defendants R. J. Wood & Co. who have been for 50 years importers in India of piece-goods and yarn, have during this period used D 1 as a trade mark on their piece-goods. The plaintiff firm commenced business on 2nd June 1917 and according to Kunj Lal plaintiff they have a factory for the manufacture of balls of thread and they also sell sundries. They have used the mark D 1 on their thread balls since that date. Both this plaintiff and Dina Nath, a former partner of the firm stated that the idea of using D 1 as a trade mark was suggested by Hans Raj, another member of the firm. Hans Raj brought in the words of Dina Nath D 1 and asked him to use it as a trade mark and how Hans Raj came to have the idea of using D 1 as a trade mark is shown by the evidence of Mohammad Mashir who has acted as printer for the plaintiff firm since its commencement. Dina Nath and Hans Raj brought to him samples of white shirting containing this trade mark D 1 and asked him to copy it. He also printed green labels for them and it is interesting to note that the defendant R. J. Wood & Co. had been in the habit of using the mark D 1 on green labels specimens of which have been produced in Court in 1917; when the plaintiff firm adopted the trade mark D 1 it had for many years been associated with the goods that were being imported by R. J. Wood & Co. and there

can be no doubt that Hans Raj copied R. J. Wood and Co.'s trade mark and in my opinion the only possible reason for doing so was to make an improper use of the reputation which had been built up by R. J. Wood & Co.

The next incident of importance occurred in 1923. In that year the firm of importers described as Sir Jacob Barren & Sons imported yarn with the mark D 1. From the evidence of Gurcharan Das, a witness for the plaintiffs it appears that this yarn was being imported for the plaintiffs and that the mark D 1 had been put on the imported yarn at the request of plaintiffs. Gurcharan Das in his evidence stated that he knew that the stamp D 1 belonged to R. J. Wood & Co. and that he made the plaintiffs understand that they would be responsible for any loss coming to them by the use of the mark D 1. The occasion for this remark arose from the fact that R. J. Wood & Co. had brought an action against one Nur Ilahi in the Court of the Subordinate Judge at Delhi to restrain the use of the mark D 1 on yarn imported by Nur Ilahi. After a decision adverse to R. J. Wood and Co. had been given at the trial Mr. Stensfield who was then the Manager for Sir Jacob Barren and Sons, refused to promise to cease using the mark D 1 on the ground that R. J. Wood and Co. had just lost their case but when R. J. Wood and Co. won their case in the appellate Court, Mr. Stensfield said that his firm had given up importing yarn marked D 1 and I would infer from the evidence that after Gurcharan Das's threat to the plaintiff firm about the use of the mark D 1 the plaintiff firm refrained from ordering any more yarn from Sir Jacob Barren and Sons with the Mark D 1 on it. The plaintiff firm have continued to use the mark D 1 upto the present and some years ago they successfully prosecuted Benarsi Das and Prabhu Dial at the instance of Hans Raj for having sold cotton thread balls marked D 1. A short time before the institution of the present proceedings the defendants Bishambar Nath and Co. commenced to use the trade mark D 1 on cotton balls with the authority of R. J. Wood and Co. It is suggested by the plaintiffs that Prabhu Dial was at the bottom of this and that he was giving effect to his rancour against Hans Raj which had been caused by his prosecution. Two questions have been discussed and argued before me. For

R. J. Wood and Co. it has been argued that cotton piece-goods and cotton yarn are goods of the same description and that if they acquired the right to the trade mark D 1 in connexion with cotton piece-goods they are entitled to use it also for cotton yarn and that the plaintiffs have no property in the trade mark D 1 so far as cotton goods of the same description are concerned. Neither of the learned Judges who have already expressed views on the case has given a definite finding on this point. Jai Lal, J. has said:

It is not the case and indeed this was not even argued before us that balls of cotton thread and shirtings and mulls are the same species of goods.

Coldstream, J. referred to the finding of the trial Judge that cotton yarn and cotton cloth are not goods of the same description. Later in his judgment he says:

In the circumstances of this case it seems to be a proper inference that having regard to the history of the mark D 1, its use by R. J. Wood and Co. on their thread could not be calculated to lead an ordinary purchaser, wary or unwary, to associate with their thread any other firm than themselves. On the contrary, the reasonable presumption is that the plaintiffs in using the mark D 1 for their thread were all along infringing R. J. Wood's trade mark.

From this I Judge that Coldstream, J. though not expressing a clear finding was inclined to think that R. J. Wood and Co. had acquired the right to use the mark D 1 on the ground that cotton yarn and cotton cloth were goods of the same description. The point has been argued by both sides before me and it is necessary that I should come to a finding. Evidence has been produced by both sides on this point and there is a direct conflict between the evidence for the plaintiffs and the evidence for the defendants. The two kinds of goods are not as a rule sold by the same retailers but there is no doubt that importers of cotton goods and wholesale vendors of cotton goods almost invariably deal in both commodities. This is true of the defendants' firm R. J. Wood and Co. I am inclined to give importance to the evidence of Col. Mayne Mackintosh, an importer of Delhi, who has been in the import trade for 12 years. He imports cloth and yarn and he stated that cloth and yarn were goods of the same species. The reasons given by the witnesses who asserted that cloth and yarn are not goods of the same species are to my mind unconvincing and in some cases were illogical. The learned trial Judge relied on the fact that yarn and cloth are classified

under separate headings for the purposes of trade marks in England. But he goes on to cite a passage from Kerly on Trade Marks where it is laid down that the question should be looked at from a business and commercial point of view and that the true test would seem to be whether the two sets of goods are so commonly dealt in by the same trader that his customers knowing his mark in connexion with one set and seeing it upon the other would be likely to suppose that it was used upon them also to indicate that they were his goods. In my opinion this is a good test and there can be but one answer when the test is applied to the present case. The second point in the case which has most been considered by the learned Judges is whether in the circumstances of this case an injunction ought to be granted. The relief in the present case is sought under S. 54, Specific Relief Act, and Coldstream, J. considers that Illus. (w) applies to this case: Jai Lal, J. considers that it does not. Illus. (w) is as follows:

A improperly uses the trade mark of *B*. *B* may obtain an injunction to restrain the user provided that *B*'s use of the trade mark is honest.

I agree with Coldstream, J. and in my opinion the plaintiffs have been dishonestly using this trade mark D 1 since they commenced to use it in the year 1917. They have deliberately copied R. J. Wood and Co.'s mark and notwithstanding a warning that they received in 1923 and that it was then brought to their notice that there was risk in using it, they persisted in doing so. I cannot conceive how any one could suggest that their use of the trade mark has been honest. I think that the plaintiffs' action should be dismissed on both grounds. If I were satisfied that the use of this mark had been adopted by Bishambar Nath and Co. merely for the purpose of revenge at the instance of Prabhu Dial and that Prabhu Dial was connected with the defendants' firm, I should not grant costs to the defendants, but I think the evidence on this point merely creates a suspicion and I am not prepared to say that the ordinary rule about costs should not apply. I would allow the defendants their costs of the suit and this appeal against the plaintiffs.

R.W./K.S.

Appeal allowed.

A. I. R. 1937 Lahore 193

ABDUL RASHID, J.

Sardar Bishen Singh and another—
Defendants—Appellants.

v.

Pirthi Chand and others, Plaintiffs
and *another, Defendant—Respondents.*

Second Appeal No. 437 of 1936, Decided
on 16th July 1936, from decree of Dist.
Judge, Ambala, D/- 13th January 1936.

(a) Practice—New plea—Not to be allowed
in second appeal when it involves taking of
evidence.

A new point which necessitates the taking of
evidence cannot be allowed to be raised for the
first time in second appeal. [P 194 C 1]

(b) Limitation Act (1908), S. 22—Suit by
some of members of Hindu joint family on
pronote in favour of family—Other members
impleaded as defendants but after limitation—
Suit against original defendants is not barred.

When one out of several persons jointly entitled,
either as partners, members of a joint Hindu
family, or otherwise, to sue, brings a suit in his
own name within the period of limitation, and
subsequently after the period of limitation has
expired joins those who were entitled to sue with
him as defendants, such joinder does not render
his suit liable to dismissal by reason of S. 22,
Limitation Act, as against the original or real
defendants, as that section does not apply where
there is no community of interest between the
two sets of defendants, and the fresh parties are
merely joined for the purpose of safeguarding the
original defendants. This principle is applicable
even when the suit is not instituted by the karta :
57 P R 1905, *Foll.*; 20 P R 1909, *Rel. on*; 79
P R 1906 and 36 Cal 675, *Disting.* [P 194 C 1, 2]

Tek Chand and Qabul Chand—for
Appellants.

D. N. Aggarwal—for Respondents.

Judgment.—The material facts of the
case for the purposes of this appeal may
be shortly stated. On the 7th January
1932 a pronote for a sum of Rs. 1,000 was
executed by Lehna Singh in favour of Des
Raj, son of Atma Ram. On the 8th January
1935, the present suit was instituted by
Pirthi Chand and Tirloki Chand, sons of
Des Raj, against Lehna Singh for recovery
of Rs. 1,000 together with interest at 6
per cent. per annum from the date of the
institution of the suit till the date of
realisation. It appears that after the
institution of the suit Lehna Singh died
and his three sons, Shamsheer Singh,
Bishan Singh and Amrik Singh, were
brought on the record as defendants 1
to 3. The defendants pleaded *inter alia*
that the pronote was without considera-

tion, that the plaintiffs were not the heirs
of Des Raj, deceased, and that as the widow
of Des Raj also claimed the sum in suit
the plaintiffs could not recover the amount
due on the pronote without obtaining
succession certificate. On the 13th March
1935 the defendants made an application
to the Court that as the plaintiffs were
members of a joint Hindu family with
their grandfather Atma Ram, Atma Ram
should also be made a party to the suit.
On the 22nd March 1935, Ch. Kanshi
Ram, counsel for the plaintiffs, stated that
the plaintiff's grandfather Atma Ram was
alive, that he was a member of a joint
Hindu family along with the plaintiffs,
and the plaintiffs had no objection if
Atma Ram were made a defendant in the
present case. After Atma Ram had been
impleaded as defendant 4, the other defen-
dants stated that as Atma Ram had been
impleaded after the period of limitation
the suit was time-barred. On the plead-
ings of the parties, the trial Court framed
a number of issues. It was held by the
trial Court that the plaintiffs were the
heirs of Des Raj, deceased, that as they
were members of a joint Hindu family
with their father, no succession certificate
was necessary simply because the widow
of Des Raj was also claiming the amount
according to the allegations of the defen-
dants. It further held that the pronote
was for consideration and the plaintiffs
were entitled to a decree for Rs. 1,000.
Against this decision, Shamsheer Singh,
Bishan Singh and Amrik Singh, defendants,
preferred an appeal to the learned District
Judge. The learned counsel for the defen-
dants-appellants stated before the learned
District Judge that he abandoned all other
grounds of appeal and that he would only
argue the question of limitation. The
learned District Judge held that the plain-
tiffs' suit was within time and on that
finding dismissed the defendants' appeal.
Against this decision the defendants have
preferred a second appeal to this Court.

The learned counsel for the appellants
contended that the plaintiffs were not
entitled to bring the suit as Atma Ram
was the karta of the joint Hindu family,
and he alone could sue the defendants on
the basis of the pronote executed by Lehna
Singh in favour of Des Raj. This point
was not taken by the defendants in their
written statement, and therefore no issue
was framed on this question. This point
was not even raised by the defendants in

their grounds of appeal before the learned District Judge. Had this point been raised, it would have been open to the plaintiffs to prove that Des Raj was really the managing member of the family, and that Atma Ram was not the karta of the family. The determination of the question as to whether the plaintiffs were competent to bring the present suit would necessitate the taking of further evidence. I therefore did not allow the appellant to raise this new point for the first time in second appeal specially as it was never alleged by the defendants in the trial Court that Atma Ram was the karta of the family. After the conclusion of his arguments on the question of limitation the learned counsel for the appellants sought to argue that in view of the provisions of S. 48, Negotiable Instruments Act, Pirthi Chand and Tirloki Chand, plaintiffs, were not entitled to bring the present suit without obtaining a succession certificate. This point was not raised in the trial Court or in the lower appellate Court or in the grounds of appeal to this Court. Had this point been raised at an earlier stage the plaintiffs might have asked the trial Court to stay the suit so that they could obtain the succession certificate. I, therefore, refused to allow counsel for the appellants to raise this point for the first time at the conclusion of his arguments in this Court. The only question argued before me was one of limitation. This question is concluded by a Full Bench ruling of the Punjab Chief Court reported as 57 P R 1905.¹ It was held in that case that :

When one out of several persons jointly entitled, either as partners, members of a joint Hindu family, or otherwise, to sue, brings a suit in his own name within the period of limitation, and subsequently after the period of limitation has expired joins those who were entitled to sue with him as defendants such joinder does not render his suit liable to dismissal by reason of S. 22, Limitation Act, as against the original or real defendants, as that section does not apply where there is no community of interest between the two sets of defendant, and the fresh parties are merely joined for the purpose of safeguarding the original defendant.

The learned counsel contended that this ruling was inapplicable to the present case as the plaintiff in the reported case was the karta of the joint Hindu family. In my opinion, however, the principle underlying the Full Bench ruling is fully

1. Labhu Ram v. Kanshi Ram, (1905) 57 P R 1905=76 P L R 1905 (F B).

applicable to the present case. Reference may be made in this connection to 20 P R 1909.² In that case the following observations occur :

The counsel for the respondent attempted to distinguish the present case on the ground that in 57 P R 1905¹ the suit was found to have been instituted by a managing member of the family. But the position so taken is altogether untenable as the question referred for decision by a Full Bench was a general issue as stated at pp. 194 and 195 of the report regardless of the fact whether the suit is or is not instituted by the managing member of a joint Hindu family.

The learned counsel for the appellants relied on 79 P R 1906,³ and 36 Cal 675.⁴ In each of these cases a person was added as co-plaintiff after the period of limitation, and it was held that the suit was barred under the provisions of S. 22, Limitation Act. These cases are clearly distinguishable from the present case as Atma Ram was added as a defendant and not as a plaintiff. For the reasons given above I affirm the decision of the Courts below and dismiss this appeal with costs.

K.S./R.K.

Appeal dismissed.

2. Gohru v. Amira, (1909) 20 P R 1909=1 I O 455=24 P W R 1909.
3. Motun Mal v. Kripa Mal, (1906) 79 P R 1906.
4. Mathewson v. Ram Kanai Singha Deb, (1909) 36 Cal 675=1 I C 626=9 C L J 523.

A. I. R. 1937 Lahore 194

JAI LAL AND ABDUL RASHID, JJ.

Sahib Dayal and another — Decree-holders—Appellants.

v.

Jamal-ud-din and others — Judgment-debtors—Respondents.

Exn. Second Appeal No. 257 of 1936, Decided on 6th July 1936, from order of Dist. Judge, Jullundur, D/- 20th November 1935.

Punjab Alienation of Land Act (13 of 1900), S. 16 — Land of member of agricultural tribe cannot be sold in execution even when decree itself directs sale.

The prohibition contained in S. 16 is absolute. The land of a member of an agricultural tribe therefore cannot be sold in execution of a decree even when the decree itself has directed its sale and the executing Court is competent to go behind such a decree : *A I R 1936 Lah 845, Rel. on.*

[P 195 O 1]

Vishnu Datta—for Appellants.

Muhammad Monir—for Respondents.

Jai Lal, J—This appeal originally came up for hearing before me on 25th May 1936, and in view of the conflict of deci-

sions in this Court on the point involved, I referred it to a Division Bench for decision. The point involved is whether the land of a member of an agricultural tribe can be sold in execution of a decree even when the decree itself has directed its sale. It arises in this manner. The appellant was originally a mortgagee with possession of the land in dispute. He instituted a suit for sale of the mortgaged property and the suit was decreed, a decree for sale of the property being passed in form provided for decrees in mortgage suits. When however the decree-holder applied for the sale of the land he was met by an objection that the same could not be sold by virtue of the prohibition contained in S. 16, Punjab Alienation of Land Act. This objection has been allowed by the Courts below. Consequently the decree-holder has presented this second appeal. Now S. 16, Punjab Alienation of Land Act, is :

No land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any civil or revenue Court, whether made before or after the commencement of this Act.

The prohibition contained in the section appears to be absolute, but it is contended on behalf of the appellant that it does not extend to cases where the decree contains a direction for sale of the land ; in support of this contention, reference is made to the well recognized principle that an executing Court must execute the decree according to its terms and is not competent to question its legality. Since this reference was made by me to the Division Bench, the question involved in this appeal has been considered and decided by another Division Bench of this Court in Civil Ex. A. No. 118 of 1936.¹ My learned brother Abdul Rashid wrote the judgment in that case and was of opinion that S. 16, Punjab Alienation of Land Act, was an authority for the executing Court to go behind the decree and that the general principle referred to above was deliberately departed from in enacting that section. In this view Addison, J. concurred. There is no doubt that contrary opinions have been expressed in this Court but only in Single Bench cases and no judgment of a Division Bench has been cited before us in which the contrary view has been taken. The matter is therefore concluded by

authority and though I do not feel impressed by the view taken in it, I must decide this appeal on the rule of *stare decisis*. I would therefore following the Division Bench judgment of this Court referred to above, dismiss this appeal with costs.

Abdul Rashid, J.—I agree in the order proposed by my learned brother.

V.B.B./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 195

DIN MOHAMMAD, J.

Prabhu Dayal — Petitioner.

v.

Emperor — Opposite Party.

Criminal Revn. No. 1062 of 1936, Decided on 10th September 1936, from order of Sess. Judge, Karnal, D/-13th July 1936.

Criminal Trial - Sentence — Enhancement of—Imposition of fine by appellate Court is not enhancement of sentence if aggregate period of imprisonment is less than original period—Interference in revision is proper if alteration renders sentence excessive and inappropriate.

The mere fact that a fine was imposed by the appellate Court would not in law be an enhancement of sentence if the aggregate period of imprisonment which the accused would have to undergo is to any extent less than the period of the original sentence; but where such an alteration of the sentence has the effect of rendering it in the circumstances of the case excessive and inappropriate, the interference in revision of superior Court may be called for : 30 Mad 103 (F B), *Rel. on.* [P 196 C 1]

M. L. Puri—for Petitioner.

Order.—Prabhu Dayal was convicted under S. 61 (2) (a), Excise Act, and sentenced to four months' rigorous imprisonment. On appeal the Sessions Judge reduced the sentence of imprisonment to two months but added a fine of Rs. 100. Coldstream, J. admitted this petition on the question of sentence and at the same time released the petitioner on bail.

Counsel for the petitioner contends that the Sessions Judge was not empowered to enhance the sentence imposed on the petitioner and that the imposition of fine amounts to enhancement in his case. In 30 Mad 103¹ it was held that the mere fact that a fine was imposed by the appellate Court would not in law be an

¹ Chhajju Ram v. Muzaffar Ahmad, reported in A I R 1936 Lah 845=165 I C 243=38 P L R 1065.

¹ Baktavatsalu Naidu v. Emperor, (1907) 30 Mad 103=5 Cr L J 36=16 M L J 560 (F B).

enhancement of sentence if the aggregate period of imprisonment which the accused would have to undergo is to any extent less than the period of the original sentence; but where such an alteration of the sentence has the effect of rendering it in the circumstances of the case excessive and inappropriate, the interference in revision of a superior Court may be called for. In my opinion the Madras case is on all fours with this case. I accordingly remit the sentence of fine, and as the petitioner was released on bail after he had served about six weeks in jail, I do not propose to send him back. The sentence of imprisonment already undergone will be held sufficient in his case. The fine if paid will be refunded.

W.D./A.L.

*Sentence remitted.***A. I. R. 1937 Lahore 196 (1)**

ABDUL RASHID, J.

Mohammad Raja and others — Accused
— Petitioners.

v.

Emperor — Opposite Party.

Criminal Revn. No. 1064 of 1936,
Decided on 20th October 1936, from order
of Sess. Judge, Shahpur, D/- 4th May
1936.

Penal Code (1860), S. 430—For conviction
under S. 430, mischief within meaning of
S. 425 is essential — Accused not damaging
canal in any way but only continuing to take
water even after end of their turn — Offence
held not under S. 430.

In order to make S. 430 applicable, mischief,
within the meaning of S. 425, must be committed
by a person before he can be convicted under
S. 430. [P 196 C 2]

Where the accused did not damage the canal or
any of its banks or openings in any manner but
only continued to take water from the canal even
after the end of their turn :

Held : that there was no offence under S. 430.
The accused were liable to be dealt with only
under the provisions of the Canal Act.

[P 196 C 2]

Muhammad Amin—for Petitioners.

Order.—Nine persons, namely, Muham-
mad son of Raja, Ahmad, Chanan Ahmad-
yar Sher, son of Ditta, Muhammad, son of
Jiwan, Mohabbat Sher, son of Fateh Khan
and Sardara, were convicted under S. 430,
Penal Code, and were each awarded a
sentence of one day's imprisonment and a
fine of Rs. 50. Their appeal having been
dismissed by the learned Sessions Judge
they have preferred a petition for revision
to this Court.

The case for the prosecution is that an
order was issued by the Canal Authorities
allowing Narsingh Das (P. W. 1) to take
water from a canal at a certain point. The
Zilladar, two Patwaris and two employees
of Narsingh Das went to the spot. The
petitioners were asked to allow Narsingh
Das to take the turn of water, but they
refused to let the water be diverted from
their field. No violence seems to have
been used though the petitioners are
alleged to have come to the place of occur-
rence with lathis in their hands. The
petitioners also did not damage the canal
or any of its banks or openings in any
manner. The evidence has been recorded
by the Magistrate in Urdu, in Shakista
handwriting, and in spite of diligent efforts
made by myself, the counsel and the
reader, I have not been able to read the
greater part of it. The facts enumerated
above have been gleaned from the judg-
ments of the lower Courts.

It appears to me that the provisions of
S. 430 are inapplicable to the facts of the
present case. In order to make S. 430,
applicable, mischief, within the meaning
of S. 425, must be committed by a person
before he can be convicted under S. 430.
In the present case, the petitioners did not
cause destruction of any property, nor did
they cause any such change in property
which may destroy its value or utility. If
the petitioners continued to take water
after their turn had ended, they can be
dealt with under the provisions of the
Canal Act.

For the reason given above, I accept
this petition for revision and acquit the
petitioners. The fines, if paid, shall be
refunded.

S.C./D.S.

*Revision allowed.**** A. I. R. 1937 Lahore 196 (2)**

TEK CHAND, J.

Mt. Charjo and another—Petitioners.

v.

Dina Nath and others — Opposite
Parties.

Civil Revn. No. 390 of 1936, Decided on
18th November 1936, from order of Dist.
Judge, Sialkot, D/- 25th May 1936.

(a) Succession Act (1925), S. 372—Proceed-
ings for grant of certificate—It is unusual to
send notice to debtor or make him party—
But issue of such notice is no ground for
setting aside decision in such proceedings.

It is no doubt unusual to issue notices to the debtors of the deceased or implead them as parties to proceedings for grant of a succession certificate. But there is no legal bar to the Court doing so and the decision in such proceedings cannot be set aside on this ground alone.

[P 198 C 1]

(b) Succession Act (1925), S. 372 — Scope of enquiry — Court has not to determine definitely and finally as to who has best right to estate — It has merely to hold summary enquiry into right to certificate to facilitate collection of debts and for giving valid discharge—Grant of certificate does not give grantee absolute right to debt — Nor does it bar regular suit among heirs *inter se*.

The enquiry in proceedings for grant of succession certificate is to be summary, and the Court, without determining questions of law or fact, which seem to it to be too intricate and difficult for determination, should grant the certificate to the person who appears to have *prima facie* the best title thereto. In such cases the Court has not to determine definitely and finally as to who has the best right to the estate. All that it is required to do is to hold a summary enquiry into the right to the certificate, with a view, on the one hand, to facilitate the collection of debts due to the deceased and prevent their being time-barred, owing (for instance) to dispute between the heirs *inter se* as to their preferential right of succession, and, on the other hand, to afford protection to the debtors by appointing a representative of the deceased and authorizing him to give a valid discharge for the debt. The grant of a certificate to a person does not give him an absolute right to the debt nor does it bar a regular suit for adjustment of the claims of the heirs *inter se*. If necessary the Court can grant certificate conditional on the grantee furnishing security for indemnifying the person who may be ultimately held entitled to the whole or any part of the debt.

[P 198 C 2]

(c) Hindu Law — Marriage — Parties Brahmin residents of town — Presumption is of approved form.

Where the parties are Brahmins and residents of a town, in the absence of any evidence to the contrary, the marriage must be presumed to have been in one of the approved forms. [P 199 C 1]

(d) Hindu Law of Inheritance (Amendment) Act (1929), S. 1 (2) — Person dying intestate before 1929 leaving widow—Death of widow after coming into force of Act—Succession is governed by Act 2 of 1929.

The provisions of Act 2 of 1929 regulate succession to the estate of a Hindu male, governed by the law of the Mitakshara, who had died before the Act came into force but whose estate had vested in a female holder who was alive on 21st February 1929 which is the date of the enforcement of the Act : *A I R 1932 Lah 361* and *A I R 1936 Lah 124, Foll.*

[P 199 C 2]

* (e) Hindu Law of Inheritance (Amendment) Act (1929), S. 2—Husband succeeding to stridhana of wife—Succession to such property is subsequently governed by law applicable to property of husband — Succession opening out after Act 2 of 1929 — Act applies

It is quite true that Act 2 of 1929 is very limited in its scope. It, in terms, regulates succession only to the separate property of a Hindu male dying in intestacy. It does not purport to alter the law in respect of the property of a female. But where a husband succeeds to his wife's stridhana property, and if he is dead, it descends in the same way as if it had belonged to the husband himself; and to ascertain as to who the heirs of the husband are, the Court must *ex necessitate rei*, refer to the law governing succession to the property of the husband in force at the time when succession opens out. If at such time Act 2 of 1929 has come into force, it is that Act which governs succession and the property cannot be deemed to be property of a female : *A I R 1929 Oudh 296, Disting.*

[P 199 C 2 ; P 200 C 1]

M. L. Puri—for Petitioners.

Amir Chand and Achhru Ram — for Opposite Parties.

Order. — The following pedigree-table will be helpful in understanding the facts of the case :

(W. 1) = NAWAHU = (W. 2) Mt. Melo

Thakar (son)	Labha (son)=
	Mt. Partap Kaur
Mt. Charjo	(wife)
(daughter)	

Nawahu was a Brahmin of Sialkot City, admittedly governed by the Mitakshara. He died many years ago. He had married twice, and had a son, Thakar, from his first wife, and another son, Labha, from the second wife, Mt. Melo. Nawahu's first wife and his two sons Thakar and Labha are dead. Thakar left a daughter, Mt. Charjo. Labha died childless, leaving a widow, Mt. Partap Kaur. Mt. Melo, the surviving widow of Nawahu, died on 1st January 1935. At the time of her death a sum of Rs. 2,545 was shown in her *bahi* as due to her by Amir Chand, respondent. After Mt. Melo's death, her daughter-in-law, Mt. Partap Kaur, and her step-son's daughter, Mt. Charjo, claiming to be her heirs, jointly brought a suit against Amir Chand for recovery of Rs. 3,200 made up of Rs. 2,545 principal and Rs. 655 interest. The defendant Amir Chand objected that the suit was not maintainable in the absence of a succession certificate. The Sub-Judge, in whose Court the suit was pending, granted time to the plaintiffs to obtain a succession certificate and postponed further proceedings. In accordance with this order Mt. Charjo and Mt. Partap Kaur jointly made an application under S. 372, Succession Act, in the Court of the Senior Sub-Judge, Sialkot, for grant of a succession certificate for realization of the

debt due by Amir Chand to Mt. Melo. In the application it was stated that Dina Nath and Narinjan Das were the collaterals of the husband of Mt. Melo, deceased, and that notices be served on them. At the hearing Dina Nath and Narinjan Das appeared and filed a written statement admitting their relationship with Nawahu and stating that they did not contest the claim of the applicants (Mt. Charjo and Mt. Partap Kaur) to obtain the succession certificate which might be granted to them. In the meantime Amir Chand, the alleged debtor, had applied that he be made a party to these proceedings. The Senior Sub-Judge granted the application. Thereupon Amir Chand raised an objection that under Hindu law, which admittedly governed succession to the estate of Mt. Melo, neither Mt. Charjo nor Mt. Partap Kaur was her heir and that the certificate could not be granted to either or both of them. The Senior Sub-Judge upheld this plea and dismissed the application.

The applicants appealed to the District Judge, who has affirmed the order of dismissal, though on grounds different from those given by the Sub-Judge. Mt. Charjo and Mt. Partap Kaur have come up in revision to this Court, and the first contention raised on their behalf is that the learned Sub-Judge acted illegally and with material irregularity in making Amir Chand a party to the proceedings, and that, in any case, on the admission of Dina Nath and Narinjan Das, who being collaterals of Mt. Melo's husband were the only other heirs, the petitioners were the persons having *prima facie* the best title to the certificate, which should have been granted to them. After hearing counsel at length, I am not prepared to accept the first branch of this contention as sound. It is no doubt unusual to issue notices to the debtors of the deceased or implead them as parties to proceedings for grant of a succession certificate. But there is no legal bar to the Court doing so, and I cannot see how the decision of the Courts below could be set aside on this ground alone.

The second branch of the contention however appears to be more substantial. As already stated, the only surviving members of the family of the deceased were the two applicants, and the only two agnatic relations of her husband were Dina Nath and Narinjan Das. It is obvious that one or other of these four

persons had the right to the certificate. There was, however, no dispute *inter se* between them. They were all agreed that the certificate be granted to the applicants. The learned Judge appears to have thought that the certificate could not be granted to the applicants, as neither of them was an heir to the estate of Mt. Melo; and that it could not be granted to Dina Nath and Narinjan Das apparently for the reason that they had not asked for it. He accordingly dismissed the application, after expressing the opinion that the estate had probably escheated to the Crown.

Now, if this is the correct view, there seems little doubt that by the time the Secretary of State takes steps to sue for recovery of the amount, the claim against the debtor would have long since become time-barred. It is hardly necessary to say that it is to guard against such contingencies that the legislature has laid down that the enquiry in such proceedings is to be summary, and the Court, without determining questions of law or fact, which seem to it to be too intricate and difficult for determination, should grant the certificate to the person who appears to have *prima facie* the best title thereto. In such cases the Court has not to determine definitely and finally as to who has the best right to the estate. All that it is required to do is to hold a summary enquiry into the right to the certificate, with a view, on the one hand, to facilitate the collection of debts due to the deceased and prevent their being time-barred, owing (for instance) to dispute between the heirs *inter se* as to their preferential right of succession, and, on the other hand to afford protection to the debtors by appointing a representative of the deceased and authorizing him to give a valid discharge for the debt. The grant of a certificate to a person does not give him an absolute right to the debt nor does it bar a regular suit for adjustment of the claims of the heirs *inter se*. Their rights are amply protected by the statutory provision that in appropriate cases the Court, as a condition precedent to the grant of the certificate, may require the person to whom it proposes to make the grant, to furnish security for indemnifying the person who may be ultimately held entitled to the whole or any part of the debt. In these circumstances, the proper course for the Court was to grant the certificate to one

or other, or (under certain safeguards) to both the applicants jointly, conditional on their furnishing security and leaving the question of succession for subsequent determination in a regular suit by the collaterals or the Crown. The lower Courts appear to have completely ignored this essential aspect of the case, and this material irregularity is sufficient to justify a reversal of the order dismissing the application.

It is not necessary to consider the relative rights of the two applicants, as Mr. M. L. Puri, their learned advocate, stated that he does not press the claim of Mt. Partap Kaur for the grant of the certificate, reserving to her the right to adjust her claims with Mt. Charjo in a separate case if necessary. He argues, however, that Mt. Charjo was the next heir to the estate of the deceased and he strenuously urges that the certificate be granted to her. This prayer is strenuously opposed by Mr. Achhru Ram, counsel for the contesting respondent Amir Chand. It is conceded by Mr. Puri that the debt in question must be considered to be the absolute property of Mt. Melo, and the question for determination is whether Mt. Charjo was an heir to her stridhana at the time of her death. Now it is common ground between the parties that Mt. Melo left her surviving no descendants, male or female. According to the Mitakshara, stridhana (other than sulka) belonging to a female (if she was married in one of the approved forms) passes, in the absence of her issue, to her husband, and after him to his heirs in order of their succession to him; and on failure of the husband's heirs it goes to her blood relations in preference to the Crown: Mulla's Hindu Law, para. 147. It is conceded by both counsel that the parties being Brahmins, residents of a town, the marriage of Mt. Melo with Nawahu must, in the absence of any evidence to the contrary, be presumed to have been in one of the approved forms. The short question for decision, therefore, is, "who would have taken the property if it had belonged to Nawahu?" There is no doubt that under the Hindu law of the Benares School, as interpreted by British Indian Courts before 1929, a son's daughter was not in the line of heirs. The text of the Mitakshara, enumerating the female heirs of a male, was held to be exhaustive and not illustrative and therefore such near relations as son's daughter,

sister, etc., who were not expressly mentioned in the text, were held to be excluded from succession. In 1929, however, the legislature intervened, and by Act 2 of 1929 several important modifications were made in the Hindu law of succession with respect to the property of males not held in co-parcenary and not disposed of by will. By S. 2 certain persons, who were not in the original line of heirs, were recognized as such, and the first of them is the son's daughter, who ranks after the father's father. If, therefore, Nawahu had died intestate after 1929, his son's daughter, Mt. Charjo, would have been in the line of his heirs. The fact that he had died long before 1929 is, however, immaterial, as he had left a widow, Mt. Melo, who had succeeded to his estate and she died on 1st January 1935, when the Act was in force.

It is settled law that the provisions of Act 2 of 1929 regulated succession to the estate of a Hindu male, governed by the law of the Mitakshara, who had died before the Act came into force, but whose estate had vested in a female holder, who was alive on 21st February 1929, which is the date of the enforcement of the Act: 13 Lah 178¹ and 17 Lah 356.² Mr. Achhru Ram has not contested this proposition and has conceded that if the debt in question had been proved to have been owned by Nawahu in his lifetime, Mt. Charjo's right to inherit it would have been unquestioned. He urges, however, that Act 2 of 1929 is inapplicable to the present case as it applies "only to the property of males not held in co-parcenary and not disposed of by will," and it had been found as a fact, and is indeed no longer denied, that the debt in dispute was never held by a male but was the acquired and absolute property of Mt. Melo. This contention is obviously devoid of force. It is quite true that the Act is very limited in its scope. It, in terms, regulates succession only to the separate property of a Hindu male dying in intestacy. It does not purport to alter the law in respect of the devolution of other property of a Hindu male or the property of a female. But in referring to the Act for the purpose of deciding the question involved in this case, we are not going beyond its proper scope. As already

1. Shib Das v. Nand Lal, A I R 1932 Lah 361=138 I C 291=13 Lah 178=33 P L R 423.

2. Shakuntala Debi v. Kaushalya Devi, A I R 1936 Lah 124=162 I C 718=17 Lah 356=38 P L R 673.

stated, the rule of succession to stridhana, as laid down in Mitakshara is that, in the absence of the issue of the female holder, it devolves on her husband, and if he is dead, it descends in the same way as if it had belonged to the husband himself. To ascertain as to who the heirs of the husband are we must, *ex necessitate rei* refer to the law governing succession to the property of the husband in force at the time when succession opened out. In the present case, therefore, the heir to Mt. Melo's property is the person, who would have inherited it, if it had been Nawahu's property, in 1935, and this as shown above is his son's daughter Mt. Charjo.

In coming to the contrary decision the learned District Judge has relied upon A I R 1929 Oudh 296.³ That case was, however, decided long before Act 2 of 1929 came into force and no question of the interpretation of its terms arose. Further, there an attempt was made to extend a certain custom, found to exist in the matter of succession of the property of a male owner, to inheritance to the property of a female, but the learned Judge ruled that this could not be done, as it was not permissible to find custom by analogy. Mr. Achhru Ram frankly conceded that the case is clearly distinguishable and it does not seem to be necessary to discuss it further. I accept the petition for revision and in supersession of the order of the Courts below, direct the Senior Sub-Judge to grant Mt. Charjo a succession certificate to collect the debt mentioned in the application. Amir Chand, respondent, shall pay to Mt. Charjo her costs throughout. The application of Mt. Partap Kaur is dismissed. She will bear her own costs in all Courts.

K.S./R.K.

Petition accepted.

3. Raj Bachan Singh v. Bhanwar Lalji, A I R 1929 Oudh 296=118 I C 760=4 Luck 690=6 O W N 287.

A. I. R. 1937 Lahore 200

TEK CHAND, J.

Balwant Singh — Decree-holder —
Petitioner.

v.

Jagdish Saran—Opposite Party.

Civil Revn. No. 216 of 1936, Decided on 29th May 1936, from order of Senior Sub-Judge, Delhi, D/- 2nd December 1935.

Civil P. C. (1908), S. 60 (1) (c)—Exemption of house from attachment—Bona fide occupation for agricultural purposes must be proved.

In order to claim exemption from attachment or sale under S. 60 (1) (c) it is not sufficient merely to show that the house in question belonged to an agriculturist, or was being lived in by him, but it must be established further that it was being used or occupied bona fide for purposes of agriculture: A I R 1930 Lah 1034 and A I R 1933 Rang 227 (F B), Rel. on; A I R 1934 Lah 680, Dissent. [P 201 C 1]

Bishan Narain—for Petitioner.

Harbhajan Das—for Opposite Party.

Order.— The petitioner obtained a money decree against the respondent from the Small Cause Court, Meerut, and got it transferred for execution at Delhi. In execution, a house belonging to the judgment-debtor situate at Shahdara, Delhi Province, was attached. The judgment-debtor objected that he was an agriculturist and occupied the house for agricultural purposes and therefore it was exempt from attachment under S. 60 (c), Civil P. C. The executing Court accepted the objection and ordered the release of the house from attachment. The decree-holder appealed to the Senior Sub-Judge who affirmed the decision of the executing Court.

In dismissing the appeal, the learned Senior Sub-Judge relied upon a Single Bench ruling of Abdul Qadir, J. reported in A I R 1934 Lah 680¹ in preference to another Single Bench decision of Jai Lal, J. in A I R 1927 Lah 66.² Following the former ruling, the Senior Sub-Judge held that it was not necessary for the judgment-debtor to prove that the house was used or occupied bona fide for purposes of agriculture, and that all that was necessary for him to prove was either that it was lived in, or that it was used for agricultural purposes by the judgment-debtor. Before me, counsel for the respondent has admitted that the interpretation of the law in A I R 1934 Lah 680¹ is not correct. It appears that the attention of the learned Judge of the Court below was not drawn to a Division Bench ruling of this Court reported in 12 Lah 367,³ where it was held that in order to

1. Jagat Singh v. Phuman Singh, A I R 1934 Lah 680=149 I C 428=35 P L R 509.

2. Ralia Ram v. Hayat Bibi, A I R 1927 Lah 66=98 I C 857.

3. Mirza v. Zanda Ram, A I R 1930 Lah 1034=130 I C 419=31 P L R 842=12 Lah 367.

claim exemption from attachment or sale under S. 60 (1) (c) it is not sufficient merely to show that the house in question belonged to an agriculturist, or was being lived in by him, but it must be established further that it was being used or occupied bona fide for purposes of agriculture. This ruling has been followed in several cases of this Court. A Full Bench of the Rangoon High Court also, has held in 11 Rang 372⁴ that the exemption from attachment under prov. (c), S. 60 is of a house occupied by an agriculturist, and this means a house dwelt in or occupied by an agriculturist as such and in good faith for the purpose of agriculture. It does not include other houses, belonging to and occupied by an agriculturist, otherwise than in connexion with his calling. There are various rulings of the other High Courts in which the same interpretation has been adopted. In the Punjab, of course, the law has since been amended by (Punjab) Act 7 of 1934, but the property in question is situate within the province of Delhi, and that Act has not been extended there. It is clear therefore that the learned Senior Sub-Judge misdirected himself as to the law and did not consider the evidence from a proper standpoint. Consequently his conclusion cannot be upheld. I accept the revision, set aside the judgment of the learned Senior Sub-Judge and remand the case to him for re-hearing and disposal in accordance with law. Costs shall abide the event.

R.W./K.S. *Revision accepted.*

4. Bank of Chettinad v. Ko San Ok, A I R 1933 Rang 227=145 I C 326=11 Rang 372 (F B).

A. I. R. 1937 Lahore 201

JAI LAL, J.

Municipal Committee, Lahore—Defendant—Appellant.

Mrs. Chaudhri Fazal Ilahi—Plaintiff—Respondent.

Second Appeal No. 424 of 1936, Decided on 13th October 1936, from order of Addl. Dist. Judge, Lahore, D/- 4th December 1935.

Punjab Municipal Act (3 of 1911), Ss. 195 and 232—Person erecting good portion of building with and during sanction by Municipality—Sanction subsequently suspended by Deputy Commissioner under S. 232—Municipality cannot under S. 195 order

demolishing of building erected during sanction.

There is no provision under S. 195 to enable the Committee to issue a notice to alter or demolish a building which has been sanctioned by it and which has been constructed in conformity with such sanction and during the existence of the sanction. Even in respect of a building which has been deemed to have been sanctioned by it, the powers of the Committee are limited as indicated in the sanction. [P 203 C 1, 2; P 204 C 1]

So if a person relying on the sanction of the Municipality builds a good portion of the building before such sanction is cancelled by the Deputy Commissioner, the Municipality cannot order under S. 195 to demolish the building.

[P 204 C 1]

Chuni Lal Vohra—for Appellant.

Malak Mohammad Hussain—for Respondent.

Judgment.—This appeal is by the Municipal Committee of Lahore against a decree of the Additional District Judge, Lahore. The facts are these: The respondent, Mrs. Chaudhri Fazal Ilahi, made an application under S. 189, Punjab Municipal Act, to the Municipal Committee, Lahore, for sanction to build on a site which abuts the Davis Road, Lahore. The erection of the building was sanctioned by the Municipal Committee by its resolution under S. 193 of the Act. In pursuance of this resolution she commenced to erect the building and it appears that she constructed a good portion of the sanctioned building. Subsequently however the Deputy Commissioner, acting under S. 232 of the Act, suspended the sanction on the ground that it contravened a scheme sanctioned by the Commissioner under S. 192, Punjab Municipal Act. This action of the Deputy Commissioner was confirmed by the Commissioner and there is no contention and doubt that the orders of both the Commissioner and the Deputy Commissioner are valid. It is admitted that when this order of the Commissioner was served on the respondent, she immediately stopped further building.

A notice under S. 195, Punjab Municipal Act, was then served upon her by the Municipal Committee requiring her to demolish the building which she had erected before receipt of the orders of the Deputy Commissioner and the Commissioner suspending the sanction, and as she did not comply with this notice, a notice under S. 220 of the Act was served upon her by the Municipal Committee intimating to her that the Committee would demolish the building itself. Thereupon

the suit out of which this second appeal has arisen was instituted by the respondent against the Municipal Committee of Lahore for an injunction restraining the Committee from demolishing the building which she had already erected and restraining the Committee from preventing her from completing the building, on the grounds that the orders of the Deputy Commissioner and the Commissioner were illegal; with regard to the prayer for injunction preventing the Committee from demolishing the building already erected by the respondent, further ground was taken by her that the notice to demolish such building was ultra vires as it was not authorized by any provision of the Punjab Municipal Act. The trial Court refused injunction so far as the prayer to prevent the Municipal Committee from prohibiting the plaintiff from completing the building was concerned and the suit was dismissed pro tanto on the ground that the orders of the Deputy Commissioner and the Commissioner were legal and were binding both on the Committee and the plaintiff. The suit was however decreed so far as the prayer to restrain the Committee from demolishing the existing building was concerned. From this decree both parties appealed to the Additional District Judge of Lahore but both the appeals were dismissed.

Consequently the Municipal Committee has presented this second appeal and it is contended on its behalf that the notice issued by the Municipal Committee under S. 195 directing the respondent to demolish the building which she had erected under the sanction of the Municipal Committee, which however was subsequently suspended, was a perfectly legal notice. It is not claimed before me that the Committee had power to have the building demolished under any other provisions of the Municipal Act or that any notice under any such provisions of the Act was served upon the respondent. The only question that I have therefore to decide in this appeal is whether the Municipal Committee was competent under S. 195, Municipal Act, to call upon the respondent to demolish the building which she had already erected before the sanction of the Committee was suspended. S. 195 is as follows:

Should a building be begun, erected or re-erected
(a) without sanction as required by S. 189 (1);
(b) without notice as required by S. 189 (2) or

(c) when sanction has been refused, the committee/executive officer may by notice deliver to the owner within six months from the completion of the building require the building to be altered or demolished as it/he may deem necessary within the period specified in such notice.

Now, it is not claimed on behalf of the Committee that its notice was given under this provision of the section nor do the circumstances mentioned in the section as read by me exist in this case. But the section continues as follows:

Should it be begun or erected (d) in contravention of the terms of any sanction granted, or (e) when the sanction has lapsed; or (f) in contravention of any bye-law made under S. 190; or in the case of a building of which the erection has been deemed to be sanctioned under S. 193 (4), if it contravenes any bye-law or any scheme sanctioned under S. 192; the committee/executive officer may by notice, to be delivered to the owner within six months from the completion of the building, require the building to be altered in such manner as it/he may deem necessary, within the period specified in such notice:

Provided that the Committee may instead of requiring the alteration or demolition of any such building, accept by way of compensation, such sum as it may deem reasonable;

Provided also that the Committee shall require a building to be demolished or altered so far as is necessary to avoid contravention of a building scheme drawn up under S. 192.

The learned counsel for the appellant relies upon the last-mentioned proviso. His argument seems to be that this proviso confers upon the Municipal Committee, independently of the other provisions of S. 195, an absolute power to have a building demolished or altered so far as it may contravene a building scheme sanctioned under S. 192. But this proviso must, in my opinion, be read with the remaining part of the section which confers on the Committee power to issue a notice to require a building to be altered if it contravenes the terms of any sanction granted or if it is constructed when the sanction has been lapsed or if it is in contravention of any bye-law made under S. 190; or, in the case of a building which has been deemed to be sanctioned under S. 193 (4), if it contravenes any bye-law or any scheme sanctioned under S. 192. It is not claimed before me that the building is in contravention of any bye-law made under S. 190. The only contention of the Municipal Committee is that the building contravenes a scheme sanctioned under S. 192. Therefore under the main part of the section the Municipal Committee is entitled to require the demolition of the building if it contravenes the scheme under S. 192 only if the building is deemed to

have been sanctioned under S. 193 (4). There is no provision under S. 195 to enable the Committee to issue a notice to alter or demolish a building which has been sanctioned by it and which has been constructed in conformity with such sanction and during the existence of the sanction. The proviso referred to therefore only means this: that whereas in the other cases mentioned in Cls. (d), (e) and (f) of S. 195, the Committee may require the building to be altered or as an alternative to the alteration of the building may accept compensation, in the case of a building which has been deemed to be sanctioned under S. 193 (4) the Committee must order it to be demolished or altered so as to avoid contravention of a building scheme sanctioned under S. 192. In such a case no option is left to the Committee to accept compensation and an additional power is conferred on it to direct the demolition of the building and not merely alteration thereof. In my opinion therefore the proviso does not help the appellant as it exists. Reference may at this stage be made to what is meant by the expression "has been deemed to be sanctioned under S. 193 (4)." In order to understand this it is necessary to go back to S. 189. That section provides that:

No person shall erect or re-erect or commence to erect or re erect any building without the sanction of the Municipal Committee,

and further provides the manner in which the sanction of the Municipal Committee has to be applied for. S. 190 empowers a Municipal Committee to make bye-laws as to the mode of construction of buildings and S. 191 empowers a Municipal Committee to ask applicants for erection or re-erection to give information required by the Committee as specified in that section in cases where no bye-laws have been framed by the Committee. S. 192 empowers the Committee, if it is required by the Commissioner, to draw up a building scheme for built areas, and a town planning scheme for unbuilt areas; it is claimed by the Committee that the scheme which has been contravened was sanctioned under this section and this is a matter on which the parties are at issue before me. S. 192 (A) provides punishment for use of a building erected or re-erected so as to contravene the scheme, and the punishment provided for is fine subject to limitations mentioned in that section which it is not necessary to state

here. S. 193 empowers the Committee to sanction or to refuse to sanction an application made under S. 189 to erect or to re-erect a building subject to such conditions and modifications as the Committee may deem fit. But sub-s. 4 of that section provides:

Notwithstanding anything contained in sub-s. (1) or sub-s. (2) but subject to the provisions of sub-s. (2), S. 190, if the Committee or Executive Officer neglects or omits, within 60 days of the receipt from any person of a valid notice of such person's intention to erect or re-erect a building, or within 120 days, if the notice relates to a building on the same or part of the same site, on which sanction for the erection of a building has been refused within the previous 12 months, to pass orders sanctioning or refusing to sanction such erection or re erection, such erection or re erection shall, unless the land on which it is proposed to erect or re-erect such buildings belongs to or vests in the Committee, be deemed to have been sanctioned, except in so far as it may contravene any bye-law, or any building or town-planning scheme sanctioned under S. 192.

This land is not claimed to belong or to vest in the Committee. But this proviso does not apply to the present case because sanction was expressly granted by the Committee to the respondent and S. 195, Cl. (f) empowers a Committee to issue a notice to alter only a building of which erection has been deemed to be sanctioned under S. 193, if it contravenes any bye-law or any scheme sanctioned under S. 192. It may incidentally be remarked that the two sections appear to contradict each other because according to S. 193 (1) an application to build which contravenes any bye-law, or any building or town-planning scheme sanctioned under S. 192, can never be deemed to have been sanctioned; still Cl. (f), S. 195 empowers a Committee to issue notice in the case of a building of which the erection has been deemed to be sanctioned under S. 193 (4) if it contravenes any bye-law or any scheme sanctioned under S. 192. This is the only provision of S. 195 which empowers a Committee to require the alteration or demolition of a building which it has indirectly sanctioned, that is to say, which has been deemed to be sanctioned under S. 193 (4). In order to enable the Committee to succeed in this case it is necessary for it to show that it has statutory power to issue the notice which it has issued to the respondent, but no provision of the law except S. 195 has been relied upon. In my opinion that section does not help the Committee because it does not empower it to require the demoli-

tion or alteration of a building which it has expressly sanctioned and even in respect of a building which has been deemed to have been sanctioned by it, the powers of the Committee are limited as indicated in the section.

This building, as I have already shown, was sanctioned by the Municipal Committee and it was erected when that sanction was still in force. Under S. 232, the Commissioner or Deputy Commissioner, may, by order in writing, suspend the execution of any resolution or order of a Committee or joint Committee, or prohibit the doing of any act which is about to be done, or is being done in pursuance of or under cover of this Act, or in pursuance of any sanction or permission granted by the Committee in the exercise of its powers under the Act. Now, in the first instance, no order of prohibition is claimed to have been issued by the Commissioner or the Deputy Commissioner to the respondent, but such an order of prohibition could not be issued with regard to the acts which have already been done. It could only relate to future acts and it is admitted before me that after the order of the Deputy Commissioner or the Commissioner was notified to the respondent, the building operations were immediately stopped. Therefore the present structure that exists on the spot had been constructed before the order of the Deputy Commissioner or the Commissioner was served upon the respondent. The position may be unfortunate, but the remedy is in the hands of the Legislature. As the law exists it does not empower the Committee to secure the demolition of a building as in this case. On the other hand, there is this consideration that if a person relying upon sanction granted by the Committee bona fide spends money on erection of a building before such sanction is cancelled by the higher authority, it does not seem fair to make him suffer by ordering the demolition of the building unless compensation is paid to him. To the grounds therefore on which the learned Additional District Judge confirmed the decree of the trial Judge issuing injunction to the Municipal Committee, there can be no valid or legal objection.

Another objection was raised by the respondent's counsel before me but at a late stage of the arguments, in fact when I was dictating this judgment. He pointed out that in fact no scheme under S. 192,

Punjab Municipal Act, has been sanctioned which has been contravened by the sanction granted by the Municipal Committee. This however is not a ground on which the judgments of the Courts below are based and therefore I have refrained from giving any finding on this contention of the respondent's counsel. I have also refrained from deciding whether the notice under S. 195 was properly served upon the respondent because the learned Additional District Judge has not decided that question either, and, in my opinion, in view of what I have held on the main contention of the appellant, it is not necessary to give a finding on this question also. I dismiss this appeal with costs.

S.C./D.S.

Appeal dismissed.

* A. I. R. 1937 Lahore 204

ADDISON AND ABDUL RASHID, JJ.

Des Raj—Decree-holder—Appellant.

v.

Fazal Karim — Judgment-debtor — Respondent.

Letters Patent Appeal No. 32 of 1936, Decided on 20th April 1936, from judgment of Agha Haidar, J., D/- 16th January 1936, reported in *A I R 1936 Lah 388*.

(a) Civil P. C. (1908), S. 151 — Court failing to pass personal decree under O. 34, R. 6 through oversight — Court can correct mistake.

On an application under O. 34, R. 6, Civil P. C., for personal decree, the judgment-debtor raised an objection that the application was barred. The Court dismissed the objection but failed to pass a personal decree as prayed. The decree-holder applied under S. 151 to get the mistake corrected:

Held: that the Court had power to correct the mistake and it should do so because there was no fault of the decree-holder. [P 205 O 2]

* (b) *Res judicata*—Words in Expl. 5, S. 11, Civil P. C., are 'relief claimed in plaint'—Relief of personal decree claimed in application under O. 34, R. 6—Court failing to pass personal decree—Fresh application for personal decree not barred by S. 11, Expl. 5: 38 P L R 700=*A I R 1936 Lah 388*=163 I C 119, *Reversed*.

In an original plaint personal relief was claimed and the usual preliminary decree was made, giving the plaintiff liberty to apply for a personal decree if the sale proceeds of the property were not sufficient to meet the decree. It so turned out that they were insufficient and he then put in an application under O. 34, R. 6, asking for a personal decree. While disposing of this application filed under O. 34, R. 6, the Court failed to pass the personal decree as prayed. On this the decree-holder again applied to Court for passing the

personal decree. The judgment-debtor contended that as in the previous application the relief of a personal decree was not granted it should be taken to have been refused, and as such under the provisions of S. 11, Expl. 5, Civil P. C., the present application was barred:

Held: that in S. 11, Expl. 5 the words are 'relief claimed in plaint' and not 'in an application,' so the second application was not barred by res judicata: 38 P L R 700=A I R 1936 Lah 388=163 I C 119, Reversed. [P 206 C 1]

Mehr Chand Mahajan and Ratan Lal Chawla—for Appellant.

Niaz Ali—for Respondent.

Addison, J.—Fazal Karim mortgaged certain property in favour of Des Raj by deed, dated 15th March 1922, for Rs. 2,000. He brought a suit on his mortgage on 27th August 1930 and obtained the usual preliminary decree on 5th December 1931. This decree was made final on 21st December 1931. The mortgage property was then sold on 4th July 1932, the sale being confirmed on 13th August 1932. After the sale, Rs. 5,458 remained outstanding. Accordingly on 13th August 1932 the decree-holder put in the usual application under O. 34, R. 6, Civil P. C., for a personal decree. The only defence raised by the judgment-debtor was that the personal liability was time-barred. By order, dated 23rd March 1933, the Subordinate Judge overruled the objection regarding limitation. Having done so he went on to say that the decree-holder stated that he would apply for execution again and he accordingly consigned the record to the record room but without actually passing a personal decree or drawing up a decree sheet making the judgment-debtor personally liable.

The judgment-debtor, Fazal Karim, took this decision on appeal to this Court: see C. A. No. 997 of 1933.¹ The Judge who heard this appeal pointed out that the only defence raised, namely, the question of limitation, had been decided against Fazal Karim, but that the trial Judge did not go on to make an order to the effect that a personal decree should be passed, nor did he draw up any decree sheet. He, therefore, held that in these circumstances there could be no appeal against a mere judgment, but he added that if and when a decree was passed, an appeal might be open to Fazal Karim. As no decree had been passed he dismissed his appeal.

Thereupon the decree-holder Des Raj put in an application under S. 151, Civil P. C., on 23rd July 1934, to the Court asking that the words might be added that a personal decree was passed and a decree sheet should be drawn up. While this application was still pending, he put in another application under O. 34, R. 6, Civil P. C., on 2nd March 1935, for a personal decree, and it might be here noted that this application would be within time. The Judge dismissed both applications holding that he could not alter the order of his predecessor under S. 151, Civil P. C., and that the second application could not proceed, being barred by the rule of res judicata. Against this decision Des Raj appealed and his appeal was dismissed. Des Raj then put in this appeal under the Letters Patent.

It is obvious that what happened on 23rd March 1933 was that the only defence raised by Fazal Karim to the grant of a personal decree to Des Raj was repelled and the Judge then forgot to pass a personal decree or overlooked doing so. The decree-holder apparently thought this order had been passed and stated to the Judge that he did not wish to execute the decree then and there but would bring a fresh application to do so later. Even the judgment-debtor Fazal Karim seems to have been under the impression that a personal decree had been passed against him and he appealed to this Court attacking the order of the Sub-Judge. The result of this appeal has already been noted. It was then that the decree-holder came to know that the personal decree had not by oversight been passed and he then applied that that should be done and a little later by way of safeguard put in another application under O. 34, R. 6, Civil P. C., asking for a personal decree to be passed.

It seems to us that the Court had power to correct the mistake it had made and should have exercised it. There was no fault of the decree-holder. The matter had been tried and it had been decided rightly or wrongly that the personal remedy was not barred. We are, therefore, of opinion that the application under S. 151 should have been accepted and a formal personal decree passed, a decree sheet being drawn up at the same time. This would then have given the judgment-debtor the right to appeal to this Court against that order. Further, it is not at all clear that the second application under O. 34, R. 6, is

¹ 1. Fazal Karim v. Des Raj, C. A. No. 997 of 1933, decided on 7th March 1934.

barred by Expl. 5, S. 11, Civil P. C. Expl. 5 runs as follows :

Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

In the original plaint personal relief was claimed and the usual preliminary decree was made, giving the plaintiff liberty to apply for a personal decree if the sale proceeds of the property were not sufficient to meet the decree. It so turned out that they were insufficient and he then put in an application under O. 34, R. 6, asking for a personal decree. It was this application which was disposed of by the Court and not a plaint; and the word 'plaint' only is used in Expl. 5, which thus does not apply in terms. In the present case, however, we think the best course is to direct the trial Court to add words, accidentally missed out in its order, dated 23rd March 1933, to the effect that a personal decree for so much is granted to the plaintiff. A decree sheet should also be drawn up. When this is done in the presence of the parties, the judgment-debtor Fuzul Karim will have the right to appeal to this Court against the finding that the personal remedy was not barred. The decree sheet should bear the date on which it is drawn up by the Court. We accept the appeal in the terms given above and remit the matter to the Court concerned to carry out the order. The parties will bear their own costs of these proceedings up-to-date.

B.D./R.K.

Appeal allowed.

A. I. R. 1937 Lahore 206

COLDSTREAM, J.

Regal Theatres, Ltd. — Defendant—Appellant.

v.

S. Gurcharan Singh — Plaintiff and others—Respondents.

First Appeal No. 179 of 1936, Decided on 1st July 1936, from order of Senior Sub.Judge, Lahore, D/- 3rd December 1934.

(a) Arbitration Act (1899), S. 19 — Order refusing stay — Only revision and not appeal is competent (*Obiter*).

Obiter. — From an order refusing stay under Section 19, Arbitration Act, no appeal lies; only revision is competent : *A I R 1931 Lah 644, Rel. on.* [P 207 C 2]

(b) Civil P. C. (1908), Sch. 2, Para. 18 — Stay of suit — Discretion must be exercised on consideration of sufficient reasons.

Although a Court has a discretion to stay or to refuse to stay a suit under para. 18, Sch. 2, Civil P. C., it is its duty to act upon the agreement to refer to arbitration unless it sees sufficient reason why the dispute should not be referred.

[P 207 C 2; P 208 C 1]

Where the lower Court holding that there was no valid admission and that there was no contract regarding arbitration between the parties and in its discretionary power did not stay the suit :

Held : that it could not be said that the lower Court exercised its discretion in an unjudicial manner or capriciously. [P 203 C 1]

Mehr Chand Mahajan and Daulat Ram—for Appellant.

Nawal Kishore and Bhagwat Dayal—for Respondents.

Judgment. — The respondent in this case, Gurcharan Singh, contracted on 14th September 1932 with E. P. Kanga and R. A. Boga, the petitioners, as promoters of Regal Theatres, Lahore, to build a cinema. On 23rd November 1932 these two gentlemen, describing themselves as promoters of the Regal Theatres Ltd. agreed with five others to promote a private limited company of eight shareholders and resolved to take over the contract entered into by Kanga and Boga. A company was formed, the Regal Theatres Ltd., and on 28th December 1932 Gurcharan Singh was informed that the company had adopted the contract "provisionally entered into between him and Messrs Kanga and Boga." It is not proved that Gurcharan Singh agreed to a fresh contract on all the terms of the original one. His letter of 31st December 1932, Ex. D-11 acknowledges a letter from the Regal Theatres Ltd. of the 28th December, but there was, it seems, another letter of that date and Gurcharan Singh's letter did not refer to the continuance of the terms of the contract. The cinema was constructed and the Regal Theatres Ltd. put in possession.

In July 1932 Gurcharan Singh submitted a bill for Rs. 24,358.2 0. In October 1932 the Regal Theatres Ltd. offered Rupees 13,882.2.0 and on 8th February 1934, Gurcharan Singh, instituted in the Court of the Senior Subordinate Judge, Lahore, a suit against the Regal Theatres Ltd., Messrs Kanga and Boga, personally, and two others, who were mortgagees, for recovery of Rs. 26,842.11.1 which sum included interest on the amount of the bill.

For the Regal Theatres Ltd. it was pleaded that the amount claimed was not payable for various reasons and an offer was made to pay Rs. 13,882.2.0. It was also prayed that the suit be stayed for a reference to arbitration in accordance with the provisions in Cl. 28 of the contract. The other defendants repudiated personal liability. Cl. 28 of the contract runs :

Provided always that if any dispute or difference arises between the employer or the architect on his behalf and the contractor during the continuance of this contract or after its determination by completion or breach or otherwise howsoever as to the rights or liabilities of the parties respectively or as to any matter or thing whatsoever arising under this contract or as to its construction, then the architect shall determine such dispute or difference by a written decision given to the contractor. Failing the acceptance of architect's decision by either party the matter will be referred to arbitration in the manner as hereinbefore provided. The said decision of the arbitrators or umpire shall be final and binding on the parties and they shall abide by this decision in every respect.

The previous provisions about arbitration were applicable in the event of the contractor not completing the work in time (Cl. 19) and of the employer (Kanga and Boga) not paying a sum due on a certificate given by the architect : Cl. 25. Cl. 25 apparently related only to certificates given during the progress of construction, for the clause provided that :

The owner shall not carry on with any further work through any other agency until such time as the contractor's claim has been assessed under arbitration and paid.

No reference to Cl. 25 was made in argument before me. The plaintiff Gurcharan Singh opposed the application for staying the suit on many grounds including the plea that there was no submission or agreement under S. 19, Arbitration Act, and that defendant was not ready and willing to do all things necessary to the proper conduct of the arbitration. It seems to have been understood by the parties and also by the Court that under S. 152, Companies Act, a company could proceed to arbitration only in accordance with the Indian Arbitration Act, a view for which there was some indirect support in the judgments of this Court. The learned Subordinate Judge held that there was no valid submission as required by S. 19, Arbitration Act, and that there was no contract regarding arbitration between the parties. He also held that there were sufficient reasons for not exercising his discretionary power to stay the suit. He

accordingly dismissed the application for stay. Against this decision the defendants have filed the present revision petition.

The correctness of the lower Court's decision, that there was no valid submission under S. 19, Arbitration Act, is not disputed before me. It is contended that as a fact the agreement to arbitrate was one to which para. 18, Sch. 2, Civil P. C., was applicable and I am asked to treat the petition as an appeal allowed by Section 104 (1) (e) of the Code, and to revise the lower Court's order on the ground that it was wrong in deciding that there was no contract between the parties to refer the dispute to arbitration and that the Subordinate Judge did not properly exercise his discretion under para. 18, Sch. 2.

Had the case been one of an agreement to refer to arbitration under the Arbitration Act and S. 19 of that Act been applicable, then the order of the lower Court could have been attacked only by way of petition for revision : *see* A I R 1931 Lah 644¹ as an appeal would not have been competent. Such a petition would not have had force, for the Subordinate Judge did not refuse to exercise his jurisdiction nor did he act with irregularity in the exercise of it. He had jurisdiction to decide whether the suit would be stayed or not and he exercised this jurisdiction. But in reality there is no question of the applicability of the Arbitration Act, for it is now settled by C. A. No. 1206 of 1935,² decided by a Full Bench of this Court on 10th June 1936 that S. 152, Companies Act, does not preclude a company from going to arbitration otherwise than in accordance with the provisions of the Arbitration Act. The case was therefore one which might have been dealt with under the provisions of Sch. 2, Civil P. C., and as S. 104 (1) (e) of the Code allows an appeal against an order refusing to stay a suit under para 18 Sch. 2, I propose to deal with this petition as if it were an appeal.

There is no doubt that although a Court has a discretion to stay or to refuse to stay a suit under para. 18, Sch. 2, it is its duty to act upon the agreement to refer to arbitration unless it sees sufficient reason

1. Punjab Marwari Chamber of Commerce Ltd., Delhi v Ram Mal Lilu Shah, A I R 1931 Lah 644=132 I C 850=13 Lah 59.

2. Balmukand v. Punjab National Bank, reported in A I R 1936 Lah 721=164 I C 393=17 Lah 722=39 P L R 35 (F B).

why the dispute should not be referred. In the present case the learned Subordinate Judge has considered the question and has refused to stay because all the defendants were clearly not parties to the contract regarding arbitration and the mode of realising the money found due to the plaintiff from the several parties would be different. In so deciding the lower Court cannot be said to have exercised its discretion in an unjudicial manner, or capriciously. Its reason is not a bad reason. Moreover before me the appellant's counsel states that his clients are not prepared to submit this matter to the arbitration of the architect in the first instance as provided in Cl. 28 of the contract. In the circumstances I am not prepared to interfere with the lower Court's decision and dismiss the petition regarding it as an appeal with costs. Considerable argument was addressed to me by counsel on the question whether the lower Court was right in holding that there was no contract between the present parties to refer the dispute to arbitration; but I do not think it necessary to deal with this argument here as the question may be a material one for the decision of the suit.

R.W./K.S.

Appeal dismissed.

A. I. R. 1937 Lahore 208

COLDSTREAM AND BRIDE, JJ.

Ibrahim and another—Appellants.

v.

Emperor — Opposite Party.

Criminal Appeal No. 805 of 1936, Decided on 5th November 1936, from order of Sess. Judge, Karnal Division, D/- 17th June 1936.

(a) Criminal Trial—Confession—Accused's extra-judicial confession is not admissible.

In a criminal trial, accused's extra-judicial confession to a Magistrate is not admissible in evidence and must therefore be wholly excluded: *A I R 1936 P C 253, Foll.* [P 210 C 2]

(b) Criminal Trial—Confession—Retracted and induced—Admissibility of.

A confession cannot be held inadmissible merely because it has been retracted or because of allegations as to its having been induced in the absence of evidence to support them: *A I R 1925 Lah 605, Ref.* [P 210 C 2]

*M. L. Sethi, M. Parkash Chandra and J. G. Sethi—*for Appellants.

*Dr. R. Sawhney—*for the Crown.

Coldstream, J.—On the morning of 2nd February 1936 the body of a boy about 15 to 17 years old was found in a sack near the Dhobiwala pond at Sonapat. The boy's throat had been cut. The body was identified as that of Rafik alias Phika by his mother Mt. Hafizan who at once accused Machhu (alias Ibrahim), a butcher of the town with whom the boy had been associating, as the murderer. The Assistant Sub-Inspector of Police who had gone to the spot when the discovery of the body was reported, proceeded towards Machhu's *baithak* in the town but before his party reached it, they met Machhu. On being questioned Machhu's demeanour was so suspicious that the Assistant Sub-Inspector arrested him forthwith. The door of Machhu's *baithak* was found chained from inside. It was opened by a boy Fakhr-ud-Din alias Fakhru (aged about 16 or 17) a distant relation of Machhu, who lived with Machhu. Fakhr-ud-Din's jacket and loin-cloth had stains of blood on them. Blood was also found on a heap of gram chaff in the *baithak* and on a board lying on the heap. A tassel which appeared to belong to the fez hat found with the corpse in the sack was also discovered. Fakhr-ud-Din was interrogated and pointed out a place in the *baithak* where the floor had been recently spread with earth and sand. Below this sand and earth the ground was blood stained. Machhu then dug up a bloodstained butcher's knife from below the heap of chaff. The Assistant Superintendent of Police had noticed the track of a bicycle leading from the metalled road to the place where the corpse was found. A bicycle was found in the *baithak*.

Examination of the corpse by an Assistant Surgeon showed that Rafik's throat had been cut across from ear to ear, and down to the spine. The wound was full of gram chaff. There were four other incised wounds on and near the neck and a number of cuts on the hands. In the Assistant Surgeon's opinion the injuries might have been inflicted at any time between about 2 p. m. on 31st January and the same time on the 2nd February. Machhu was also examined by the Assistant Surgeon who found small lacerations on his penis consistent with his having committed sodomy within a "day or so." Machhu and Fakhru were tried by the Sessions Judge of Rohtak for the murder of Rafik. Besides proving the facts I have

set forth above, the prosecution called evidence to prove that Machhu had on the 12th February dug up from a graveyard clothes belonging to him which were bloodstained, that Rafik's loincloth had remains of semen on it and that Fakhru had confessed his unwilling participation with Machhu in the murder of Rafik which he said was committed in the *baithak*. The confession had been duly recorded by a First Class Magistrate, P. W. 18. A tailor, Badr-ud-Din, P. W. 6, gave evidence that Machhu and Rafik used to associate at his shop and that Machhu had suspected Badr-ud-Din of intimacy with the boy and had threatened to kill him. Machhu had sent Badr-ud-Din a warning message through Siti, P. W. 17, to keep away from Rafik. Hafizan, P. W. 8, Rafik's mother, deposed that a fortnight before her son was killed he had spent the night away from his home and had returned with the marks of a bite on his cheek. On being questioned Rafik had accused Machhu of sodomy. Jan Mohammad, P. W. 7, who is married to the sister of Rafik's father (Rafik's father works and lives in Saharanpur) and is related to the appellant was told of this. He took Machhu to task and Machhu asked to be forgiven.

On the 1st February, so further evidence discloses, Machhu in the presence of Fakhru had asked his friend Abdul Rahim, P. W. 2, to follow Rafik to the railway station, where Rafik used to work as an outside coolie, and bring him back to Machhu. This was some time after 11-30 a. m. Abdul Rahim met Rafik near the station and brought him back to Machhu's *baithak*. Abdul Rahim then left the *baithak* at Machhu's request. He and Rafik had been seen going towards the *baithak* by Chandgi P. W. 3 and Amir-ud-Din P. W. 4. Fakhru was present in Machhu's house at that time. Machhu left Sonapat for Karnal by a train which left Sonapat at 3 o'clock the same afternoon, and he returned home at 10-30 p. m. (P. W. 2 and Hashmat Ali, P. W. 12). Gokal P. W. 5, a cartman, alleged that at 3-30 a. m. he had seen Machhu pushing a bicycle with a load in a gunny bag on the handle bar towards the place where the body was found. Both the appellants denied their guilt. Machhu declared that the *baithak* where the murder was alleged to have been committed was not his property, and denied that he had been improperly intimate

with Rafik who, he said, was his nephew but did not live with him. He had been falsely incriminated by his enemies including the Honorary Magistrate Rishi Parkash who had witnessed the search of the *baithak* and the recovery of Machhu's clothes. Fakhru declared that his confession had been made under police pressure. He could not explain why he had been implicated. Five witnesses were produced. The first was Shabrati, Fakhru's father, who deposed that he had heard his son's cries in the *thana* while he was being tortured and had been advised by the Assistant Sub-Inspector to make Fakhru confess. The second gave evidence of no consequence. The third said he had seen Fakhru at the railway station at 3 p. m. on the 2nd February. The remaining two were brothers of Machhu who asserted that the *baithak* said to be Machhu's was theirs and not his. One of them claimed to be the owner of the blood-stained knife.

The four assessors unanimously found both the appellants guilty. Two held that Fakhru had not acted deliberately. They all believed that his confession was wholly true. The learned Sessions Judge rejected the evidence of Fakhru's confession holding that it had been induced by the conduct of the Assistant Sub-Inspector. As against Machhu he found the confession would in any case have been inadmissible as it tended to exculpate Fakhru himself. He also rejected the evidence of the cartman Gokal. Finding the guilt of both appellants established by the rest of the evidence he convicted them under S. 302, I. P. C. and sentenced Machhu to death and Fakhru to transportation for life. Before us counsel for the appellants concedes that the evidence leaves no reasonable doubt that Rafik was murdered in the *baithak* where Fakhru was arrested on the 2nd February. He contends that this *baithak* is not proved to belong to Machhu whose brothers claim it as their property, that there is no admissible evidence proving at what exact time the murder was committed, while the probability is that it was committed at night when the surrounding streets would not be full of passers-by, that the blood-stained knife is not satisfactorily proved to be Machhu's and that the belated recovery of Machhu's blood-stained clothes is obviously a piece of padding. For Fakhru it is argued that the admissible

evidence does not connect him necessarily with the murder.

I deal first with the appeal of Machhu. Apart from the natural resentment of Rafik's mother at Machhu's treatment of him there is no evidence of previous enmity on her part towards Machhu. That Rafik was Machhu's catamite is clear from the evidence. I see no good reason to reject the evidence of Badruddin, P. W. 6, that Machhu was jealous of him and had threatened to kill both Badruddin and Rafik. It is proved that Rafik was brought to Machhu's baithak shortly before midday on 1st February by Abdul Rahim, P. W. 2. He was not seen alive again. He was killed in the baithak. There is ample evidence that the baithak was occupied by Machhu as his residence and none of any motive on the part of any person other than Machhu to do the boy harm. I disbelieve the evidence of Bashir, D. W. 3, and of Ismail, D. W. 4 and Allah Razi, D. W. 5, Machhu's brothers, that the baithak and the knife were not Machhu's. The knife which Machhu dug up is proved to have belonged to him. I have no doubt that the evidence on this point is genuine. The knife is of a peculiar shape and bears marks made by the maker, P. W. 15. A bicycle track led from the high road to the place where the body was found. These were noticed when the body was found by the police and a bicycle was recovered from the baithak. The fact that Machhu went to Karnal on the afternoon of the 1st does not in my opinion throw doubt upon the prosecution case. Had the murder been done at night there would have been no need to put the body in the heap of gram chaff as it was certainly placed. The medical evidence proves that Rafik had eaten a meal a few hours before his death. I find that all this evidence leaves no reasonable doubt of Machhu's guilt. His crime was brutal and I would dismiss his appeal and confirm the sentence of death.

Against Fakhru, apart from his duly recorded but retracted confession there is the evidence that he lived with Machhu, that he was present in the baithak when Abdul Rahim brought Rafik there on 1st February and when the police arrived next morning, that he pointed out a place where the actual murder had been committed and where the blood-stained ground had been covered with sand and clay, and that when arrested his clothes had human

blood upon them. Excepting his statement as to the place of the murder which led to the discovery of blood upon this ground at the place pointed out, his extra-judicial confession to the Magistrate, Pt. Rishi Parkash, P. W. 11, must be wholly excluded in view of the Privy Council ruling in A I R 1936 P C 253.¹

I have already mentioned that the learned Sessions Judge has held Fakhru's retracted confession inadmissible against Fakhru himself as well as against Machhu. His decision that it was induced by the police is strongly attacked by the learned counsel for the Crown who contends that it is based on no evidence but has been arrived at on mere conjecture and surmise. That the confession was made in the hope of pardon may be assumed. That it was extorted by the police as Fakhru himself states is not supported by any evidence except that of his father which the learned Judge has not acted upon. The case was one of a race for pardon, a fact which, I have no doubt, explains Machhu's belated recovery of his blood-stained clothes many days after the investigation had begun and after the police had found strong evidence against him. But a confession cannot be held inadmissible merely because it has been retracted or because of allegations as to its having been induced in the absence of evidence to support them: see 6 Lah 415.² The learned Judge has concluded that Fakhru's confession was induced by the Assistant Sub-Inspector because there was a delay of thirteen days in recording it while correspondence was being carried on with superior officers as to the advisability of granting him a pardon and that when the proposal to make him an approver was dropped the Assistant Sub-Inspector did not inform him of this fact. But the Assistant Sub-Inspector has denied that he ever told Fakhru that he would endeavour to obtain a pardon for him, and the only evidence that the confession was improperly induced is that of Fakhru's father Sharbati, D. W. 1, whose statement that he heard his son crying out because he was being beaten inside the thana on the afternoon of 2nd February is certainly untrue. The Assistant Sub-Inspector has

1. Nazir Ahmad v. Emperor, A I R 1936 P C 253 = 1936 Cr O 752 = 163 I O 881 = 37 Cr L J 897 = 63 I A 372 = 17 Lah 629 (P O).

2. Partap Singh v. Emperor, A I R 1926 Lah 605 = 93 I O 978 = 27 Cr L J 514 = 6 Lah 415.

denied that Sharbati saw him that day or that any relative of Fakhru interceded for the young man or asked the Assistant Sub-Inspector to stop beating him. There is always delay in arranging for a pardon. In this case the accused had already, immediately after his arrest, pointed out the spot where the murder had been done and I see nothing to suggest his story was a tutored one invented at a late stage of the investigation. He was duly informed by the Magistrate when his confession was recorded that it could be used against him. My conclusion is that this confession has been illegally excluded. It appears to be a true statement and I accept it as such.

That Fakhru was present and close to Rafik when Rafik was killed is clearly proved by the admissible evidence independently of the retracted confession. The confession proves that he helped Machhu to kill Rafik. It is more than likely that Machhu who was, it seems, a notorious bad character was able to intimidate the young man and that Fakhru was in fear of his own death when he gave his help. The prosecution have not proved any motive which might have prompted Fakhru independently. But if we accept it as a whole, as we must in this case, it does not show that Fakhru aided Machhu in the murder in pursuance of any common intention. His story was that when Fakhru had failed to make Rafik respond to his admonition Machhu put his hand on Rafik's mouth and threw him on the ground. Fakhru wanted to run away but Machhu told him to hold Rafik's legs which Fakhru did in terror not knowing what was going to happen. Then Machhu whipped out his knife and killed Rafik. Fakhru said: "Uncle, what have you done" but was threatened with instant death by Machhu who showed him his knife. So he helped Machhu to clean the baithak and place the body in the chaff. Later on he told Rafik's mother that Rafik had not come to this baithak and in the middle of the night he helped Machhu to put the body in a sack and place it on his bicycle. He was not then in fear of harm so far as his confession goes to show and it is clear that he is punishable under S. 201, I. P. C. I would accordingly accept his appeal and altering his conviction to one under S. 201, I. P. C., sentence him to five years' rigorous imprisonment.

Bhide, J.—I agree.

P.R./D.S.

Appeal accepted.

A. I. R. 1937 Lahore 211

JAI LAL, J.

Raja Balbhadar Singh and another — Judgment-debtors—Appellants.

v.

Shankar Das—Decree-holder—Respondent.

Exn. First Appeal No. 267 of 1936, Decided on 28th October 1936, from order of Senior Sub-Judge, Gurdaspur, D/-28th March 1936.

(a) *Res judicata* — Matter not decided expressly or impliedly on merits — Matter is not *res judicata* and can be subsequently decided.

Ordinarily, when once a matter has been decided for any reason whatsoever, it should not be re-opened in the same proceedings, but this is merely a rule of procedure and does not amount to a legal bar. The rule of *res judicata* does not come into operation unless the matter which is subsequently decided by a Court is expressly or impliedly decided on the merits in the previous proceedings. [P 212 C 2; P 213 C 1]

(b) *Custom (Punjab)*—Custom or personal law — Migration — Family of Rajputs of Jammu migrating to Gurdaspur District—Presumption is that they are governed by Hindu law—Burden of proving that they are governed by custom of Gurdaspur District is on them.

In the case of family of Rajputs, which migrates from Jammu State to Gurdaspur District, normally the presumption is that they are governed by their personal law, that is, the Hindu law and the burden is on them to prove that they are governed by the custom relating to succession and alienation which governs the Rajput agriculturists of Gurdaspur District. [P 213 C 1]

(c) *Civil P. C. (1908), S. 60*—Grant—Jagir—Government granting income of certain water mills as jagir—Jagirdar leasing out water mills — No distinction between right to recover revenue and right to recover rent from lessee — Consequently income from lease is not liable to be attached.

No distinction can be drawn between the right of a jagirdar, who has been granted the income as jagir of certain water mills to recover a certain sum per year as revenue, jagir or royalty and his right to recover rent from the lessee, whom he has granted lease of the water mills. The only right he has in the water mills is the right to recover rent from the occupants of the water mills and the rent is really the royalty for the use of water. The occupation of the water mills is merely a subsidiary right to the principal right and the principal right is conferred upon him as a jagir by the Government. Consequently his income from the lease cannot be attached. [P 214 C 2; P 215 C 1]

(d) *Civil P. C. (1908), S. 60*—Grant—Jagir—Grant of jagir can be in form of assignment not only of land revenue but also of cash allowance or other dues recoverable by Government.

Ordinarily the Government grant jagirs in the form of assignment of land revenue but it may also take the form of cash allowance by the Government or the assignment of other dues recoverable by the Government as the recovery of the fines and recovery of the income of a garden.

[P 214 C 2]

M. L. Whig—for Appellants.

D. N. Aggarwal—for Respondent.

Judgment.—The respondent Shankar Das has a money decree for over Rupees 12,000 against the appellants Raja Balbhadar Singh and others and in execution of that decree he attached certain property of the judgment-debtors. In this appeal we are concerned with the attachment of land and water-mills as there is no question here with regard to other property attached and sold or released from attachment. The land attached consists of 547 kanals and 7 marlas which has been found to be ancestral in the hands of the judgment-debtor and 181 kanals and 7 marlas which has been found to be non-ancestral. The objection of the judgment-debtor with regard to this land is that the whole land being ancestral is exempt from attachment and sale by virtue of the principle enunciated in 4 P R 1913.¹ On the merits it is contended that 181 kanals and 7 marlas must also be held to be ancestral. With regard to the water-mills the contention of the appellant judgment-debtors is that they have been granted to him as a jagir by the Government and are not therefore saleable in execution of the decree of the respondent.

The learned Senior Subordinate Judge has held that the appellants are not governed by custom in matters of alienation and succession and therefore 4 P R 1913¹ has no application to land even if it be held to be ancestral. With regard to the water-mills he has held that the Government originally granted the appellants a jagir of Rs. 30 which presumably was the land revenue assessed on the water-mills at the time of the grant and that the rest of the interest of the judgment-debtors in these water-mills does not come within the definition of jagir and is, therefore, saleable. This interest has actually been sold and purchased by the decree-holder for Rs. 4,200 and the learned Judge has directed that the sale

be confirmed subject to the liability of the decree-holder to pay Rs. 30 a year to the judgment-debtors as jagirdars for a period of twenty years for which period the lease of the water-mills has been sold for Rs. 4,200. The judgment-debtors have appealed against this order.

Before dealing with the case about the two properties mentioned above on its merits it is necessary to decide a legal point which arose before the Senior Subordinate Judge and which has been decided by him in favour of the appellants. This point was raised by the respondent before me. It was contended that the appellants were debarred by rule of res judicata from raising the objections relating to the sale of the land and to the sale of the water-mills. It appears that some time after an application was made to attach and to sell the two properties mentioned above, it is not certain whether the water-mills had been actually attached at that time as it is alleged that they have never been attached, the judgment-debtors raised objections to the sale of the water-mills and the land. These objections were, however, dismissed on the ground that they were belated. A suit was subsequently filed by them for a declaration that the two properties mentioned above were not saleable. This suit also was dismissed on the ground that it did not lie under S. 47, Civil P. C. Subsequent objections raised on the same ground before the executing Court were also dismissed on the ground of delay and on the ground of the dismissal of the previous objections. In spite of these previous proceedings the objections were repeated when the properties were actually sold or were going to be sold and were entertained by the learned Senior Subordinate Judge and decided as indicated above. An objection was raised before him by the decree-holder that the judgment-debtors were debarred from raising the objection by virtue of the previous orders but the learned Senior Subordinate Judge has held that the rule of res judicata does not operate against the judgment-debtors because the previous objections were never decided on the merits.

It is contended that legally the Senior Subordinate Judge was not competent to entertain the objections owing to the rule of res judicata. In my opinion there is no force in this objection because the rule of res judicata does not come into opera-

1. Jagdish Singh v. Narayan Singh, (1913) 4 P R 1913=15 I C 866=173 P L R 1912=160 P W R 1912.

tion unless the matter which is subsequently decided by the Court is expressly or impliedly decided on the merits in the previous proceedings. As I have already stated, there was no decision on the merits on any previous occasion. The rule of *res judicata* therefore did not prevent the Senior Subordinate Judge to entertain the objections though of course ordinarily when once a matter has been decided for any reason whatsoever it should not be re-opened in the same proceedings, but this is merely a rule of procedure and does not amount to a legal bar. In my opinion, therefore, the decision of the Senior Subordinate Judge that the objection of *res judicata* was not sound is correct.

Now, it is necessary to mention the history of the family of the judgment-debtors in order to discuss in detail the objection relating to the sale of the land and the water-mills. The ancestors of the appellants are said to be at one time rulers of Jammu State (I have quoted from the judgment of the learned Senior Subordinate Judge) whether they were rulers of Jammu and Kashmir States or whether there was a separate state of Jammu is not clear, but there is no doubt that they were rulers of a State. After they had been deposed they found their position in the State over which they once ruled to be difficult and consequently they migrated to the Gurdaspur District and settled there and a jagir was granted to them. The history of this jagir I will discuss when I take up the question of the water-mills. It is necessary to state that the appellants are Rajputs and that the head of the family has the hereditary title of Raja. They own land in the Gurdaspur district and the land which has been described by me above, that is 547 kanals and 7 marlas and 181 kanals and 7 marlas, is owned by this family.

The first question to be decided is whether this family can claim to be governed by the custom relating to the agriculturists in the Gurdaspur district. Normally, having regard to their status and the history of their family the presumption is that they are governed by their personal law, that is the Hindu law, and the burden is on them to prove that they are governed by the custom relating to succession and alienation which governs the Rajput agriculturists of the Gurdaspur

district. The learned Senior Subordinate Judge after considering the evidence produced by them—and the evidence is very meagre in this case—has come to the conclusion that they have not established that they are governed by custom in the matter of succession and alienation. The only evidence which is worth consideration is the statement of one of the judgment-debtors that the family follows the same rule as the other Rajput agriculturists of the district, but, under the circumstances, no reliance can be placed on the statement of the judgment-debtor who is interested in saving his land from sale in execution of this decree. In my opinion, therefore, the conclusion of the learned Senior Subordinate Judge is correct that the rule laid down in 4 P R 1913¹ does not apply to the family of the appellants. With regard to the ancestral nature of 181 kanals and 7 marlas of land very little was urged at the bar. The history of this land as given by the learned Senior Subordinate Judge makes it clear that by no stretch of language can this land be held to be ancestral. I, therefore, affirm the order of the learned Senior Subordinate Judge, with regard to the two items of land, that is 547 kanals and 7 marlas and 181 kanals and 7 marlas.

This leaves the difficult question of the water-mills. The original record or the documents, whereby the jagir was granted to Raja Raghubar Dev in 1851, have not been produced and neither party has thought it necessary to produce them or to secure their production either before the Senior Subordinate Judge or before me. The counsel have based their arguments on whatever information has been extracted from the revenue records and placed on the record and I will consequently discuss the question on the basis of this available material. (His Lordship then considered the evidence and proceeded.) Now, with regard to water-mills, the value of the jagir is mentioned to be Rs. 30, but there is no evidence that the actual income of the Government at that time was Rs. 30, or that Rs. 30 was the land revenue assessed on the water-mills. Apparently Rs. 30 also was the estimated income of the water-mills. Again it does not appear whether the income derived by the Government which was granted as jagir was merely the amount paid by the occupants of the water-mills as royalty for use of water or whether it was also

for the occupation of the buildings of the water-mills. These buildings, it may be mentioned, are ordinarily of very small value. It is also not clear whether the buildings belonged to the Government or whether they belonged to the lessees, or rather the licensees. The water-mills existed on the shamilat land of village Akhrota at that time and it appears from Ex. J. D/12 that subsequently the proprietors of the village, who were the owners of the shamilat land on which the water-mills existed, made a claim against the jagirdar and the dispute was subsequently settled by a compromise whereby it was agreed that the jagirdar would keep 7/8ths of the income of the water-mills and the proprietors of the village would get 1/8th of such income on account of the use of their land. Incidentally it is claimed by the jagirdar that he never paid the 1/8th share to the proprietors of the village. Whether this is true or not is immaterial for the purposes of this case.

In Ex. J. D/8 which was prepared at the time of the settlement of 1911-12 and is part of the wajibularz mention was made of the existence of ten water-mills in 1852 and it was stated that the income of the water-mills was divided according to ancestral shares. There is no mention of the water-mills in the next settlement of 1865, but in the settlement of 1890-91, it was stated that:

There are ten water-mills in the village in respect of which six rupees per water-mill, total Rs. 60, is realized from the Jhiwars as lagan. Out of this Rs. 52-8-0 is paid to Raja Inder Dev, jagirdar, and the rest, Rs. 7-8-0, is paid to the owners, and the same statement was continued in 1911-12, but it was noted that the income was fluctuating and, therefore, the proportion was 14 annas and 2 annas between the jagirdar and the proprietors. From the statement made in 1890-91 it appears that the water-mills were in the occupation of Jhiwars who ordinarily are the professional workers of water-mills in this part of the Gurdaspur District and these people paid Rs. 6 per water-mill to the jagirdar and the proprietors of the village. Apparently it is this payment by the Jhiwars which was granted to the jagirdar as his jagir. These are the three important documents from which the history of the jagir and its nature can be determined.

The Senior Subordinate Judge has apparently held that the appellants, the jagirdars, have a double interest in the

water-mills. They are entitled to recover land revenue payable to the Government for the use of the water and they are, in addition to this, entitled to recover rent from the lessees of the water-mills. It is this last income that he has held to be saleable subject to the payment of Rs. 30 per year to the jagirdars. What appears to have happened is this: the jagirdars have granted a lease of the water-mills to a lessee for about 11 years on payment of Rs. 500 or Rs. 550 per year and the lessee has undertaken, and has been granted permission to construct buildings for the water-mills. It is this right that the learned Senior Subordinate Judge has professed to sell. In my opinion, however, no distinction can be drawn between the right of the judgment-debtor to recover Rs. 30 per year as revenue, jagir, or royalty and his right to recover rent. The only right that he has in the water-mills is the right to recover rent from the occupants of the water-mills and the rent is really the royalty for the use of water. The occupation of the water-mills is merely a subsidiary right to the principal right and the principal right was conferred upon him as a jagir by the Government. I have already said that the Government had estimated that the jagirdar would get Rs. 30 a year but the amount was to fluctuate according to the circumstances. The amount which was expected to be Rs. 30 in 1852 has now increased to Rs. 500 or Rs. 550. The whole of this income must be deemed to be the jagir of the judgment-debtor, but it is contended by the respondent that a jagir can only be the assignment of land revenue by the Government. I do not think there is any force in this contention. It is true that ordinarily the Government grant jagirs in the form of assignment of land revenue but it may also take the form of cash allowance by the Government or the assignment of other dues recoverable by the Government as is illustrated by this case, as the recovery of fines was also assigned to the jagirdar in 1852, and the recovery of the income of a garden was also assigned.

There is, therefore, no reason to hold that a jagir can only be in the form of an assignment of land revenue. It was not contested before me that if the income derived by the judgment-debtors from the water-mills be deemed to be their jagir, then it must be held to be exempt from sale in execution of a money decree against

the jagirdar. I have already held that the income from the water-mills derived by the judgment-debtors has been granted by the Government to them as their jagir. I hold that it is exempt from sale in execution of a decree and to this extent I accept the appeal and set aside the order of the Senior Subordinate Judge confirming the sale of the lease of the water-mills for 20 years. This right of the judgment-debtors shall be released, otherwise the appeal is dismissed. Under the circumstances I leave the parties to bear their own costs throughout.

V.B.B./D.S. *Order accordingly.*

A. I. R. 1937 Lahore 215

ABDUL RASHID, J.

Manna Singh — Convict — Petitioner.
v.

Emperor — Opposite Party.

Criminal Revn. No. 1144 of 1936, Decided on 3rd November 1936, from order of Sess. Judge, Jhang, D/- 4th August 1936.

Criminal Trial—Revision—Enhancement of sentence—Principles of—Trial Court in case under S. 247, I. P. C., sentencing accused to one year's imprisonment — On appeal Sessions Judge reducing sentence to six months and recording reasons for doing so—Sentence held not grossly inadequate.

High Court in the exercise of its revisional power enhances a sentence only where the sentence is so grossly inadequate as to amount to a miscarriage of justice. [P 217 C 1]

There was a conviction under S. 247, I. P. C., and a sentence of one year's rigorous imprisonment was passed. On appeal the Sessions Judge maintained the conviction but reduced the sentence to a term of six months. Petition was made to the High Court for enhancement of sentence :

Held : that the reduction of sentence being reasonable and the sentence not being grossly inadequate, the High Court would not enhance the sentence : *A I R 1928 Lah 507 and 107 I C 759, Rel. on.* [P 217 C 1]

Shiv Ram Sawhney—for Petitioner.

Des Raj Sawhney—for Opposite Party.

Order.—The petitioner Manna Singh was convicted under S. 217, I. P. C., and sentenced to one year's rigorous imprisonment by Mr. Amin-ud-Din on 18th June 1936. In addition to the sentence of imprisonment, he was ordered to pay a fine of Rs. 500. On appeal, the learned Sessions Judge maintained the conviction and the sentence of fine but reduced the term of imprisonment from one year to six

months. The petitioner has preferred a petition for revision to this Court against his conviction and sentence, while a petition for the enhancement of the sentence has been presented by the learned Government Advocate on behalf of the Local Government. Both of these petitions can conveniently be disposed of by one judgment.

The facts of the case have been given in great detail in the judgment of the trial Court and that of the learned Sessions Judge and it is unnecessary to repeat them at length. Briefly stated, the case for the prosecution is that Manna Singh, petitioner, was the officer in charge of the Haram Gate Police Station in Multan since 1931. From 1931 up to 8th May 1934, a gang of persons headed by one Hussain Bakhsh, was looting a large number of people by cheating. Hussain Bakhsh, who used to pose as a Nawab, had his headquarters in a house which was situated at a distance of about a mile from the police station. The petitioner in his capacity as Sub-Inspector of the Haram Gate Police Station was conniving at the activities of this gang and was shielding them from prosecution. The petitioner used to receive 10 per cent. of the money made by Hussain Bakhsh's gang if no report was made to the police ; but if a report was lodged at the police station the share of the petitioner was 50 per cent. of the amount extorted by the gang from their victim. Bhag Singh and Lalu, who were members of the gang of Hussain Bakhsh, have given evidence in this case with respect to the different incidents whereby a number of persons from all over the province were robbed by this gang.

On 7th May, Suba Ram, complainant, (P. W. 2), came to Multan from village Mitru in order to make purchases for his shop. He brought a sum of Rs. 2,080 with him. He also brought his bahi as he had to consult two lawyers, namely Mehta Asa Nand and Mehta Vir Bhan, regarding some cases that he had instituted. He put up in the shop of Honda Ram, who is a Nanbai, and also provides sleeping accommodation. Goraya Ram had also come to Multan from Chak No. 96 to make purchases for his own shop. Ram Kishen and Motan Das, who were members of Hussain Bakhsh's gang, met Goraya Ram and Suba Ram at the shop of Honda Ram. On the morning of 8th

May Suba Ram was seen by Motan Das and Ram Kishen while he was counting his money. At about 9 a. m. Suba Ram went and consulted one of the lawyers, and in his absence Ram Kishen and Motan Das told his son Tara Chand to ask his father to take him for a drive round the town in a tonga. It may be mentioned that Tara Chand, aged about 11 years, had accompanied his father Suba Ram to Multan. At about 11 a. m. Ram Kishen, Motan Das, Goraya Ram, Tara Chand and Suba Ram went out for a drive. After going round the town, the tonga was stopped in front of a house. Suba Ram was taken into a room which was beautifully furnished and had liquor and soda water bottles lying on a table. Ram Kishan gave Suba Ram a drink, while Motan Das came in with a box on his shoulder accompanied by a man who was addressed as Nawab Sahib. The Nawab Sahib opened the box and placed a number of sovereigns, currency notes and silver coins in front of Tara Chand to play with. He also took out a pack of cards and asked Suba Ram to play cards with him. Suba Ram declined to play cards, whereupon Motan Das forcibly snatched his bahi from under his arm and handed it to the person who was addressed as Nawab Sahib. The Nawab put the bahi in a box and locked it. Suba Ram raised an outcry and three constables in uniform entered the room. They asked him not to raise a hue and cry as they would help him to get his money back. Bhag Singh, P. W., then came in and posed as the orderly of the Superintendent of Police. Bhag Singh addressing the Nawab Sahib (Hussain Bakhsh) told him that the Superintendent of Police would be dining with him that night. Hussain Bakhsh handed the bahi containing currency notes to the value of Rs. 2,080 to Bhag Singh and the whole party went to the house of Honda Ram. At the house of Honda Ram, Bhag Singh told Hussain Bakhsh that he was to go on duty at 4 p. m. and handed the bahi containing the money to Hussain Bakhsh. Soon afterwards a Head Constable accompanied by three constables appeared and told Suba Ram that he had been gambling, and had lost his money, and that no question of his being robbed therefore arose. Suba Ram was taken to the police station and produced before Manna Singh, petitioner. After hearing his story the petitioner abused Suba Ram,

and told him that he had lost his money in gambling. He however asked him to see him again at 8 a. m. the next morning. The next morning also the petitioner refused to register any case against the persons who had robbed Suba Ram. Suba Ram thereupon consulted Mehta Vir Bhan, Pleader and presented an application to the Superintendent of Police, Multan.

The story for the prosecution is supported by Bhag Singh and Lalu who belonged to the gang of Hussain Bakhsh. Their evidence stands on the same footing as that of an approver and must be corroborated in material particulars before a conviction can be based thereon. In the present case, the statements of these two witnesses are corroborated by overwhelming evidence. Suba Ram and his son Tara Chand give a detailed version of the incident alluded to above. They have both been subjected to a searching cross-examination, but nothing has been elicited from them which may throw any doubt on their testimony. Ganga Ram (P. W. 7) is a completely disinterested witness. He does not even belong to the village of Suba Ram. His testimony proves the case for the prosecution beyond a shadow of doubt. The learned counsel for the petitioner contended that Suba Ram had really lost his money by gambling, and that he had fabricated the present case against the petitioner as the petitioner had refused to give him any relief by registering a case of robbery at his instance. There is however not an iota of evidence to support the contention of the learned counsel. Suba Ram throughout refused to play cards. No evidence has been produced in defence to show that Suba Ram was addicted to gambling or that he had at any time come to Multan for that purpose before.

The learned counsel drew my attention to a number of discrepancies in the prosecution evidence and urged that these discrepancies showed that the prosecution story was false and that Suba Ram had really lost his money while gambling. The discrepancies relied upon by the learned counsel for the petitioner all relate to comparatively unimportant matters and do not in any case affect the essential features of the case. I have also been taken through the evidence of the defence witnesses Khuda Bakhsh and Basant Singh. In my opinion this evidence does not help the case of the petitioner at all. I am therefore of the opinion that the

petitioner has been rightly convicted of an offence under S. 217, I. P. C. Coming to the petition for the enhancement of the sentence, it must be remembered that the maximum punishment permissible under S. 217, I. P. C., is two years' rigorous imprisonment and fine. The petitioner was sentenced to one year's rigorous imprisonment and a fine of Rs. 500 by the trial Court. This sentence was ordered to run concurrently with the sentence imposed on him in another case. The learned Sessions Judge has reduced the term of imprisonment to six months. The principles which are invariably observed by this Court in enhancing sentences are well recognized. It was held by a Division Bench of this Court in 108 I C 162¹ that though it is competent to the High Court to enhance the sentence in revision, it will only do so for exceptional reasons. Where a sentence passed is substantial even though inadequate it will not be enhanced in revision. It was laid down in 107 I C 759,² that the mere fact that the High Court as a Court of first instance would have passed a heavier sentence is not by itself a sufficient ground for enhancing a sentence in revision especially when the sentence passed by the lower Court is a substantial one. As mentioned above, the maximum sentence permissible under S. 217, I. P. C., is two years' rigorous imprisonment. In these circumstances, it cannot be held that a sentence of six months' rigorous imprisonment under S. 217 is not a substantial sentence. This Court, in the exercise of its revisional power, enhances a sentence only where the sentence is so grossly inadequate as to amount to a miscarriage of justice. This circumstance cannot be said to be present in the present case. The learned Sessions Judge has dealt with the question of sentence in detail and has given sound reasons for reducing the sentence to six months' rigorous imprisonment.

For the reasons given above, I dismiss the petition preferred by Manna Singh, petitioner, against his conviction and sentence. I also dismiss the petition presented on behalf of the Crown for the enhancement of the sentence.

P.R./D.S.

Petitions dismissed.

1. Dharam Singh v. Emperor, A I R 1928 Lah 507=108 I C 162=29 Cr L J 343.

2. Khana v. Emperor, (1928) 107 I C 759.

A. I. R. 1937 Lahore 217

DALIP SINGH, J.

Kirpal Singh and another—Accused.
v.

Emperor.

Criminal Revn. No. 575 of 1936, Decided on 4th June 1936, from order of Sess. Judge, Multan, D/- 5th March 1936.

Criminal P. C. (1898), Ss. 209 and 437—Accused charged under Ss. 304, Part II/149 and 325/149, I. P. C.—Magistrate after considering evidence honestly finding that offence fell under Ss. 325/149, I. P. C.—Application under S. 437, Criminal P. C.—Sessions Judge finding offence to be under S. 302, I. P. C., directing re-trial before him on ground that Magistrate had no jurisdiction to try offence—Magistrate held had jurisdiction under S. 209—Order of re-trial therefore was not proper.

In a case some persons were accused of forming an unlawful assembly to beat some person and in prosecution of that offence committing murder or culpable homicide not amounting to murder. The S. 30 Magistrate framed charges under S. 304, part II/149 and Ss. 325/149, I. P. C. After taking evidence the Magistrate honestly came to the conclusion that there was no intention to cause death and so convicted the accused under Ss. 325/149 I. P. C. Thereupon the complainant made an application under S. 437, Criminal P. C., to the Sessions Judge who, coming to a different finding, directed the accused to be tried before him under S. 302, I. P. C., on the ground that the Magistrate had no jurisdiction to try the offence and that the Magistrate had snatched at the jurisdiction which he had not :

Held : that under S. 209, Criminal P. C., the Magistrate had jurisdiction to decide whether the offence was triable by Sessions Court or was triable by himself. There was nothing to show that the Magistrate snatched at any jurisdiction or perversely held that the offence was one triable by himself in order to minimize the offence. It was a case of an honest difference of opinion on a subject which was always open to doubt and difference of opinion and the best way to decide cases like those was not to consider them abstractly. This being so, it was useless to subject the accused to the strain of re-trial and hence the order of the Sessions Judge should be set aside.

[P 219 C 1, 2 ; P 220 C 1]

*J. G. Sethi—*for Petitioners.

*Sardar Bahadur Sardar Mahtab Singh—*for Opposite Party (Complainant).

Order.—Kirpal Singh, Rachhpal Singh, Phagga Singh, Jiwand Singh, Fauja Singh, Buta Singh, Achhar Singh and Hazara Singh, were accused of having formed an unlawful assembly with the common object of beating Kartar Singh, Gehl Singh and Tehl Singh, and in prosecution of that common object having committed murder or culpable homicide not amounting to murder by striking Tehl Singh with dangs as a result of which he died ; also

of causing grievous hurt to Gehl Singh and simple hurt to Kartar Singh. The learned S. 30 Magistrate before whom the enquiry took place discharged Hazara Singh and charged the remaining accused under Ss. 304, Part (II)/149 and 325/149, I. P. C., with respect to the death of Tehl Singh and the grievous hurts inflicted on his brother, Gehl Singh. After a careful enquiry and trial he came to the conclusion that the real cause and origin of the fight was not known but that in all probability the fight had arisen suddenly by an altercation between Kartar Singh on one side and Achhar Singh and Kirpal Singh on the other, that partisans on either side had come up to help their respective parties, that the partisans of Kirpal Singh and Achhar Singh had mustered quicker and in larger number, there being probably six men on one side and three men only on the other, that these men had beaten Tehl Singh and caused his death, but that they had no intention of causing death, that it is not known who inflicted the fatal injury on Tehl Singh which caused his death, and he therefore, convicted Kirpal Singh, Rachhpal Singh, Achhar Singh, Phagga Singh and Jiwand Singh under Ss. 325/149, I. P. C., and sentenced them to three years' rigorous imprisonment. In the case of Kirpal Singh and Rachhpal Singh, he also inflicted a fine of Rs. 200 each or in default six months' further rigorous imprisonment. He also convicted all of them under Ss. 325/149 for causing grievous hurt to Gehl Singh and simple injury to Kartar Singh and sentenced them to two years' rigorous imprisonment, the sentences running concurrently. Rs. 250 of the fine, if realized, was to be paid to Gehl Singh by way of compensation.

The accused did not appeal, but the complainant put in a revision before the learned Sessions Judge under S. 437, Criminal P. C., asking that the case be committed to the High Court with the recommendation for enhancement of sentence or that the proceedings be quashed and the case committed for trial to the Sessions. The learned Sessions Judge held that the learned Magistrate was both incompetent to try the offence proved and that it was improper for him to have tried it. He held or appears to hold that the offence fell either under S. 302 or S. 304, Part I, I. P. C., and therefore, the learned Magistrate was not competent to try it and he

further held that, in any event, it was difficult to tell whether the offence amounted to murder or culpable homicide not amounting to murder and in case of doubt it would have been more proper for the learned Magistrate to have committed the case for trial to the Sessions Court which can fully decide and sentence the accused according to its decision on the points involved in the case. He has cited 1 P R 1893,¹ in this connection and has also cited other rulings. The learned Sessions Judge, therefore, held that the trial was without jurisdiction and ordered that the accused be committed for trial to the Sessions Court. From this order the accused have come in revision to this Court.

I have heard the learned counsel on their behalf as well as counsel on behalf of the complainant, Gehl Singh. The learned counsel for the petitioners contends that the learned Sessions Judge could not, after conviction, order a commitment under S. 437 because in such a case the learned Sessions Judge had no power to set aside the conviction and therefore if his order were correct the conviction already recorded against the accused by the trial Magistrate would stand as well as any conviction or acquittal that a Sessions Judge might pronounce upon the new trial. He conceded that if there had been an appeal to the learned Sessions Judge, he could have set aside the conviction without reference to this Court; but he contended that the powers given to the Sessions Court under S. 423 are not the same as the powers conferred on the Court by S. 437, Criminal P. C. He contended that under S. 209, Criminal P. C., the learned Magistrate had jurisdiction to decide whether to discharge the accused altogether or to decide that they should be tried by himself for a minor offence. It might be true that the learned Sessions Judge might come to a different finding on the same acts or series of acts as to the nature of the offence committed but this was insufficient to avoid the jurisdiction of the trial Court. In this connection he cited 20 Cal 633,² and relied on the words of S. 209. The learned counsel for the respondent on the other hand contended that the Sessions Judge had jurisdiction, that

1. Mangal Singh v. Empress, (1893) 1 P R 1893 Or (F B).

2. Baijnath Pande v. Gouri Kanta Mandal, (1893) 20 Cal 633.

the finding of the Magistrate was perverse and he had merely snatched at a jurisdiction which he did not really possess, and, therefore the trial and conviction by him were without jurisdiction.

I do not consider it necessary to go in any detail into the points raised. As at present advised, but without expressing any final opinion, I am inclined to think that the contention of the learned counsel for the petitioners is correct. Under S. 209, the learned Magistrate had jurisdiction to decide whether the offence was triable by the Sessions Court or was triable by himself. There is nothing to show that the learned trial Magistrate snatched at any jurisdiction or perversely held that the offence was one triable by himself in order to minimize the offence. It is more a case of an honest difference of opinion on a subject which is always open to doubt and difference of opinion. The learned Sessions Judge is, no doubt, perfectly right in saying that in all border line cases it is safer for a Magistrate holding an enquiry to commit to the Sessions Court rather than to try a case himself. But it seems clear to me after going through the record that the learned Magistrate was not wrong in charging the accused; he charged under S. 304, Part II read with S. 149 and Ss. 325/149 I. P. C. As regards injuries of Gehl Singh, he had 8 injuries, all of which were simple except one which resulted in a fracture of the ulna bone. There can be no question of the propriety of the charge under S. 325, at any rate, against the accused. So far as Tehl Singh is concerned, all the injuries received by him were simple. He had no doubt 19 injuries which have been variously described as abrasions and contusions. There is only one injury according to the medical evidence which was fatal and this injury was, no doubt, a very severe one and appears to me to have been caused either by a very heavy weapon or by an ordinary blunt weapon used with great force. Nobody, however, can prove who struck this fatal blow. In the circumstances, therefore, I do not consider that there was any grave perversity or obvious mishandling of the case in the learned Magistrate coming to the conclusion that the offence fell under Ss. 325/149, I. P. C.

It is clear enough on the record that the origin and cause of the fight is not established. The evidence of Kartar Singh and Gehl Singh on this point is open to

serious doubt ; for one thing, according to them, the origin of the fight was due to the striking of Kartar Singh. Mewa Singh, who is supposed to have been an eye-witness, does not assert any such separate striking of Kartar Singh nor does he admit the previous altercation when indecent gestures had been made against Kartar Singh. Hazara Singh was discharged rightly by the learned Magistrate and the presence of Fauja Singh and Boota Singh is extremely doubtful. In fact the learned Sessions Judge agreed in not ordering a re-trial of these two persons.

It is not very clear how the learned Magistrate came to the conclusion that the partisans of each party came up to the help of their respective parties. According to Chet Singh Subedar, who appears to be a disinterested witness though a friend of the deceased Tehl Singh, what happened was that four men were beating Tehl Singh and four men were beating Gehl Singh when he arrived at the scene. According to Mewa Singh, some six men had rushed at Tehl Singh and Gehl Singh and four had beaten Tehl Singh and two had beaten Gehl Singh. It would seem somewhat doubtful whether S. 149 could be applied on the finding of the learned trial Magistrate. It appears, however, that he considered the whole affair as one and that all the five men concerned had a common object in beating the partisans of the other side and it was a mere accident that the division of labour fell to four in one case and to two or one in the other. In the circumstances, therefore, I do not think any useful purpose would be served by ordering a re-trial of the accused by the learned Sessions Judge. I point out to the learned Sessions Judge that the best way to decide cases like this is not to consider them abstractly; it is always difficult to decide whether an offence is within Ss. 302, 304, Parts I and II, or S. 325. But the question to consider is whether in the circumstances of any particular case, the offence can be definitely held to be murder. If a S. 30 Magistrate has taken the view that there was no common intention to kill, then, as a rule, it would fall in Part II S. 304, and there is no question of any subtle distinction between the common intention and common object with a view to finding whether the case is one of murder or of S. 304, Part I. No doubt the distinction exists, but after all, if a trial has taken place, it is doubtful whether the

Sessions Judge has jurisdiction to set it aside though I express no final opinion on the point, and, in matters of doubt, it is useless to subject the accused to the cost and strain of a re-trial.

I would, therefore, set aside the order of the learned Sessions Judge directing a re-trial by commitment to himself. At the same time I am definitely of the opinion that the sentences passed in the case are inadequate. It is true that Tehl Singh, as pointed out, sustained only simple injuries except for the grievous hurt which was on the head; nonetheless he had 19 injuries and the statement of the doctor who saw him while still alive shows that most of the injuries were due to lathi blows. At least four men were concerned in this according to the evidence. I would, therefore, issue notice to Kirpal Singh, Rachhpal Singh, Phagga Singh and Achhar Singh, who, according to the evidence, took part in this affair to show cause why their sentence should not be enhanced. Jawind Singh was only concerned in the beating of Gehl Singh whose injuries are not so serious and I would not interfere in his case.

P.R./D.S.

Order accordingly.

* A. I. R. 1937 Lahore 220

JAI LAL AND SALE, JJ.

Lala Dewan Chand—Plaintiff—Appellant.

v.

Punjab and Kashmir Bank, Ltd., Rawalpindi and others—Defendants—Respondents.

First Appeal No. 1915 of 1933, Decided on 27th June 1935, from decree of Senior Sub-Judge, Attock, D/ 29th August 1933.

* (a) Civil P. C. (1908), O. 22, R. 4—Distinct interests—*P* and *A* attaching separately same property in execution of their decrees against *C*—Objection to attachment by *R* dismissed—Appeal by *R*—On date of hearing of appeal *A* found to have died long before institution of appeal—Appeal abating against him as no legal representatives of *A* were brought on record within time—Appeal held did not abate also with respect to *P*, their interests being separate and divisible and separate attachments by them giving rise to separate causes of action.

P and *A* attached the same property in execution of their decrees against *C*. Objection to attachment by *R*, the purchaser of the property was dismissed by the Court. The declaratory suit by *R* under O. 21, R. 63 was also dismissed.

R filed an appeal but on the date of hearing of the appeal it was found that *A* had died long before the institution of appeal by *R* against *P* and *A*, and no legal representatives of *A* being brought on record within time, the Court passed an abatement order with respect to *R*. It was contended by *P* that the appeal abated in toto:

Held: that as separate attachments were made by the two decree-holders *P* and *A* whose interests were clearly separate and divisible and as the separate attachments gave rise to separate causes of action, the right of the appellant *R* to challenge the decree against *P* was not lost merely because the appeal abated as against *A*. The appeal did not therefore abate with respect to *P*: *A I R 1928 Lah 572 (F B)* and *A I R 1932 Lah 281, Rel. on.* [P 221 C 1, 2]

(b) Stamp Act (1899), S. 2 (5)—Bond—Test of—Acknowledgment attested by two witnesses and containing implied promise to pay interest—Such acknowledgment is not bond as there is no express obligation to pay amount due—Implied obligation cannot convert acknowledgment into bond.

An acknowledgment attested by two witnesses and containing an implied promise to pay interest but containing no express obligation to pay the amount due is not a bond within meaning of S. 2 (5) of the Act. The essential feature for constituting a document as a bond is that there must be an express obligation to pay. No such obligation can be inferred from a mere acknowledgment of the balance. An implied obligation cannot therefore convert an acknowledgment into a bond: *A I R 1933 Lah 271, Rel. on.*

[P 222 C 1]

(c) Transfer of Property Act (1882), S. 53—Preference—Sale by debtor to one of his creditors—Transfer for long outstanding debts—Transaction genuine and not tainted with fraud—Such preference can be no ground for setting aside sale.

Where a debtor transfers his property by sale to one of his creditors for long outstanding debts and the sale is genuine and for good consideration and not tainted with fraud, the preference shown by the debtor to one of his creditors can be no ground for avoiding the sale merely because other creditors happen to suffer by the transaction.

[P 222 C 2]

Har Gopal, M. L. Puri and S. L. Puri—for Appellant.

J. L. Kapur, Ram Lal Anand II and Ranbir Sawhney—for Respondents.

Sale, J.—This dispute arises out of a double attachment of a bungalow situated at Rawalpindi by two judgment-creditors in execution of their decrees against one Charan Das deceased, who had been in financial difficulties for some years before his death in 1928. The bungalow in suit was originally attached by the Punjab and Kashmir Bank, Ltd., the first decree-holder, on 12th November 1925. Subsequently, it was again attached on 30th June 1929 at the instance of the second

decree-holder Lala Amir Chand Shah. Objection was filed by Rai Bahadur Lala Dewan Chand on the basis of a registered sale deed relating to this bungalow executed by the judgment-debtor in his favour on 9th May 1925. So far as the site of the bungalow is concerned, the objection was accepted, but it was dismissed in regard to the building; and the objector Rai Bahadur Lala Dewan Chand instituted this suit under O. 21, R. 63, Civil P. C., to obtain a declaration in respect of the building. The suit was dismissed by the Senior Subordinate Judge on the ground that the sale by the judgment-debtor in favour of the plaintiff was fraudulent and made with the intention of defeating and delaying his creditors. From this decision the objector has preferred this appeal.

In the memorandum of appeal which was instituted in this Court on 27th November 1933, the two decree-holders were cited as respondents 1 and 2. When the appeal came up for hearing on 11th June 1935, it was reported that the respondent decree-holder, Amir Chand Shah, had died more than three months previously and an order was passed that the appeal had abated against him, but the appellant's counsel was given an opportunity to show cause why this order should be set aside. It has now been ascertained that Amir Chand Shah had died before the institution of the appeal 16 months ago. Mr. Puri for the appellant pleads for extension of limitation on the ground that his client had no knowledge of Amir Chand Shah's death. But no affidavit has been filed on behalf of the appellant, and having regard to his position and standing, I am of opinion that he failed to exercise due diligence in the matter of ascertaining Amir Chand Shah's death, and taking the necessary steps to have his legal representatives impleaded within limitation. I see no reason, therefore, to set aside the abatement order as against Amir Chand Shah. On behalf of the respondent Mr. Kapur has argued that the effect of this order should be that the appeal abates in toto. There is no force in this contention. Separate attachments of the bungalow in suit were separately obtained by the two decree-holders, whose interests are clearly separate and divisible. These separate attachments gave rise to separate causes of action; and the fact, that one of the decree-holders has now dropped out of the appeal, does not take away the right of

the appellant to challenge the decree as against the other decree-holder. The principles laid down in 10 Lah 7¹ and 13 Lah 70² apply and I would hold that the appeal can proceed against the surviving respondents. It is not denied that the appellant was already the owner of the site of the bungalow when the registered sale deed of 9th May 1925 transferring the bungalow to him in consideration of a payment of Rs. 40,200 was executed by Charan Das deceased. The consideration recited in this deed is threefold: (1) Book credit in reduction of outstanding debt to the extent of Rs. 33,000; (2) Payment by cheque on the Punjab National Bank, Quetta, of Rs. 7,000 on 9th May 1925; (3) Cash payment before the Sub-Registrar of Rs. 200.

The case for the appellant is that this was a bona fide sale for consideration: that pre-existing debts due to the vendee were outstanding, and that though the sale may have had the effect of defeating the rights of other less vigilant creditors in the persons of the respondents, the preference shown to one creditor is, in the absence of fraud, no ground for avoiding the sale. To prove pre-existing debts and the passing of consideration as recited in the deed, the appellant has relied on the loan account as between the appellant and Charan Das together with a number of pronotes and other acknowledgments by the debtor. The loan account shows that the indebtedness of Charan Das to the appellant commenced in 1920, i. e., five years before the transaction in suit; dealings continued regularly upto and even after the sale of the bungalow. It appears that periodically the debtor used to sign acknowledgments of the balance outstanding against his name in the appellant's account and would then execute pronotes for the amount due in favour of the appellant. In particular, under date 20th October 1920, there is an acknowledgment of a debt of Rs. 60,000 due to the appellant signed by the debtor and attested by two witnesses.

The trial Judge refused to admit this acknowledgment in evidence on the ground that it constitutes a bond and being

1. Sant Singh v. Gulab Singh, A I R 1928 Lah 572=114 I C 417=10 Lah 7=30 P L R 453 (F B).
2. Mt. Umrao Bibi v. Ramkishan, A I R 1932 Lah 281=137 I C 820=13 Lah 70=33 P L R 1003.

unstamped was liable to a large penalty which the appellant declined to pay. I am of opinion that the order of the trial Judge holding this document to be a bond cannot be supported. It is true that the entry is attested by two witnesses and contains an implied promise to pay interest, but there is no express obligation to pay the amount due. The definition of a bond in sub-s. 5, S. 2, Stamp Act, requires that a person should oblige himself to pay money to another on certain conditions. In other words, there must be an express obligation to pay. In the present case, the debtor has not undertaken any obligation to pay. No such obligation can be inferred from a mere acknowledgment of the balance. An implied obligation cannot convert an acknowledgment into a bond: see A I R 1933 Lah 271.³ On this interpretation, the document printed at p. 67 of the paper book is not a bond. It is conceded by counsel for the appellant that it is an agreement and as such liable to a duty plus penalty of Rs. 5.8.0. This sum has today been paid into Court and the document therefore becomes admissible in evidence and is hereby admitted. The trial Judge appears to have held that the balance of Rs. 33,000 expressed to be due on 20th October 1920, prior to the payment of cheque No. 013139, is also a bond. This finding is clearly an error. There is no separate acknowledgment of this balance; it is part and parcel of the acknowledgment of Rs. 60,000, which has now been admitted in evidence as an agreement.

All the acknowledgments and pronotes in this case have been proved to be in the handwriting of Charan Das, the debtor. The loan account taken as a whole has, in my opinion, been adequately proved. Criticism has been directed to the failure of the plaintiff himself to come into the witness-box and to produce his rokar and khata bahis. But plaintiff's mukhtiar, Narain Das, was examined as a witness, and as regards the non-production of the rokar and khata bahis, it must be remembered that the plaintiff relied on a registered sale deed, together with a loan account confirmed by pronotes and acknowledgments executed by the debtor himself. If the respondent had any real doubts as to the genuineness of these transactions he could have compelled the

plaintiff to produce other relevant account books. But, in my opinion, the production of these account books was not necessary for the purpose of enabling the plaintiff to discharge the onus which lay upon him. Taking the three items mentioned as consideration in the sale deed, it has been proved by the evidence of the Sub-Registrar that Rs. 200 was paid in cash at the time of the registration. The payment of Rs. 7,000 by a cheque (Ex. P-32) is proved by the evidence of the Manager of the Punjab National Bank, Quetta, on whose Bank the cheque was drawn by the plaintiff. The books of the Bank show that Rs. 7,000 was actually paid to Charan Das on 9th May 1925.

It has been suggested in this connection that a payment of Rs. 7,000 by the appellant to his debtor was unlikely on this date, because it had the effect of increasing Charan Das's indebtedness, whereas the object of the sale was to reduce the indebtedness. It must be remembered, however, that the plaintiff, who was already the owner of the site of the bungalow in suit, must have had good reason to entertain doubts at this time as to Charan Das's financial position; and he may well have been anxious to secure from Charan Das the building standing on this site as part settlement of his large outstanding debt. As an inducement to sell the property, Charan Das may well have demanded some cash payment and this would explain why the plaintiff should have made a cash payment of Rs. 7,000 out of a total consideration of Rs. 40,000. Preference by a debtor shown to one of his creditors is, provided the transaction is genuine and not tainted by fraud, no ground for avoidance merely because the other creditors happen to suffer, and there is no indication of fraud or any fictitiousness in this case.

The balance of Rs. 33,000 was shown as credited in the loan account to a reduction of Charan Das's outstanding indebtedness to the plaintiff. The main ground on which the transaction was attacked is the allegation that the whole loan account from start to finish was fictitious and invented to provide a bogus consideration for a transaction which was merely intended to defeat the rights of the judgment-creditors. I am unable to accept this view. It is impossible to reject the loan account which starts from a date five years prior to the transaction in suit, and includes

3. Jagannath v. Mt. Chauhi, A I R 1933 Lah 271 =142 I C 535=34 P L R 417.

numerous pro-notes and acknowledgments proved to have been executed by the debtor in favour of the plaintiff. Evidence has been led in the shape of Bank officials and other independent witnesses to prove most of the main items in this loan account. I am satisfied that this loan account establishes that Charan Das was genuinely indebted to the plaintiff in May 1925. The right and title of Charan Das to sell the bungalow in suit has not been challenged in appeal. The factum of the sale for good consideration has been established. There is no evidence to indicate any fraud on the part of the plaintiff transferee; and the mere fact that the plaintiff as one of the creditors secured by this transaction preference over the other creditors, is no ground for invalidating this transaction. I am of opinion that this suit must succeed. I would, therefore, accept the appeal, set aside the lower Court's decree and decree the suit of the plaintiff as against the Punjab & Kashmir Bank, Ltd. with costs.

Jai Lal, J.—I agree.

K.B./A.L.

Appeal allowed.

A. I. R. 1937 Lahore 223

ADDISON AND ABDUL RASHID, JJ.

Dewan Singh and others—Plaintiffs—Appellants.

v.

Mt. Santi and others—Defendants—Respondents.

Second Appeal No. 1074 of 1935, Decided on 7th April 1936, from decree of Addl. Dist. Judge, Lyallpur, D/- 28th March 1935.

(a) *Riwaj-i-am*—Evidentiary value—Entry in customary law of Jullundur District excluding daughters from succession in certain cases is strong piece of evidence—Such evidence cannot be rebutted by general remarks that daughters are not consulted when enquiry into customs of people takes place—Nor can it be rebutted by saying that general custom in Punjab is to the contrary or that document is not carefully prepared.

The customary law of Jullundur District in the Punjab excluding the daughters from succession in certain cases is a strong piece of evidence. Such evidence cannot be rebutted by general remarks that daughters are not usually consulted when an enquiry is made into the customs of the people or that the custom generally followed in the Punjab is to the contrary. Similarly it cannot be rebutted by a reasoning that the document of custom was not carefully prepared, for all that it purports to

be is a compilation of the statements of custom as given by the people: *A I R 1916 P C 129, Rel. on.* [P 223 C 2; P 224 C 1]

(b) Evidence Act (1872), S. 13—Judgment—Judgment recognizing custom cannot have same importance as clear cut instance of custom recognized by parties themselves.

A judicial decision recognizing a custom cannot have the same importance as a clear cut instance of custom recognized by parties themselves. In judicial decisions instances of the alleged custom are accepted or rejected for different reasons in different cases; while, if there is a clear instance where the parties have themselves recognized the custom, there is no such confusion. [P 224 C 2]

(c) Custom (Punjab)—Succession—Daughter—Self acquired property of father—Johar Jats of Phillaur tahsil of Jullundur District—Daughters do not succeed in preference to second degree collaterals.

Amongst Johar Jats in the Phillaur tahsil of Jullundur District in the Punjab, the daughters do not succeed to the self-acquired property of their father in preference to the collaterals of the second degree as the *riwaj-i-am* and the majority of the instances of such a custom are in favour of collaterals: *Case law referred.* [P 226 C 1]

Lala Badri Das—for Appellants.

Lala Achhru Ram Indar Dev—for Respondents.

Addison, J.—The parties are Johar Jats of Tahsil Phillaur of the Jullundur district, but the land is situated in the Lyallpur district. Lyallpur was colonised in the nineties by persons coming from all over the Punjab who carried their respective customs with them. The question is whether the appellants, who are collaterals in the second degree, are entitled to exclude daughters from succeeding to the self-acquired property of their father. The Customary law of the Jullundur district was compiled in 1918 and is a voluminous document. According to the answers to Questions 45-A and B of that Code, collaterals up to the fifth degree exclude daughters as regards ancestral or self-acquired property of their father in the three tahsils Jullundur, Nakodar and Phillaur, while collaterals up to the seventh degree in the Nawanshahr tahsil exclude daughters with respect to both properties. In accordance with the decision of their Lordships of the Privy Council in 45 P R 1917,¹ this entry is a strong piece of evidence in favour of the collaterals appellants in support of the custom alleged by them, and as I have remarked in various other judgments,

1. *Beg v. Allah Ditta*, A I R 1916 P C 129=38. I C 354=44 I A 89=44 Cal 749=45 P R 1917. (P C).

this statement of their Lordships cannot be whittled away by general remarks that daughters are not usually consulted when an enquiry is made into the customs of the people or that the custom generally followed in the Punjab is to the contrary. Similarly, there is little use in attempting to reason *a priori* that the document of custom was not carefully prepared, for all that it purports to be or should be is a compilation of the statements of custom as given by the people.

The burden was thus heavy on the respondents and it remains to see how this burden has been discharged. The first instance against the daughters is Ex. P-11, a decision of a Subordinate Judge dated 24th August 1931 in which it was held that collaterals of the third degree excluded daughters from succeeding to self-acquired property amongst Jats in tahlil Phillaur. There was an appeal to the District Judge against this decision where the matter was partly compromised. The widow had gifted the self-acquired property of her husband to her daughter and the collaterals had sued to have this gift set aside and were successful, as already stated, in the trial Court. The daughters appealed on the ground that they were entitled to succeed and the gift was therefore only an acceleration of succession. By the compromise the decree was maintained, cancelling the gift and the widow took back the land from her daughter, a rider being added that the question of succession would be taken as not having been decided and could be re-opened on the death of the widow. This is certainly relevant under S. 13, Evidence Act, though it may not have the same value as some of the other instances. S. 13, Evidence Act, runs as follows:

Where the question is as to the existence of any right or custom, the following facts are relevant: (a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence; (b) particular instances in which the right or custom was claimed, recognized or exercised or in which its exercise was disputed, asserted or departed from.

The question arises whether a judgment recognizing a custom is relevant under this section. It will be seen that the word "recognized" in Cls. (a) and (b) of the section comes between "claimed" and "exercised" in Cl. (b) and between "claimed" and "asserted or denied" in Cl. (a). There is no question that the

claim, assertion, denial or exercising must be an act of the parties and it is difficult to see how the word "recognized," which comes between these terms means recognition by Courts. However, there are a number of cases which treat judicial recognition of a custom as relevant under S. 13, Evidence Act, though it seems to me that this is a doubtful matter. Certainly in my judgment a judicial decision is far from having the same importance as a clear cut instance of custom recognized by the parties themselves. In judicial decisions instances of the alleged custom are accepted or rejected for different reasons in different cases, while, if there is a clear instance where the parties have themselves recognized the custom, there is no such confusion. The second instance against the daughters is a very clear cut one. It is embodied in the document Ex. P-12. The parties were Jats of Phillaur tahsil and the collaterals of the fifth degree were found entitled to exclude daughters from succeeding to their father's self-acquired property. This case actually came to this Court where it was held in A I R 1936 Lah 130² that the revenue authorities acted quite correctly.

The third instance is another clear case against daughters succeeding to the self-acquired property of their father in the presence of second degree collaterals. It is Ex. P-13. This is a mutation dated 3rd May 1932, in which the married daughter was examined on interrogatories and recognized the custom. The fourth instance (Ex. P-14) is equally good. There again collaterals of the second degree excluded daughters from succeeding to the self-acquired property of their father. The married daughter appeared before the Revenue officer and admitted and recognized the custom as being such. Ex. P-17 is another mutation sanctioned on 25th October 1926 by which it was held that second degree collaterals were entitled to exclude three married daughters. This land has also been proved to be self-acquired. The sixth transaction is Ex. P-18, another mutation amongst Jats from Jullundur district. Here again the second degree collaterals by order dated 27th July 1929 were held entitled to exclude the daughter from succeeding to her father. The husband of the daughter appeared and admitted that his wife was not

2. Sajjan Singh v. Mt. Dhanti, AIR 1936 Lah 130.

entitled to succeed. In this case it has not been proved that the land was self-acquired, but it was land in Lyallpur and in all probability was self-acquired for reasons given at the commencement of this judgment. In any case, the custom being stated to be the same as regards ancestral and self-acquired property, this instance is not without value.

The seventh instance is Ex. P-19, another case from Phillaur tahsil, in which second degree collaterals were held on 10th February 1930 to exclude daughters from succeeding to the property of their father. This land has been proved to be self-acquired by the evidence of P. W. 10 Dalip Singh. All these seven mutations are valuable, and five of them are of very great value, under the provisions of S. 13, Evidence Act and they are in accordance with the statement of custom given in the *riwaj-i-am* which in itself is a strong piece of evidence against the daughters. The custom of other agricultural tribes in Jullundur according to the *riwaj-i-am* is the same. Instances therefore amongst other tribes are of some value, the custom followed being apparently more local than tribal. Instance No. 8, Ex. P-21, is an instance amongst Kambohs of Phillaur tahsil where mutation was refused on 18th December 1926 as regards a gift by a widow in favour of her daughters of the self-acquired property of her husband. The 9th instance, which is also amongst Kambohs of Nakodar tahsil of the Jullundur district, is set out in 15 Lah 586.³ This also was self-acquired property. The 10th instance is a decision of this Court in Civil Appeal No. 613 of 1933, decided on 2nd October 1934 amongst Jats of the Nakodar tahsil of the Jullundur district as regards self-acquired land. This is 8th instance amongst Jats, though it is 10th instance relied upon by the appellants.

On behalf of the daughters reliance was placed on the following instances. Ex. D-5 is a mutation sanctioned on 10th August 1927 where a gift by a widow of her husband's self-acquired land was sanctioned in favour of the daughter, though the collaterals objected. As this was a gift of self-acquired land by a widow, it was contended that the collaterals need not sue till 12 years after the widow's death, but the instance is not without value as an

instance in favour of daughters. Ex. D-9, a judgment of the District Judge of Jullundur, is the second case relied upon in favour of daughters. The land was partly ancestral and partly self-acquired and it was conceded by counsel before the trial Judge that the collaterals could not contest the gift with respect to such portion of the land as was found to be self-acquired. It was attempted to raise this point before the District Judge on appeal but he refused to hear arguments on it, as it had been conceded in the trial Court. The point was not thus argued, the *riwaj-i-am* was not even mentioned or relied upon, and in my judgment this case must be rejected. Ex. D-11 must also be rejected. There the widow gifted to her daughter her husband's self-acquired property with the consent of her husband's brother, the next heir. The distant collaterals objected, which obviously they had no right to do, apart altogether from the question of custom, for the husband's brother could do with the land as he liked, as he was the next heir and on his succeeding to it, it would have been self-acquired property in his hands.

The next instance relied upon in favour of daughters is Ex. D-16 a decision of this Court reported in A I R 1935 Lah 607.⁴ This was a case of Jats of Phillaur tahsil, decided about the same time as Civil Appeal No. 613 of 1933, where the opposite view was taken as already mentioned. This is the second instance in favour of daughters. The third instance in favour of daughters is a decision of this Court in Civil Appeal No. 2279 of 1934,⁵ a case amongst Jats of Jullundur tahsil.

There are also two Division Bench authorities of this Court amongst Arains, reported in A I R 1935 Lah 613⁶ and 12 Lah 412⁷ while there is another decision of this Court amongst Sainis reported in A I R 1935 Lah 834.⁸ There are thus in favour of daughters three cases amongst Jats, and three cases amongst other tribes. These are the established instances on the

4. Narain Singh v. Mt. Chand Kuar, A I R 1935 Lah 607=156 I C 174=37 P L R 220.

5. Harbans Kaur v. Nagina Singh, reported in A I R 1936 Lah 273.

6. Ibrahim v. Mt. Zainab, A I R 1935 Lah 613=156 I C 29=37 P L R 163.

7. Ghulam Muhammad v. Mt. Ralli, A I R 1931 Lah 641 = 134 I C 795 = 12 Lah 412 = 32 P L R 929.

8. Mt. Santi v. Dharam Singh, A I R 1935 Lah 834=156 I C 1011=38 P L R 456=17 Lah 201.

3. Mt. Naraini v. Bhag Singh, AIR 1934 Lah 280 =149 I C 962=15 Lah 586 = 36 P L R 331.

record. It is for the party alleging custom to prove what the custom is but, even if there had been no *riwaj-i-am*, in my judgment the evidence would establish that daughters do not succeed. With the *riwaj-i-am* in favour of the appellants however and eight instances amongst Jats and two amongst Kambohs established in favour of the appellants and only three amongst Jats and three amongst other tribes against the appellants, there can be no question but that it has been established on the record that daughters do not succeed to the self-acquired land of their father amongst Jats of Phillaur tahsil of the Jullundur district in preference to second degree collaterals. For the reasons given, I would accept the appeal and decree the plaintiff-appellants' claim with costs of this Court, parties bearing their own costs in the trial Court and in the lower appellate Court.

Abdul Rashid, J.—I agree.

W.D./A.L. *Appeal allowed.*

*** A. I. R. 1937 Lahore 226**

BHIDE AND CURRIE, JJ.

Girdhari Lal—Plaintiff—Appellant.

v.

Secretary of State — Defendant — Respondent.

First Appeal No. 1679 of 1934, Decided on 5th December 1935, from decree of Addl. Dist. Judge, Lahore, D/- 5th June 1934.

(a) Limitation Act (1908), Arts. 2 and 115—Applicability — Dismissal of Subdivisional Officer for preparing false T. A. bills—Suit for damages for wrongful dismissal — Dismissal is not 'an act done in pursuance of any enactment in force'—Art. 2 does not apply—Suit is one for breach of contract—Art. 115 applies.

A Subdivisional Officer was dismissed from his services for preparing false T. A. bills and a suit was brought by him for damages for his wrongful dismissal and it was contended that the suit was barred under Art. 2 of the Act:

Held: that the act of dismissal was not an act done in pursuance of any enactment in force and therefore Art. 2 did not apply. The suit was one for breach of contract and was governed by Art. 115 of the Act. The suit was not therefore barred by time: *Case law referred.* [P 228 C 1]

* (b) Government of India Act (1919), S. 96-B—Rules regarding civil services, R. 55—Words in S. 96-B 'subject to the provisions of this Act and the rules made thereunder' govern whole section—Rules made under it limit power of Crown to dismiss at pleasure

—Dismissal of Subdivisional Officer without following provisions of R. 55—Cause of action arises against Secretary of State — Civil Court has jurisdiction to entertain suit for damages.

The words at the commencement of the section 'subject to the provisions of this Act and of rules made thereunder' govern the whole section and thus the rules made under the section limit the power of the Crown to dismiss the servants at pleasure. This intention of the legislature is clear from Cls. 4 and 5 of the section. [P 231 C 1, 2; P 232 C 1]

A Subdivisional Officer was dismissed from service for preparing false T. A. bills, without following the procedure laid down for inquiry by R. 55 of the Civil Services Classification Rules. A suit was brought by the officer against the Secretary of State in a civil Court for damages for his wrongful dismissal. It was contended by the Secretary of State that the jurisdiction of the civil Court was barred in such matter as no cause of action arose against the Secretary of State for India:

Held: that as there was a failure to comply with the provisions of R. 55 of the Civil Services Classification Rules inasmuch as the procedure laid down therein was not followed during the inquiry of the officer concerned, the dismissal of the officer was wrongful to that extent and therefore a cause of action arose against the Secretary of State for India and that the civil Court had jurisdiction to entertain such suit: *A I R 1927 Cal 311 and A I R 1934 Rang 381, Rel. on; Case law discussed.* [P 232 C 1, 2]

* (c) Master and Servant—Wrongful dismissal—Damages — Measure of — Dismissal for preparing false T. A. bills—Dismissal itself not wrongful but manner of enquiry leading to dismissal wrongful—In determining damages Court must consider whether there were good grounds for dismissal.

Where an officer was dismissed from his service for preparing false T. A. bills and where the dismissal was not wrongful in itself, but the manner of enquiry leading to such dismissal was wrongful and a suit was brought for damages for wrongful dismissal:

Held: that in assessing the measure of damages, the Court could go into the merits of the case and consider whether there were good grounds for dismissal: *A I R 1934 Rang 381, Rel. on; In re London & Colonial Co., Ex parte Clark, 7 Eq. 550 and Earl of Stamford v. Dawson, 4 Eq. 352, Disting.* [P 232 C 2; P 233 C 1]

Mehr Chand Mahajan, Nawal Kishore and Arjan Das—for Appellant.

Norman Edmunds and Krishen Lal Kapur—for Respondent.

Currie, J.—The appellant, G. L. Bhola, was Subdivisional Officer in the Irrigation Branch. He joined Government service in 1916 as an upper subordinate and in 1920 was promoted to the Provincial Service of Engineers on time scale pay of Rs. 250-20-550/20-750. He had been serving in the Kirana Division of the lower Jhelum Canal since the end of 1927

and from January to October 1930 was in charge of the Khadir Subdivision. He was then transferred to the 2nd Bahawalpur Circle of the Sutlej Valley Project. The Executive Engineer was Mr. D. D. Jaini and the Superintending Engineer was Mr. Jesson. The Superintending Engineer, who had taken exception to the Subdivisional Officer, Khadir's travelling allowance bill of April 1930, pointed out in his letter of 16th June 1930, to the address of the Executive Engineer (Ex. D.26), that the Subdivisional Officer did not carry out regular tours of his subdivision and this led to excessive mileages being charged. He refused to accept the argument that Subdivisional Officers did not charge for all mileages actually performed and remarked "touring about in motor cars is really for the convenience of a Subdivisional Officer as he can do precious little proper inspection from a motor car touring along the boundary roads." Mr. Jesson also remarked that he considered that five days at headquarters during the month was ample for any Subdivisional Officer. These orders were communicated to the Subdivisional Officer. Subsequently on 29th September 1930, the Superintending Engineer called for an explanation of discrepancies between the Subdivisional Officer's travelling allowance bill for August (Ex. P.15) and the Telegraph Despatch Register of Kot Naja (Ex. P.16). The explanation was furnished in Ex. P.11. On 2nd March 1931, the Chief Engineer issued orders to the Superintending Engineer, 2nd Bahawalpur Circle, S. V. P., to take the explanation of the appellant regarding discrepancies between his T. A. bills for the months of May, July and August 1930 and the Despatch Register of the Kot Naja Telegraph Office. Accordingly Mr. Hughes formally charged the appellant in the following terms :

You have submitted untrue travelling allowance journals for the months of May, July and August 1930, as shown by a comparison of the Despatch Register of the Kot Naja Canal Telegraph Office and the travelling allowance journals submitted by you for the months named. You have therefore been called to my office today and are given from 10 a. m. to 4 p. m. during which time you will write your defence in my presence.

The Subdivisional Officer submitted his explanation (Ex. P.9) with a covering letter. On 8th June 1931 the letter dismissing him was issued; it was communicated to him on the 11th June, and he was relieved on 15th June. His dismissal

was gazetted on 11th December 1931. On 22nd December 1931 his appeal was dismissed by the Governor-in-Council. A subsequent memorial to the Governor-General was withheld under the rules but was treated as an appeal to the Governor and dismissed. On 25th April 1932 the appellant gave notice of suit and on 28th July 1932 instituted a suit claiming Rs. 1,50,000 for wrongful dismissal. After a lengthy trial the learned Additional District Judge held that the dismissal was wrongful as R. 55 of the Classification Rules had not been fully complied with. After considerable discussion of the quantum of damages he eventually awarded a sum of Rs. 5,160 holding that :

His action in charging only enhanced rate of daily allowance at Rs. 6 when if his mileages could be allowed he was entitled to more was not altogether due to innocent causes, but was partly due to his attempt to hide the fact that he visited the headquarters almost daily and there was therefore an element of deception, and it was in disobedience of the spirit of the Superintending Engineer's orders that he continued visiting the headquarters so frequently.

On the question of damages the learned Additional District Judge had accepted the evidence of a Chartered Accountant, P. W. 5, to the effect that the capitalized value of the remaining years of service plus the capitalized value of his pension would have amounted to Rs. 76,405, but for the reasons given by him he considered that Rs. 5,160 was sufficient. The amount of Rs. 5,160 was selected as being one year's pay at the rate of Rs. 430 per mensem, the rate then drawn by the appellant. Against this order the present appeal has been preferred, the appellant claiming an additional sum of Rs. 70,000. On behalf of the Secretary of State cross-objections have been presented claiming that the suit should have been dismissed in toto: (a) for want of jurisdiction; (b) because the plaintiff had no cause of action; and (c) because the suit was barred by time.

It will be convenient to consider the point of limitation first. The learned assistant Legal Remembrancer contends that Art. 2, Sch. 1, Lim. Act applies. This, Article provides that in the case of a suit for compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India, the period of limitation shall be 90 days from the time when the act or omission takes place. Mr. Edmunds contends that the suit should

therefore have been brought within 90 days from the date of plaintiff's dismissal. He has referred to certain rulings but these are not directly in point. 72 P R 1909¹ and 4 Lah 428² relate to act done in the one case by Municipal and in the other case by Canal officials which actually caused material damage. 39 Bom 600³ is entirely irrelevant as the limitation there was held to be governed by a special section of the District Municipal Act (Bom. Act 3 of 1901). 1931 A L J 858⁴ was a case where the plaintiff sued for damages for malicious arrest on a charge of dacoity. The rulings quoted on the other side, 65 I C 105⁵ and 29 I C 597⁶ are a little more helpful. Though the latter ruling dealing with dismissal of the Municipal Secretary contains a remark that Art. 2 of the Limitation Act did not apply, but in the opinion of the learned Judge Art. 115 applied. It appears to me that it cannot possibly be said that the dismissal of the plaintiff was "an act done in pursuance of any enactment in force," and therefore Art. 2 would not apply. The suit is one in reality for breach of contract and is thus well within time.

The real crux of the case lies in the cross-objections regarding jurisdiction and cause of action preferred by the Secretary of State. These two points are really closely inter-connected and can conveniently be dealt with together. The principal point raised by the learned Assistant Legal Remembrancer is that the Court had no jurisdiction to hear such a suit. He argues, as far as I have been able to follow him, that there is no contract between the Crown and public servants and that public servants hold their appointment at the pleasure of the Crown. They are therefore liable to be dismissed whenever the Crown pleases and the Crown cannot be sued for wrongful dismissal. According to his argument the

rule contained in the Classification Rules regarding the procedure to be adopted before a Government servant is dismissed or otherwise punished are merely directions intended for the guidance of the authorities whose duty it is to maintain the administration of the services. He urges that no authority is competent to fetter in any way the power of the Crown to dismiss at pleasure, as that involves an abrogation of the prerogative. It is urged that the rules made by the Secretary of State have no statutory force. In support of this contention Mr. Edmunds has referred to a large number of English authorities. He first cited (1882) 3 T L R 114⁷ in which the House of Lords held that if there had been any contract, such contract must necessarily have had imported into it the ordinary course of practice of the Crown, that is to say, it must have been subject to reservation of the right of the Crown to dismiss. In (1896) 1 Q B D 116⁸ Lord Esher, M. P., took the same view. 1895 A C 229⁹ was a case in which the plaintiff who had been appointed temporarily to act in the place of the officer who was on leave, sued for damages on the ground that he had been dismissed before the expiration of the leave of the officer for whom he had been appointed to act. The case came from Western Australia. It was held that certain regulations which existed were merely directions given by the Crown to the Governments of Crown Colonies for general guidance, and that they did not constitute a contract between the Crown and its servants. In delivering the judgment of their Lordships of the Privy Council, Lord Hobhouse remarked :

They consider that unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown, not by virtue of any special prerogative of the Crown but because, such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly his remedy is not by a law suit but by an appeal of an official or political kind.

Again in 34 T L R 341 Avory, J. referring to the remarks by Lord Hobhouse in 1895 A C 229⁹ understood the words "where it was otherwise provided" to

1. Richard Watson v. Municipal Corporation of Simla, (1909) 72 P R 1909=2 I C 819=112 P W R 1909=108 P L R 1909.

2. Punjab Cotton Press Co. v. Secretary of State, A I R 1924 Lah 169=79 I C 208=4 Lah 428.

3. Municipality of Ratnagiri v. Vasudeo Balakrishna, A I R 1915 Bom 121=30 I C 390=39 Bom 600=17 Bom L R 652.

4. Shariful Hasan v. Lachmi Narain, A I R 1932 All 16=135 I C 558=1931 A L J 858.

5. Panchanan Chatterjee v. Santosh Kumer Bose, (1922) 65 I C 105.

6. Municipality of Tatta v. Assanmal Chandumal, A I R 1914 Sind 125=29 I C 597=8 S L R 294.

7. De Dohse v. Queen, (1882) 3 T L R 114.

8. Dunn v. Queen, (1896) 1 Q B D 116=65 L J Q B 279=73 L T 695=44 W R 243=60 J P 117.

9. Shenton v. Smith, 1895 A C 229=64 L J P O 119=11 R 375=43 W R 637=72 L T 130.

mean "otherwise provided by statute." In 1896 A C 575¹⁰ it was held that the Crown has by law, whether in England or New South Wales, power to dismiss at pleasure either its civil or military officer, a condition to that effect being an implied term of the contract of service except where it is otherwise expressly provided, but that certain provision of the New South Wales Civil Servants Act of 1884 being manifestly intended for the protection and benefit of the officer are inconsistent with such a condition and consequently restrict the power of the Crown in that respect. The provisions of that Act, as appear from the report, were in many cases similar to the provisions of the Classification Rules. The learned Assistant Legal Remembrancer contends that in that case the provisions were included in a statute whereas no such provisions are contained in the Government of India Act itself but appear only in the Classification Rules.

In (1920) 37 T L R 138,¹¹ a case in which an officer had been dismissed not for misconduct but only for difficulties with relation to his health, it was held that the Crown servant against whom no misconduct is alleged is liable to be dismissed even if the form of contract implies that except in case of misconduct the engagement can be terminated only by notice. This decision was given in November 1920, but the plaintiff's employment had been terminated as far back as 8th January 1913, and thus the case is not very helpful in determining the effect of the provisions of S. 96-B, Government of India Act. In A I R 1934 P C 60¹² their Lordships of the Privy Council held that :

If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine "for cause" it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded.

In their view this followed from the reasoning of the Board in 1896 A C 575.¹⁰ They further remarked :

The contrary view to that, here expressed, would defeat the security given to numerous servants of the Crown in judicial and quasi-judicial and other offices throughout the Empire where one of the terms of their appointment has been expressed to be dismissal for cause.

Mr. Edmunds contends that these remarks are obiter as the appeal was ultimately determined on other grounds, namely that the performance of the contract had become impossible by legislation which had abolished the appellant's post and thus the contract had been discharged. The remarks however were necessitated by the fact that there had been a difference of opinion on the point between the Judges in the Canadian Courts. Reference was also made to 1898 A C 661.¹³ This ruling held that :

Although it was decided in *Gould v. Stuart*,¹⁰ that the effect of the Civil Service Act, 1884, (in New South Wales) was to deprive the Crown of its rights to dismiss its civil servants summarily without following the procedure prescribed by the Act, it was certainly not suggested that the provisions of the Act do, either directly or by implication, take away the right of the Crown to abolish a civil office.

The ruling therefore is not in point. From the above authorities it appears clear to me that though ordinarily the Crown can dismiss an officer at pleasure, there are certain cases in which provision is made for the limitation of that right and that as held in A I R 1934 P C 60¹² where the terms of the appointment definitely prescribe a term and expressly provide for a power to determine 'for cause' any implication of a power to dismiss at pleasure is excluded. The question therefore is whether it should be held that in India any such provision exists. S. 96-B, Government of India Act, provides that "subject to the provisions of this Act and of rules made thereunder every person in the civil service of the Crown in India holds office during His Majesty's pleasure." Cl. (2) of the said section gives the Secretary of State power to make rules regulating the classification of the civil services in India, their conditions of services and discipline and conduct. Cl. (4) runs :

For the removal of doubts, it is hereby declared that all rules or other provisions in operation at the time of the passing of the Government of India Act, 1909, whether made by the Secretary of State in Council or by any other authority, relating to the civil service of the Crown in India, were duly made in accordance with the powers in that behalf, and are confirmed but any such rules or provisions may be revoked, varied or added to by rules or laws made under this section.

Clause (5) provides that :

No rules or other provisions made or confirmed under this section shall be construed to limit or abridge the power of the Secretary of State in Council to deal with the case of any person in the

10. *Gould v. Stuart*, 1896 A C 575=65 L J P C 82=75 L T 110.

11. *Denning v. Secy. of State*, (1920) 37 T L R 138.

12. *Clifford B. Reilly v. Emperor*, A I R 1934 P C 60=148 I C 637=1934 A C 176=103 L J P C 41=150 L T 384=50 T L R 212 (P C).

13. *Young v. Waller*, 1898 A C 661=67 L J P C 80=78 L T 508=14 T L R 374.

Civil Service of the Crown in India in such a manner as may appear to him to be just and equitable . . . provided that where any such rule or provision is applicable to the case of any person, the case shall not be dealt with in any manner less favourable to him than that provided by the rule or provision.

The Civil Services (Classification, Control and Appeal) Rules were made by the Secretary of State for India in Council under S. 96-B, Government of India Act, on 27th May 1930 and R. 55 is the one with which we are now concerned. This rule runs :

Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of dismissal, removal or reduction shall be passed on a member of a Service (other than an order based on facts which had led to his conviction in a criminal Court) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires or if the authority concerned so direct, an oral inquiry shall be held. At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called, as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof. This rule shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule may, in exceptional cases, for special and sufficient reasons to be recorded in writing, be waived, where there is a difficulty in observing exactly the requirements of the rule and those requirements can be waived without injustice to the person charged.

We have therefore to consider the effect of these rules. In support of his contention that despite these rules the Crown can dismiss at pleasure, the learned Assistant Legal Remembrancer has referred to various rulings : In 158 I C 626,¹⁴ a decision of the Division Bench of the Allahabad High Court, it was held that where the office is held at pleasure then on the principle of 1895 A C 229,⁹ no action would lie for an order of dismissal

which is made not in accordance with the rules. That case dealt with powers of a District Board to dismiss its servants and is not directly in point. Two cases of this Court have been cited by him. In 155 I C 395,¹⁵ in a brief judgment in which there was no reference to S. 96-B, Government of India Act, or the rules thereunder, it was held that the plaintiff, a cleaner at the North-Western Railway, was, as a servant of the Crown, liable to be dismissed at will and pleasure unless the Crown had deprived itself of the prerogative by statute. It is not clear whether the plaintiff in that case came within the scope of the Classification Rules. In another case reported in 158 I C 369,¹⁶ a Single Judge dealing with an application for leave to sue in *forma pauperis*, remarked without any discussion :

It is however the general rule that all servants of the Crown are liable for termination of service at pleasure.

The principal ruling on which reliance is placed is 57 Mad 857,¹⁷ in which the whole position was discussed at length by Sir Owen Beasley, Chief Justice, who held (p. 872) that, if the appellant held his appointment at the pleasure of the Crown, it was clear that the Secretary of State could not be sued for damages for breach of contract for dismissing a servant who held his appointment or office under such a tenure because the contract of service being at the pleasure of the Crown has not been broken by such dismissal. The learned Chief Justice in discussing 1896 A C 575,¹⁰ distinguished that case on the ground that, in the New South Wales Act of 1884, there was no express enactment as there is in S. 96-B (1), Government of India Act, that the tenure was at the pleasure of the Crown and hence in those circumstances there could not be imported by implication into the contract of service the term that the Crown may put an end to it at its pleasure. In discussing the rules the learned Chief Justice pointed out that R. 14 of the rules then in force (which is equivalent to the present R. 55) contained the words "without prejudice to the provisions of the Public Servants

15. Jamun v. Secy. of State, A I R 1935 Lah 669 = 155 I C 395 = 37 P L R 370 = 16 Lah 1017.

16. Lal Singh v. Secy. of State, A I R 1935 Lah 965 = 158 I C 369.

17. R. T. Rangachari v. Secy. of State, A I R 1934 Mad 516 = 154 I C 884 = 57 Mad 857 = 67 M L J 123.

14. Roshan Lal v. District Board, Aligarh, A I R 1935 All 802 = 158 I C 626.

(Inquiries) Act of 1850" and S. 25 of that Act runs :

Nothing in this Act shall be construed to affect the authority of Government for suspending or removing any public servant for any cause without any enquiry under this Act.

The Public Servants (Inquiries) Act of 1850 provides for public enquiry in the case of public servants accused of misconduct, and in view of the scheme of the Act, S. 25, in my humble judgment, really only reserves to Government right to remove a public servant without an enquiry under that Act, that is to say as of a departmental enquiry and not of a public enquiry. In 16 I C 922,¹⁸ a Division Bench of the Calcutta High Court took the view that :

Except where it is otherwise provided by statute as in *Gould v. Stuart*,¹⁹ all public officers and servants of the Crown hold their appointments at the pleasure of the Crown ; and all, in general, are subject to dismissal at any time without cause assigned, nor will an action for wrongful dismissal be entertained,

for

what the Crown could do independently of any enquiry and without the assignment of any reason, cannot very well be questioned in a Court of law on the ground that the inquiry has not been satisfactory or in proper form, or that the reason assigned is unsound or open to criticism.

That decision however was given in 1912 before the passing of the present Government of India Act and is therefore inapplicable. A I R 1929 Sind 69¹⁹ was a case of dismissal of a surveyor by the Karachi Municipality and is not really in point. 27 Bom 189²⁰ was a suit for damages for defamation brought by a Deputy Collector against the Secretary of State, and proceeded on its own facts and is not in point in the present discussion. In 59 Cal 1289²¹ it was held that a suit for damages did not lie against the Secretary of State for India in Council for misfeasance, wrongs, negligence or omission of duties of managers appointed by the Court of Wards ; I am unable to see how this ruling is applicable in the present case. For the appellant reliance is placed on a decision of a Division Bench of this Court in 158 I C 996,²² in which Dalip Singh, J.

dissented from 57 Mad 857,¹⁷ and held that it was not correctly decided in so far as it held that the rules made by the Secretary of State cannot qualify the tenure of civil servants in India. He held that though the English authorities supported the contention put forward on behalf of the Secretary of State, so far as the law in India was concerned, it appeared to be governed by S. 96-B, Government of India Act. Apart from this ruling reliance has been placed on 54 Cal 44,²³ in which Buckland, J. remarked, after citing the provisions of S. 96-B, Government of India Act :

It appears to me on the authority of *Gould v. Stuart*,¹⁹ that as in that case these provisions, which are manifestly intended for the protection and benefit of the officer, are inconsistent with importing into the contract of service the term that the Crown may put an end to it at pleasure, which is the language used in the case cited. Stated in other words what it comes to is that before a Police Officer may be dismissed, the procedure laid down by R. 14 must be followed. In so far as the plaintiff alleges that such regulation was not complied with, the plaint discloses a cause of action.

In 57 Cal 231,²⁴ at pp. 237-238, Costello, J. appears to approve this ruling though he did not finally decide the question as it was unnecessary to do so in that case. In 8 Rang 215,²⁵ Cunliffe, J. remarked :

In principle I am unable to distinguish the case before me now from the decision in *Gould v. Stuart*.¹⁹ To my mind the meaning of the words 'subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure' read together with R. 14 is quite clear. They indicate that certain formalities must be observed before a civil servant can be dismissed, and in so far as these formalities are alleged not to have been followed, the plaintiff is not precluded from bringing his action.

The same view was taken in 12 Rang 556,²⁶ by a Division Bench. In my opinion, in view of the clear wording of S. 95-B the view taken by the Rangoon Court and Buckland, J. in 54 Cal 44²³ is correct. The words at the commencement of the section 'subject to the provisions of this Act and of rules made thereunder' must be held to govern the whole section and thus the rules made under the section limit the

18. Ram Das Hazra v. Secy. of State, (1912) 16 I C 922=18 O W N 106=17 C L J 75.

19. Abraham Reuben v. Karachi Municipality, A I R 1929 Sind 69=113 I C 387=26 S L R 435.

20. Jehangir M. Cursetji v. Secy. of State, (1903) 27 Bom 189=5 Bom L R 30.

21. Secy. of State v. Sree Govinda Chaudhuri, A I R 1932 Cal 834=140 I C 856=59 Cal 1289=36 C W N 606=55 C L J 542.

22. Hari Ram v. Secy. of State, A I R 1936 Lah 282=158 I C 996=37 P L R 780.

23. Satish Chandra Das v. Secy. of State, A I R 1927 Cal 311=101 I C 581=54 Cal 44.

24. Bimalacharan Batabyal v. Trustees for the Indian Museum, A I R 1930 Cal 404=125 I C 647=57 Cal 231.

25. J. R. Baroni v. Secy. of State, A I R 1929 Rang 207=120 I C 695=8 Rang 215.

26. Secy. of State v. N. D. Attaiides, A I R 1934 Rang 381=154 I C 212=12 Rang 556.

power of the Crown to dismiss at pleasure. That this is the intention appears to me to be clear from the fact that Cl. (4) confirmed all existing rules while Cl. (5) provided that where any such rule or provision was applicable to the case of any person, the case shall not be dealt with in any manner less favourable to him than that provided by the rule or provision. In my view therefore the plaintiff-appellant would have a cause of action against the Secretary of State for India in Council if the inquiry leading to dismissal had not followed the procedure laid down in R. 55 of the Classification Rules.

Before turning to consideration of the inquiry in this case, a minor point raised by the learned Assistant Legal Remembrancer may be disposed of. He contended that the dismissal of the plaintiff was an act of State or Sovereignty, and that, therefore, no action could be brought against the Secretary of State in respect thereof. He referred to various rulings by way of analogy, but none of these appears to me to be directly in point. I am unable to see how the dismissal of a servant in circumstances such as those of the present case can be described as an act of State or Sovereignty. Further, this plea was never expressly raised in the pleas and was not placed in issue. Consequently there is no material before us which would enable one to decide whether the position of the Secretary of State in such a case is such that that dismissal could be considered an act of State or Sovereignty.

It was also argued that as the rules themselves provide for a remedy by way of appeal, no further remedy is open to the person dismissed. There is, however, no authority for holding that the jurisdiction of the civil Courts is ousted in such cases. As I have shown above there are a number of rulings which hold that the Secretary of State can be sued in such circumstances, and in my opinion, this is the correct view of the law. In the present instance it is clear that the authorities did not comply fully with the provisions of Classification R. 55. A charge was framed against the plaintiff and he was called on to put in a written statement of his defence, but he was not called upon to state whether he desired to be heard in person, though in his covering letter, Ex. P-12, at p. 148, with reference to his explanation regarding his T. A. bill for May 1930 he distinctly stated that he could prove

whatever he had stated. The learned Assistant Legal Remembrancer has suggested that it should be held that these provisions were waived in accordance with the last paragraph of the rule which states that all or any of the provisions of the rule may, in exceptional cases, for special and sufficient reasons to be recorded in writing be waived; there is a difficulty in observing exactly the requirements of the rule and those requirements can be waived without injustice to the person charged. He argues that the case was so clear that it was unnecessary to continue the enquiry further. Obviously, however, this proviso cannot be applied as there is no specific order in writing giving reasons for waiving this part of the rule. It must, therefore, be held that the provisions of R. 55, were not fully complied with.

Mr. Edmunds further contended that in any case the plaintiff had no claim to damages as from what had been proved in this case it was clear that he had been guilty of misconduct which fully warranted his dismissal. The English rulings cited by him deal with cases where a master dismissed his servant without notice. The present case is one where the dismissal is for cause shown, and the suit is for damages for failure to make a proper enquiry: it is not one for damages for dismissal without notice and, therefore, the rulings cited are, in my opinion, inapplicable. There was thus a failure to comply with the provisions of R. 55 of the Classification Rules, and to that extent, the dismissal of the plaintiff was wrongful and he had a cause of action which could be tried in the civil Courts. For the appellant Mr. Mahajan contended that once it was held that the dismissal was wrongful, the Court was not entitled to go into the merits of the case and had to award full compensation. In this connexion he cited various English authorities on the subject of the law of Master and Servant, and two decisions, 7 Eq 550²⁷ and 4 Eq 352.²⁸ It appears to me, however, that these authorities are not in point, as the decisions deal with cases where the actual dismissal was held to be wrongful. In the present case it is not the dismissal itself which is wrongful but the manner of the

27. *In re London and Colonial Co., Ex parte Clark*, (1869) 7 Eq 550=38 L J Ch 562=20 L T 774.

28. *Earl of Stamford v. Dawson*, (1867) 4 Eq 352=36 L J Ch 749=16 L T 516=15 W R 896.

enquiry leading to the dismissal and it is obvious that in assessing damages in a case of this nature, the Court is compelled to consider whether there were good grounds for the actual dismissal of the plaintiff. This was the view taken in 12 Rang 556,²⁶ in which at p. 572, Baguley, J. remarked :

It is quite impossible to justify the assessment of damages in this way. The wrong that the plaintiff suffered consisted in his not having a full enquiry which complied with R. 55, before removal. Without such an enquiry, he ought not to have been removed. In order to assess the damage we must see what his position would have been if he had been replaced in his position as he was before his removal. He would still have to meet these charges; there could be no application of the principle of *autrefois acquit* and he would still be a servant holding office during pleasure, and so removable at any time after the holding of an enquiry that complied with R. 55. We have to consider what benefit he would have got from being so replaced.

These remarks appear to me to be directly in point. It is, therefore, necessary to go into the question of whether there were good grounds for dismissing the appellant.

From a perusal of the T. A. bills, which form the basis of the charge against the appellant, it is clear that these bills are so prepared that they give the impression that the officer was regularly touring in his Sub.Division and spending very little time at headquarters. The Despatch Register of the Telegraph Office at his headquarters Kot Naja, however, showed conclusively that he must have been at headquarters on certain dates when according to his T. A. bills he was out on tour. This is also borne out by the Receipt Register. The learned Additional District Judge devoted a considerable portion of his judgment to discussing whether the hours shown in the Despatch Register represented the time of the actual despatch of the message and came to the conclusion that according to the rules it was the actual hour of despatch that should have been entered. The evidence of the signallers who were produced is to the contrary and they profess entire ignorance of the rule. They all depose that the time entered as time of despatch in their registers was the time when the message was handed in for despatch and not the hour of actual despatch. Before us the registers were examined and discussed at length. In my opinion, all that can be said is that while in May it appears from the fact that batches of messages are

recorded as despatched, at the same time that it was the time of handing in which was shown. Subsequently, however, an attempt appears to have been made to show the actual time of despatch. From an examination of the registers as a whole, especially when they are checked with the time given for receipt of certain messages at other stations, it would appear that no very great reliance could be placed on these registers as regards the exact time of despatch of any particular message. They do, however, suffice to show that on certain dates when according to his T. A. bills the Sub.Divisional Officer was on tour, he must have been at his headquarters, even though it is true that certain messages were despatched by the Sub.Divisional clerk in his name. This fact indeed is admitted by the plaintiff in his attempts to explain his T. A. bills.

The learned Assistant Legal Remembrancer took us through the evidence relating to these T. A. bills at very great length and pointed out various dates on which he contended the T. A. bills were false. The dates he particularly questioned were May 1, 2, 10; July 12, 24 and August 9. There cannot be the least doubt from a perusal of the statement prepared by the plaintiff himself (Ex. P. 18) that his T. A. bills give a totally false idea of his movements. Thus, on 12th July, he showed himself as halting at Halalpur which he had reached on 9th July and on the 13th he showed himself as moving from Halalpur to Bakhuwala. In his first explanation submitted to the Superintending Engineer, Bahawalpur (Ex. P. 10) he stated that he might have come from Halalpur to Kot Naja to give instructions about closure work and rejoined camp again without charging the journey in the bill. In Ex. P. 18, however, he showed that he left Halalpur at 7 a. m. and reached Kot Naja at 8 a. m. and stopped there for the night owing to rain and left Kot Naja on the 13th. As regards 1st and 2nd May, the T. A. bills showed the Sub.Divisional Officer as proceeding on 1st May, from Yakuwala to Gausewala and, on 2nd May, as doing apparently two trips from Gausewala ending at Barama, and on 3rd May, from Pir Panja to Halalpur: *vide* Ex. P. 13. In his first explanation (Ex. P. 9) he stated that he had probably come to Kot Naja on the 2nd evening as his children were ill and returned to camp on the 3rd. In Ex. P. 18 he showed that he had gone

from Yakuwala to Kot Naja in the morning of 1st May at 8 a. m. and then gone from Kot Naja to Doda Head and back, and finally at 5-30 p. m. he left Kot Naja and reached Tail Wall and Gausewala at 7-30 p. m. On the 2nd he showed that he returned to headquarters at 9-30 a. m. and left Kot Naja again at 3 p. m. on the 3rd. The contention of the Secretary of State was that he had never been to Gausewala. In support of this, reliance was placed on a telegram (No. 2 in the Despatch Register at Gausewala) sent on 2nd May, by the Zilledar of Gausewala (D. W. No. 13) to the following effect :

Patwaris are waiting for bonus. I have to go outside for inspection of some sites. Kindly order if your good self will come today.

In reply the Sub-Divisional Officer wired, "not today".

Though these telegrams would certainly give the impression that the Sub-Divisional Officer had not been at Gausewala at all on 2nd May, it cannot be said to be clearly established that the Sub-Divisional Officer never went to Gausewala nor on the other hand has it been established that he did go there. It is however clear that when according to his T. A. bills he was in camp in his Sub-Division, he was actually for a large part of the time at headquarters.

In view of these two clear cases it is unnecessary to discuss the remaining dates at length. It is clear that in many cases he charged enhanced daily allowance to which he was not entitled as he passed a portion of the day at headquarters. On his behalf it is urged that his admissions must be taken as a whole and that he should be believed when he states that his superior officers were well aware of what he was doing. He alleges that he told Mr. Jaini that his wife was in the family way and that he would not be able to remain in camp, and that Mr. Jaini told him not to worry about it. He also alleges that he spoke to Mr. Jesson on the same subject. A child was born on 8th August, but that fact would not be an adequate explanation of his conduct in May and the early part of July. From Mr. Jaini's evidence it would appear that the plaintiff did speak to him on the subject and that he told him not to worry. The obvious inference is that Mr. Jaini signified that he would not insist on the Sub-Divisional Officer spending only five days

in the month at headquarters while his wife was ill. It does not follow that Mr. Jaini gave him permission to prepare T. A. bills which entirely concealed the fact of his spending a large portion of his time at headquarters. It is further urged on his behalf that though he may not have been entitled to enhanced travelling allowance under the rules in view of his returns to headquarters, he was acting on a misinterpretation of the rules, but it is hard to see how anyone could have misinterpreted the rules, which are perfectly clear.

The appellant's counsel also contended that had the Sub-Divisional Officer actually charged mileage for distances covered by him instead of enhanced daily allowance, he would have been entitled to draw a larger sum than he actually did. That no doubt is true, but the argument entirely ignores the fact that such mileages could never have been passed by the controlling officers as the journeys were made not on the public service but for private reasons and the Superintending Engineer had clearly stated in June that he considered such mileage unnecessary. From a consideration of the T. A. bills, in conjunction with the explanation which the plaintiff attempted to furnish, it is clear that these bills were deliberately framed to conceal the fact that he was almost daily returning to headquarters except when the Executive Engineer was on tour with him and that, at any rate, as far as the bills for July and August were concerned, they were so framed as to conceal the fact that he was disobeying the orders given to him on the subject of touring by the Superintending Engineer.

There was thus ample cause of punishing the plaintiff and as the degree of punishment rests entirely with the authorities, it is not our province to express an opinion as to whether his misconduct was such as to warrant his dismissal or whether a lighter punishment would have sufficed. The conclusion at which I have arrived is that there was ample ground for dismissing him but that the manner of his dismissal was contrary to the rules made under the Government of India Act. As regards the measure of damages, certain cases have been cited by the learned Assistant Legal Remembrancer, but these proceed on their individual facts and are not directly in point. In 57 Cal 231²⁴ three months' pay had been awarded in lieu of notice. The present case is not of

dismissal without notice but one for damages for failure to comply with the rules regarding the mode of the procedure to be adopted in inquiring into the case of the appellant. He has been awarded damages to the extent of one year's pay and in the circumstances that does not appear to me to be an unreasonable amount as owing to the failure of the authorities to adopt the prescribed procedure, the plaintiff was encouraged to embark on this litigation at very considerable expense. On the other hand in view of what has been shown in the case and his own admissions it is clear that had the inquiry been fully carried out in the first instance, there would have been ample ground for his dismissal. He is not therefore in my opinion entitled to any further damages such as he has claimed in respect of the pay he might have drawn in the future.

I would therefore dismiss the plaintiff's appeal and also dismiss the cross-objections preferred by the Secretary of State. In the circumstances of the case I think it fair that the parties should be ordered to pay their own costs in this appeal. In conclusion, I would point out that had the authorities complied carefully with the provisions of R. 55 the amount of time and money that has been wasted on this litigation would have been saved.

Bhide, J.—I agree, but wish to add a few remarks on the point of law raised in this case as regards the jurisdiction of a civil Court to entertain a suit of this nature by a public servant for wrongful dismissal. The learned Assistant Legal Remembrancer conceded in view of the decision in 1896 A C 575,¹⁰ that although public servants usually hold office during the pleasure of the Crown, this may be restricted by statute. In the present instance S. 96-B, Government of India Act, clearly lays down that :

Subject to the provisions of this Act and the rules made thereunder every person in the Civil Service of the Crown in India holds office during His Majesty's pleasure, etc., etc.

The learned Assistant Legal Remembrancer tried to distinguish the present case merely on the ground that the restriction in the present instance occurs in the rules and not in the Act itself. This contention appears to me to have no force, firstly because the section itself expressly makes the tenure not only subject to the other provisions of the Act but also of the

rules thereunder, and secondly, there seems to be no authority for holding that rules properly framed under a statute have less force than the provisions of the statute itself so long as the rules remain in force. The Legislature frequently leaves matters of details to be regulated by rules because such matters cannot be conveniently dealt with by it in the Act itself. But I see no good reason for holding that such rules have less force. It was next urged that a breach of the rules cannot be held to amount to a breach of the contract, as the rules can be altered by the Secretary of State in Council without the consent of the public servants concerned. I do not think there is much force in this argument also. When a public servant enters the service of the Crown, there is, I think, an express or implied understanding that he will be governed by the rules for the time being in force with regard to the service and both parties must be taken to have undertaken to observe these rules in their mutual relations.

In 57 Mad 857,¹⁷ which was a case of the present type, 37 T L R 138¹¹ was distinguished on the ground that in India S. 96-B, Government of India Act, clearly lays down that the civil servants of the Crown in India hold during His Majesty's pleasure while there was apparently no such provision in the New South Wales Civil Servants Act of 1884, the provisions of which governed the case dealt with in 1896 A C 575.¹⁰ But with all respect I must say that I am unable to see why this should make any difference, when S. 96-B expressly places a limitation on the tenure at the pleasure of the Crown by making it subject to the other provisions of the Act and the rules thereunder. In other words the section itself shows that the tenure is not unreservedly at the pleasure of the Crown. It was further remarked in that case that the tenure must be either during the pleasure of the Crown or some higher tenure, such as tenure during good behaviour but here, too I am unable to see why there should be an intermediate one, i. e., tenure during the pleasure of the Crown but limited in certain respects by the other provisions of the Act and the rules thereunder.

K.B./A.L.

Appeal dismissed.

A. I. R. 1937 Lahore 236

COLDSTREAM, J.

Mt. Akhtari Begum—Petitioner.

v.

Abdul Rashid—Opposite Party.

Criminal Revn. No. 655 of 1935, Decided on 2nd November 1935, from order of Addl. Dist. Magistrate, Delhi, D/- 30th April 1935.

Criminal P. C. (1898), S. 488—Maintenance to children—Application for maintenance by Mahomedan mother of her minor children under four years—Father willing to maintain them if given in his custody—Mother is proper custodian of such children—Enquiry under Mahomedan law is not necessary in such proceedings—Maintenance cannot be refused to children.

An application for maintenance of herself and her two minor children of four years and one and a half years respectively was made by a Mahomedan woman under S. 488, Criminal P. C. The father contended that he was entitled to the custody of his son under the Mahomedan law and that he was ready to maintain him if he was given in his custody. The mother being entitled to the custody of the daughter it was not disputed that the father was entitled to maintain her:

Held: that as an enquiry into Mahomedan law on point of proper custody of a minor child was not made necessary by the Statute law (Code of Criminal Procedure) which governed these proceedings, the mother was the proper person to have the custody of her son also, and the father was bound to maintain such son. The refusal of the order of maintenance by the trial Court was therefore wrong. [P 236 C 2]

Shamair Chand—for Petitioner.

Mohsin Shah—for Opposite Party.

Facts.—The respondent was discharged by Syad Aijaz Hussain Shah, exercising the powers of a Magistrate of the 1st Class in the Delhi District by order, dated 25th February 1935, under S. 488, Criminal P. C. The facts of this case are as follows: In this case *Mt. Akhtari Begum* applied for maintenance under S. 488, Criminal P. C., against her husband, *Abdul Rashid*. She applied for maintenance for herself and two minor children, namely *Iqbal Ahmad*, aged four years, and *Mt. Sikandar Jahan Begum*, aged one and a half years. The grounds taken for asking for maintenance were that *Abdul Rashid* had refused to maintain her and had ill-treated her. The case was instituted in the Court of *Syed Aijaz Hussain Shah*. After going into the case the Court refused to grant any maintenance allowance either to *Mt. Akhtari Begum* or her two children. The parties had been married for four or five years and there is

no dispute that the children are of *Abdul Rashid*. No maintenance allowance was allowed to *Mt. Akhtari Begum* for the reason that it was found that ever since the marriage she has been living apart from her husband and there was no sufficient reason for her doing so. That order (torn) perfectly correct. But the order refusing maintenance for the children is not correct.

Grounds.—The proceedings are forwarded for revision on the following grounds: That under the Mahomedan law a father is bound to maintain his children and the fact that his wife has separated from him and does not come and live with him cannot form a ground for not maintaining the children. Both the children are minors and a Mahomedan mother has the right of custody of her minor sons until they have completed their 7th year and of the daughters up to puberty. The claim put forward by *Abdul Rashid* that he will maintain the children provided his wife comes and lives with him cannot be maintained. The children are his and he is required to pay for their maintenance under his own personal law. The order of the lower Court exempting him from this maintenance is not justified.

Order.—I have heard counsel on both sides. It is not disputed that the father, *Abdul Rashid*, is bound to maintain his infant daughter to the custody of whom the mother is entitled. As regards the boy, who is about five years old, it is contended on behalf of his father that the father and mother are Shiahs and that under Shiah law the father is entitled to the custody of a son after the age of two years and that therefore *Abdul Rashid's* refusal to maintain his son only on condition that the son is placed in his custody will not entitle *Mt. Akhtari Begum* to demand an allowance for the child. *Abdul Rashid* did not meet his wife's application under S. 488 on behalf of his son with any such plea and I do not think an enquiry into Mahomedan law on this point is made necessary by the Statute law (the Code of Criminal Procedure) which governs these proceedings. The mother is in my opinion the proper person to have custody of a child of four and the father must maintain that child. I accept the recommendation and deciding that an order for maintenance of his son and daughter should be passed

against Abdul Rashid, return the proceedings to the Magistrate who will decide as to the proper amount to be paid.

K.B./A.L.

Order accordingly.

A. I. R. 1937 Lahore 237

ADDISON, AG. C. J. AND DIN
MOHAMMAD, J.

Dhalla—Defendant—Appellant.

v.

Mt. Fateh Bibi and *another*, Plaintiffs
and *others*, Defendants—Respondents.

Second Appeal No. 2045 of 1934, Decided on 10th July 1935, from decree of Senior Sub-Judge, Gujrat, D/- 20th July 1934.

Punjab Pre-emption Act (1 of 1913), S. 15 (b), thirdly — Right to pre-empt — Sale of land by two brothers — Both having no issues—Wife of one and their mother in the absence of another's wife entitled to succeed them respectively—They have a right to pre-empt land sold.

Where a certain land was sold by two brothers to a third person and both of them had no issues and only one of them had a wife and on their death ensuing, the wife of one and their mother were entitled to succeed them respectively, and they both brought a suit for possession of the land by pre-emption :

Held : that the wife and the mother being entitled to succeed them respectively on their death had a right of pre-emption under S. 15 (b), thirdly of the Act : *A I R 1914 Lah 414* and *A I R 1924 Lah 333, Dissent.*; *205 P L R 1912* ; *87 P R 1896* and *70 P R 1913, Rel. on.* [P 238 C 1]

M. L. Puri and *S. L. Puri*—for Appellant.

Shamair Chand and *Qabul Chand* — for Respondents.

Addison, Ag. C. J. — Hussain and Khanun sold some land to Dhalla and Molu for Rs. 1,000. Mt. Satto, the wife of Khanun, and Mt. Fateh Bibi the mother of Hussain and Khanun, instituted a suit for possession of the land by pre-emption. The trial Court decreed the claim of Mt. Satto for the half share of the land belonging to Khanun, her husband, on payment of Rs. 500, and dismissed the suit in other respects. On appeal the Senior Subordinate Judge, with enhanced appellate powers, decreed the plaintiff's claim for pre-emption of the whole of the land on payment of the price paid, Rupees 1,000. Against this decision Dhalla has preferred this second appeal. The plaintiffs based their claim to pre-emption under S. 15 (b), thirdly, namely, in the persons in order of succession who but for such sale would be entitled on the death of the vendor to inherit the land or property sold.

As neither Hussain nor Khanun has any issue, it is admitted that Mt. Satto would at present succeed to the estate of her husband Khanun and Mt. Fateh Bibi, mother of Hussain, would succeed to his estate. It was contended before us, however that it could not be said that these ladies are persons who, but for such sale, would be entitled on the death of the vendor to inherit the land. Reliance was placed principally upon 46 P R 1914¹ which was followed in A I R 1924 Lah 333.² It was held in 46 P R 1914¹ that a mother, not being entitled to succeed under S. 59, Punjab Tenancy Act, to the occupancy rights sold, could not pre-empt such a sale. The sale in that case appears to have been of occupancy rights as well as of land. As regards land, it was said that the mother's right under Customary law to temporary possession of her deceased son's landed property was similar to that of a widow and was a mere development of her original right to maintenance. Nothing is added in A I R 1924 Lah 333.² It is, however, too late in the day to say that a widow or a mother hold the land merely in lieu of maintenance. That may, or may not, have been the origin of their right to get the land, but it has been long held that the widow or mother of a sonless proprietor is entitled to a life interest in her husband's estate and not merely to maintenance. It is in extremely few places in the Punjab and amongst very few tribes or families that a widow takes the estate merely in lieu of maintenance. In the case before us, there is no doubt that this is the usual case of females succeeding to a life estate with power to burden and even to sell that estate for a necessary purpose including the repayment of debts of her husband, etc. As pointed out by Chevis, J. in 205 P L R 1912³:

There are strong analogies between the estate of a widow under Customary law and her estate under Hindu law. Under both laws she holds for life for the purpose of maintenance with certain powers of disposition necessarily incident to her position, and there seems to me no reason to hold that either under Hindu or Customary law, a widow is not an heir of her husband.

1. *Mt. Fateh Nishan v. Ahmad Shah*, A I R 1914 Lah 414=23 I C 532=46 P R 1914=55 P L R 1914.

2. *Mt. Amir Nishan v. Kanshi Ram*, A I R 1924 Lah 333=69 I C 191.

3. *Mt. Bhagi v. Mahommad*, (1912) 205 P L R 1912 =15 I C 734.

In the case before Chevis, J. the widow had a right to succeed collaterally (and amongst the present parties she has also that right); and he held that in such a case she had the right of pre-emption. This right was not confined to agnates alone who took a full estate. As far back as 1898, Roe, C. J. and Reid, J. held in 87 P R 1896⁴ that a widow, who holds land upon a life tenure, is entitled to exercise the right of pre-emption, and the Court has no concern with the motive which may induce a plaintiff to claim pre-emption or with the source from which funds necessary to enforce the claim may be drawn.

This authority was followed in 70 P R 1913⁵ by Reid, C. J. and Rattigan, J. That was a case where the vendor sold land to his wife and the collaterals sued to pre-empt; and it was held that the wife took precedence of her husband's reversioners as there was no issue, and therefore the reversioners' suit for pre-emption must fail. Rattigan, J. was also one of the Judges who decided 46 P R 1914,¹ and it is difficult to reconcile these two decisions. 70 P R 1913⁵ is specially important as it is a case of a wife and not of a widow. There seems in fact to be no distinction between a wife, whose husband is alive and has no son, and a widow, whose husband has died without issue, or between a mother, whose son is still alive, and a mother, who has succeeded, because her son is dead. Under S. 15 (b), thirdly the right of pre-emption vests in order of succession in the persons, who but for such sale, would be entitled on the death of the vendor to inherit the land. At present the wife and mother are the persons entitled to succeed if the vendors were to die, and it must be taken that this is the meaning of this part of S. 15. It follows that the wife and mother were entitled to the decree given them to pre-empt the land, and the appeal must accordingly be dismissed. There will be no order as to costs.

K.B./A.L.

Appeal dismissed.

4. Absan Ullah v. Jowahir Lal, (1896) 87 P R 1896.

5. Mahomed Khan v. Akbar Khan, (1913) 70 P R 1913=18 I C 384=84 P L R 1913.

A. I. R. 1937 Lahore 238

ABDUL RASHID, J.

Nanak Chand—Petitioner.

v.

Khwaja Mahmud — Complainant —
Opposite Party.

Criminal Revn. No. 794 of 1936, Decided on 7th October 1936, from order of City Magistrate, Delhi, D/- 19th May 1936.

Penal Code (1860), S. 468 — Complaint under—Document exhibited in criminal case called for by civil Court in evidence in suit by accused against complainant—Prosecution of accused held could continue even though no complaint was presented by civil Court in writing.

The accused was challaned under S. 468, Penal Code and the document in question was taken possession of from him and exhibited in the criminal case against him. The civil Court in which the accused had filed a suit against the complainant, called for the document in evidence. It was contended by the accused that the case against him could not continue inasmuch as the civil Court did not file a complaint in writing against him on document being tendered before it in evidence :

Held : that the criminal Court having already taken cognizance of the case under S. 468 and the document having been exhibited in the case before it was sent to civil Court, a complaint in writing against the accused with respect to the document was not necessary by the civil Court and the criminal case could continue against the accused :
A I R 1932 Bom 545, Ref. [P 238 C 2; P 239 C 1]

Shamair Chand and Parkash Chand—
for Petitioner.

Order.—On 26th June 1931, a complaint was presented against the petitioner, Nanak Chand, by Khwaja Mahmud under S. 468, I. P. C. A search warrant was issued and the document which forms the subject matter of the present petition for revision was discovered in the house of Nanak Chand. This document was produced and made an exhibit in the criminal case. Meanwhile on 11th June 1931, Nanak Chand had filed a civil suit against Khwaja Mahmud. The civil Court requested the criminal Court to send the document in question, and the document was also tendered in evidence in the civil case. The contention on behalf of the petitioner is that as the document in question was tendered in evidence in the civil case the petitioner's prosecution under S. 468, I. P. C., cannot continue as the civil Court has not filed a complaint in writing against the petitioner.

I am of the opinion that this contention is without any force. The criminal Court

had taken cognizance of an offence under S. 468, I. P. C., long before the document in dispute was called for by the civil Court. In fact, the document in question had become an exhibit in the criminal case before it was sent to the civil Court. In these circumstances it cannot be held that the case, under S. 468, against the petitioner, cannot continue, as the civil Court which had called for the document in question had not presented a complaint in writing against the petitioner. Reference may be made in this connexion to A I R 1932 Bom 545.¹ For the reasons given above, I dismiss this petition.

K.B./A.L.

Petition dismissed.

1. Sanjiv Ratnappa v. Emperor, A I R 1932 Bom 545 = 1932 Cr C 777 = 142 I C 386 = 34 Cr L J 357 = 56 Bom 488 = 34 Bom L R 1090.

A. I. R. 1937 Lahore 239

SKEMP, J.

Mohammad Anwar and others—Defendants—Appellants.

v.

Dial Chand and another—Plaintiffs—Respondents.

First Appeal No. 163 of 1936, Decided on 15th December 1936, from order of Dist. Judge, Sheikhupura, D/- 4th June 1936.

Pre-emption—Suit for—Pre-emption of site—Court-fee—Improvement made on property before suit—Court-fee should be paid prima facie not only on value of site stated in sale deed but also on costs of improvement.

A person who sued for pre-emption of a house site, paid court-fee only on the market value of the site although the sale deed in respect of the site specified a higher value. The vendees contended that court-fee should be paid not only on the original price of the site but also on the price of the house that they had built upon it before the suit was brought:

Held: that plaintiff must pay court-fee on what was prima facie the value of the subject matter, that is the value of the site as stated in the sale deed plus the costs of the improvements made thereon. If he found when the suit was finally tried out that he had paid higher court-fee than necessary, then he could claim refund of the excess under S. 10, Court-fees Act. [P 240 C 2; P 241 C 1]

Mohammad Amin Khan and Inder Dev—for Appellants.

R. L. Anand I—for Respondents.

Judgment.—This is an appeal from an order by the learned District Judge of Sheikhupura at Lyallpur remanding a

case in the following circumstances: The plaintiff sued for pre-emption of a site on the court-fee proper to Rs. 203. He said that, although the sale deed specified the price to be Rs. 1,000 the market value was only Rs. 400 and the site was already under mortgage to him by certain persons (not the vendors) for Rs. 197. The vendees pleaded that the suit was not properly stamped and that the plaintiff should pay court-fee on Rs. 1,000, the sale price, plus the market value of the house which the vendees had built before the suit was brought. They alleged that they had spent Rs. 1,942 on the building. The trial Judge framed two issues: (1) Does the suit lie in the present form? (2) If not, what is the market value of the defendants' building on the site in suit with a view to court-fee? The trial Court found that the defendants had spent Rs. 1,493 on the building and that the plaintiff should pay court-fee on Rs. 1,000 + Rs. 1,493 = 2,493. It also held that the plaintiff should amend his plaint by seeking demolition of the house which had been built. The plaintiff appealed to the learned District Judge who wrote:

The case law on the point is very meagre and there is much to be said for the view that when the plaintiff definitely does wash his hands of the improvements and leaves the defendant to remove those improvements and claims simply the site without the building, he should not be forced to pay the court-fees on the site plus the building, although he may ultimately be directed by the Court to pay not only the consideration for the sale but the cost of improvements as well.

He was however referred to 184 P L R 1912¹ and said he must follow that ruling. 184 P L R 1912,¹ a judgment by Kensington, J. was very similar to the present case. The plaintiff claimed a house by right of pre-emption and stated that the house was sold for Rs. 100 only and not for Rs. 400 as stated in the deed. The vendee had before suit rebuilt the house at a cost found by a local commissioner to be Rs. 2,512, the plaintiff taking no steps to obtain an injunction. The trial Judge ordered plaintiff to pay court-fee on Rs. 2,512 and when plaintiff failed to do so rejected the plaint. The Divisional Judge, as here, accepted the appeal and remanded the case. Kensington, J. held this was wrong and restored the order of the trial Judge rejecting the plaint. Subsequently

1. Khidmat Rai v. Anant Ram, (1912) 184 P L R 1912 = 17 I C 245.

in the present judgment the learned District Judge laid down the rule:

If the improvements are made in good faith and there is no notice by the pre-emptor of his intention to exercise the right of pre-emption nor a warning that the vendee should not make these improvements, the plaintiff must compensate the vendee for the improvements.

Now the plaintiff had in his plaint stated that he had given notice of his intention to sue and receipt of notice was admitted by the defendants. The learned District Judge went on to say that the lower Court did not apply its mind to this aspect of the case and remanded the appeal for a retrial on the following issues: (1) Are the plaintiffs legally bound to compensate the defendants for the improvements made? (2) What was the value of the site on the date of the suit and what was the value of the improvements on the date of the suit? It is contended before me that the order of the trial Court was correct and that the District Judge should not have passed an order of remand.

The sale deed was executed and registered on 11th August 1934 and the plaintiff Dial Chand lodged his suit for pre-emption on 10th August 1935, the last day of limitation. The sale deed specified that Rs. 99 was due to the vendees on a previous mortgage and that the balance of Rs. 901 was paid in the presence of the Sub-Registrar. Para. 5 of the plaint said that on 15th August 1934, the plaintiff had served the defendants with a notice that he intended to bring a suit for pre-emption warning the vendees not to build on the site in suit and that if they did they would not be entitled to compensation. A copy of this notice was attached to the plaint. The plaint went on to say that a reply was sent but only waste paper was found in the envelope which was also attached. In the written statement the defendants admitted receipt of notice to which a reply was sent on 17th August 1934. There was no waste-paper and a copy of the reply sent was attached.

The copy of the reply is long and argumentative and denies that there is any right of pre-emption in Sheikhupura. As a witness the plaintiff admitted that he had not drawn the attention of the vendees to the fact that a blank paper was sent in reply to his notice. No further correspondence took place between the parties. The question was raised why the plaintiff took no further steps to stop the vendees from building. The plaintiff's reply is that

they began to build in the month of September when the Courts were closed, finished the house and let it on 25th September.

The vendees said that they began to build in the middle of August and finished the house in October. A rent deed was no doubt executed on 25th September 1934. They also said that building was begun before the receipt of the plaintiff's notice. The question was also raised why the plaintiff, when he valued the site at Rs. 400, did not pay a court-fee on that amount as he was obviously bound to do. To this no satisfactory reply was given. The plaintiff is under suspicion of waiting until the house was finished and lodging a suit on the last day of limitation by way of blackmail.

In these circumstances, on what amount ought he to pay the court-fee? There is no doubt that he ought to pay on at least Rs. 1,000 the amount specified in the deed 9/10ths of which was paid before the Sub-Registrar. As to the improvements, I think the 'rule' laid down by the learned District Judge is a good rule to follow at the end of the suit when all the evidence has been heard and the Court can give a finding on the merits. But if I adopt the view which the learned District Judge would have liked to adopt, the plaintiff would obtain a decision on most of the points in suit on the court-fee payable on Rs. 203 (or, at any rate on Rs. 400) for a property valued at Rs. 2,493. The only point left would apparently be whether the right of pre-emption prevails in the locality in suit. The plaintiff has already obtained from the Court below a decision as to the amount spent by the vendees on their building and if the order of remand were carried out he would get a decision on two more important issues, still paying a court-fee only on Rs. 203. For these reasons I am of opinion that the order of the learned District Judge was erroneous and that in the circumstances the plaintiff ought to pay court-fee on the value of the site as given in the deed and on the cost of the improvements. There is no finding by the District Judge as to the cost of the improvements, and as this is a question of fact agitated in the second ground of the appeal to his Court I direct that he gives a finding upon it.

The order of the trial Court directing that the plaint should be amended is wrong. It is not necessary to put in the

plaint a prayer that the building should be pulled down; presumably the plaintiff would have no objection to buying for Rs. 203 a property valued by the trial Court at Rs. 2,493. I therefore find that in this case the plaintiff should pay court-fee on Rs. 1,000, the sale-price given in the deed, together with the cost of the improvements which still remain to be assessed on appeal by the learned District Judge. Should the plaintiff pay court-fee on the sum finally assessed and should it be found when the suit is finally tried out that a smaller court-fee is really due, it will be open for the plaintiff to make an application and for the Court to make an order under S. 10, Court-fees Act for refund of any excess court-fees paid.

I am not giving final decisions on the points in issue, but stating how the case appears on the matter so far on the record for purposes of court-fee. The plaintiff can only get an exact decision on those matters after the case has been tried out and he ought to pay court-fee on what is *prima facie* the value of the subject matter in dispute before he gets an exact decision on these points and not afterwards. The respondent is to pay the appellants' costs in this Court. The parties have been told to appear in the Court of the District Judge on 9th January 1937, for orders as to date of hearing.

B.D./D.S.

Order accordingly.

* A. I. R. 1937 Lahore 241

JAI LAL, J.

Firm Mohan Singh-Kishen Chand — Plaintiff—Petitioner.

v.

Firm Janki Dass-Ram Parshad and another—Defendants—Opposite Parties.

Civil Revn. No. 233 of 1936, Decided on 15th December 1936, from decree of Addl. Judge, Small Cause Court, Amritsar, D/- 11th January 1936.

* Partnership Act (1932), S. 69 — When suit should be dismissed — Conditions explained—Suit by unregistered firm dismissed — Unregistered firm assigning its claim to registered firm — Suit by registered firm is not barred by *res judicata*.

Under S. 69, Partnership Act, two conditions must exist before a suit can be dismissed. The contract must be with an unregistered firm and the person suing to recover the amount must be that firm or another unregistered firm; it is only then, that there can be an objection to the main-

tainability of the suit. The mere fact that the contract was with an unregistered firm is not sufficient to dismiss a suit if the plaintiff is otherwise competent to maintain it. Therefore the dismissal of a previous suit by an unregistered firm cannot operate as *res judicata* against the assignee of that firm which is a registered firm, because even the unregistered firm is competent to maintain another suit for the recovery of the same amount after its registration. [P 241 C 2; P 242 C 1]

Din Dayal Kapur—for Petitioner.

Dharam Bhushan — for Opposite Parties.

Order.—Firm Behari Lal Parshotam Das instituted a suit for recovery of money against the firm Janki Das Ram Parshad, but this suit was dismissed on the ground that the plaintiff firm was not a registered firm. S. 69, Partnership Act, provides that :

No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of firm as partners in the firm.

No decision on the merits was given and the suit was dismissed only in view of the prohibition contained in this section. Subsequently the firm Behari Lal Parshotam Das assigned the amount claimed by them to be due from the firm Janki Das Ram Parshad to the firm Mohan Singh Kishen Chand, who instituted a suit for recovery of the amount against the firm Janki Das Ram Parshad. It is conceded that the plaintiff firm in this case, that is, Mohan Singh Kishen Chand, is a registered firm and is not therefore subject to the prohibition contained in S. 69, Partnership Act. The suit however has been dismissed on the ground that it is barred by *res judicata* by virtue of the dismissal of the previous suit brought by firm Behari Lal Parshotam Das.

In my opinion this conclusion of the learned Judge is incorrect. Even the firm Behari Lal Parshotam Das was competent to maintain another suit for the recovery of the amount after registration. No provision from the Partnership Act has been cited to show that an unregistered firm is not entitled to do business or to legally assign its assets to another person who himself is competent to maintain a suit. Therefore the dismissal of the previous suit cannot operate as *res judicata* against the assignee of the firm Behari Lal Parshotam Das. It is obvious that under S. 69, Partnership Act, two conditions must exist before a suit can be dismissed.

The contract must be with an unregistered firm and the person suing to recover the amount must be that firm or another unregistered firm; it is only then, that there can be an objection to the maintainability of the suit. The mere fact that the contract was with an unregistered firm is not sufficient to dismiss a suit if the plaintiff is otherwise competent to maintain it.

I accordingly accept this petition, set aside the order of the Judge, Small Cause Court, and remand the case to it with direction to proceed with the suit in accordance with law. The parties have been directed to appear before the trial Judge on 11th January 1937. The costs of this petition shall abide the result.

B.D./D.S.

Case remanded.

* A. I. R. 1937 Lahore 242

JAI LAL, J.

Diwan Chand — Appellant.

v.

Mohan Singh and others, Insolvents and another, Official Receiver — Respondents.

Second Appeal No. 48 of 1936, Decided on 21st December 1936, from order of Dist. Judge, Gujranwala, D/- 24th June 1936.

* Provincial Insolvency Act (1920), S. 4 — Application by creditors under S. 4 to set aside alienation made by insolvent—Application can lie even if transferee's name is entered in schedule of creditors.

The mere fact that the name of the alleged transferee is entered in the schedule of creditors does not disentitle other creditors from moving the Court under S. 4 to set aside an alienation made in his favour by the insolvents. [P 242 C 2; P 243 C 1]

Mehr Chand Sud—for Appellant.*Kharak Singh*—for Respondents.

Judgment.—Prem Chand and Haveli Ram were adjudicated insolvents and it seems that the Insolvency Judge when passing the order of adjudication made a casual remark that the secured debt alleged to be due to the respondent Mohan Singh was fictitious, and relying upon this statement the appellant Diwan Chand, another creditor of the insolvents, moved the Official Receiver, in whom the estate of the insolvents vested, to take proceedings for the annulment of the mortgage. The Official Receiver, however, declined to do so and Diwan Chand's appeals to the Insolvency Judge and to the District

Judge proved to be infructuous. The District Judge, however, remarked that it was open to Diwan Chand to move the Insolvency Judge under S. 4, Provincial Insolvency Act. Thereupon the application out of which this appeal has arisen was made by Diwan Chand under S. 4, Provincial Insolvency Act.

It was alleged that the alleged mortgage in favour of Mohan Singh by the insolvents was without consideration and was fictitious and a prayer was made that the property alleged to have been mortgaged should be declared to vest in the Official Receiver free from encumbrance in favour of Mohan Singh. It appears that a schedule of creditors had already been prepared before this application was made and in that schedule the name of Mohan Singh had been entered as a secured creditor for Rs. 3,273. The only ground on which this application under S. 4 made by Diwan Chand has been dismissed by the Courts below is that the name Mohan Singh having been entered in the schedule of creditors, the remedy of the appellant was to move the Insolvency Court under S. 50, Provincial Insolvency Act, for the removal of his name from the list of creditors. In the first instance no authority has been cited in support of the contention that an application under S. 4 does not lie if the result of its success would be to rectify the schedule of creditors. But in this case Mohan Singh claims to be a secured creditor and under S. 47, Provincial Insolvency Act, a secured creditor is not entitled to be entered in the schedule of creditors—which schedule is only to contain the names of unsecured creditors. A secured creditor can be entered only if he has realised his security and a balance is due to him; in that case only to the extent of the balance, or, if he relinquishes his security for the general benefit of the creditors or where he values his security and his debt, then he can be entered with regard to the difference. Sub-s. (6), S. 47 of the Act states that where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend.

The action of the Official Receiver, therefore, in entering the name of Mohan Singh in the schedule of creditors as a secured creditor was illegal. I have already said that no authority has been shown under which the mere fact that the

name of the alleged transferee is entered in the schedule of creditors disentitles other creditors from moving the Court under S. 4 to set aside an alienation made in his favour by the insolvents. Consequently the only ground on which this application has been dismissed cannot be sustained. I do not express any opinion whether the application under S. 4 is maintainable or not maintainable for any other reasons. I have disposed of the only ground on which it has been dismissed. I accept this appeal, set aside the orders of the Courts below and send the case back to the Insolvency Judge with direction to proceed with the application in accordance with law. The costs of these proceedings shall abide the result. The parties have been directed to appear before the Insolvency Judge on 18th January 1937.

B.D./D.S.

*Case remanded.***A. I. R. 1937 Lahore 243****AGHA HAIDAR AND SKEMP, JJ.***Ahman Shah Mohammad*—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 674 of 1935, Decided on 12th December 1935, from order of Sess. Judge, Jhelum, D/- 28th May 1935.

Criminal Trial—Confession—Confession by accused that he dealt blow to deceased in self-defence and only after receipt of blow from deceased—Accused stating that deceased died of accidental hatchet blow from one of prosecution witnesses — Statement as to cause of death found false in view of medical evidence—Exculpatory statement giving rise to plea of self-defence, being distinct and separate from statement as to cause of death of deceased, held could be considered on merits.

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. [P 245 C 1]

Where the accused admitted that he dealt a blow to the deceased in self-defence, in a duel between him and the deceased and the blow was dealt to the deceased only after receiving one from him, and he further stated that one of the prosecution witnesses aimed a hatchet blow at him and unfortunately it struck the deceased and killed him, but this statement of his relating to the cause of death of the deceased was found to be

false in view of the medical evidence that the deceased died owing to not less than seven injuries:

Held: that the exculpatory statement of the accused giving rise to the plea of self-defence, being separate and distinct from the statement relating to the cause of death of the deceased could be considered on merits: *A I R 1931 All I (F B)* and *A I R 1935 Lah 671, Rel. on.*

[P 245 C 2]

Malik Mohammad Amin—for Appellant.

V. N. Sethi for Govt. Advocate—for the Crown.

Agha Haidar, J.—Ahman, Rahman and Khushi, brothers, and Rahman's son Walli, were placed before the Sessions Judge of Jhelum to take their trial under S. 302, I. P. C., for the murder of one Ismail. Rahman, Khushi and Walli have been acquitted and Ahman has been convicted and sentenced to transportation for life. Ahman has appealed to this Court. Sardara, P. W. 6, had abducted the wife of Ahman accused about five months before the occurrence. Ahman had brought a criminal action under S. 498, I. P. C., against Sardara, P. W. 6, Ismail, deceased, and Salabat, Lambardar, P. W. 9. There had been a hearing in the abduction case on the 17th or 18th January and the case was to come up again on the 29th January. Sardara and Ismail were fast friends and while Sardara was going to Phalia in connection with his case, Ismail joined him as he wanted to have some grain ground there. The story for the prosecution is that while Ismail and Sardara were going towards Phalia, the four accused came running from their well and attacked Ismail. It is said that Ahman was carrying a chhavi while Walli had a hatchet and the other two, Rahman and Khushi, were carrying lathis. Sardara ran away and Ismail was attacked by the four accused. Ismail received three contused and four incised wounds. Five of these wounds were on the head. As a result of these injuries Ismail died shortly afterwards.

The first information report was made by Sardara at Phalia and the four accused were mentioned as the assailants of Ismail. At the trial, namely Sardara, P. W. 6. Khuda Bakhsh, P. W. 7, Ali, P. W. 8 and Salabat, P. W. 9, were produced in support of the prosecution as eyewitnesses. Ali and Salabat were not mentioned in the first information report. As already stated Salabat was a co-accused with Sardara in the abduction case and Ali was Salabat's

own Chowkidar. Khuda Bakhsh was the servant of Ismail, deceased. His name was not mentioned in the first information report as the man who accompanied Sardara and Ismail at the time of the occurrence when they were going towards Phalia. At the end of this first information report it is added: "Khuda Bakhsh also accompanied". The Sessions Judge has for very good reasons rejected the evidence of Salabat, Ali and Khuda Bakhsh as interested witnesses. I have no doubt in my mind that the prosecution were at pains to produce some eyewitnesses besides Sardara. If Khuda Bakhsh had been really in the company of Ismail and Sardara, then his name would have been mentioned in the first information report in the proper place. But his name occurs at the end and in all probability it was at the suggestion of Sardara and Salabat, who had arrived at the police station, that Khuda Bakhsh's name had been interpolated contrary to facts. Furthermore I am satisfied that P. W. 11, Narotam Das, Head Constable, is not telling the truth when he says that Sardara had mentioned the name of Khuda Bakhsh when he was dictating the first information report but by an oversight it was now written and that it was only when the report was read over to Sardara and the omission was noticed that the last sentence was added.

The Sessions Judge has conceded that Sardara is an interested witness but he has based the conviction of the appellant partly on the evidence of Sardara and partly on the admission of the accused before the Court that he was present when injuries were caused to Ismail. He has also relied upon the medical evidence which shows that there were more than one assailant and that two different kinds of weapons had been used: one blunt and the other with a sharp edge. Sardara is not a merely interested witness who can be said to have some sort of bias against the accused. He is inimical to the accused in the highest degree. The accused is the husband of the woman whom Sardara had abducted five months ago and would not give up. Sardara knew that Ahman was charged under S. 302, I. P. C., and on conviction would be either hanged or transported for life. In any event it would be a piece of unexpected good luck coming in the way of Sardara if Ahman were to be either hanged or put out of the way for an indefinite period so that he, Sardara,

may have the satisfaction of enjoying the company of Ahman's wife without any let or hindrance. It is said that all is fair in love and war and therefore the conduct of Sardara who was apparently desperately in love with the wife of Ahman, would not be an exception to this time-honoured adage. Furthermore Sardara is a man who is not reluctant to manufacture false evidence. He did not hesitate to introduce falsely Khuda Bakhsh as an eye-witness in the first information report with the willing co-operation of Narotam Das, Head Constable (P. W. 11). I am not therefore prepared to place any reliance whatsoever on his evidence in determining the question of the guilt of the accused though it may be conceded that he was present at the time of the attack.

We are, therefore, thrown back upon the statement of the accused and the medical evidence. As already mentioned according to the medical evidence the deceased received three contused wounds and four incised wounds. There cannot, therefore, be any doubt that two different kinds of weapons, one blunt and the other edged, were used by two or more persons. According to the prosecution among the persons who have been acquitted Walli was carrying a hatchet while Rahman and Khushi were armed with lathis. Ahman had stated before the committing Magistrate that he had gone to see his wheat crop and while returning he was met by Ismail and Sardara, who were going towards Phalia: Ismail had a dang and Sardara had a hatchet. They challenged him and asked him to stop and give them the divorce of his wife who had been abducted by Sardara. He ran towards his well and they pursued him. Ismail overtook him and gave him a dang blow on the head. He gave him a dang blow in retaliation, and while he was grappling with Ismail, Sardara aimed a hatchet blow at him which by accident struck Ismail. In this statement the accused Ahman has clearly stated that he acted in self-defence and hit back the deceased with a dang after he had received a blow on his head. Dr. Sundar Das (P. W. 2) who examined the accused Ahman on 27th January 1935 at 5 p. m. has stated that Ahman had a vertical contused wound 1" x 1/6" skin deep on the right side of the head and that the injury was the result of a blunt weapon which is a lathi. It may be observed in passing that none of the

prosecution witnesses including Sardara has given any explanation whatsoever as to how Ahman received this injury. It may further be noted that the body of Ismail was found about 14 karms from the footpath towards the north. This would go to show that Ismail, who was a staunch friend and partisan of Sardara and is described to be a courageous man, had advanced towards the accused, leaving the footpath before any blows were exchanged.

The argument for the defence is that, if the statement of the accused is to be taken against him in order to show that he was present at the time of the fight and took part in it, the whole of his statement should be taken and not merely the inculpatory part of it to the exclusion of the exculpatory part, raising the plea of self-defence. Our attention has been invited to the recent Full Bench decision of the Allahabad High Court in 52 All 1011,¹ which lays down that:

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible.

It was argued on behalf of the Crown that part of the confessional statement of the accused is false in view of the medical evidence; therefore he should not be allowed to derive any benefit from the exculpatory portion of his statement. It is true that the accused has ascribed a single accidental blow with a chhavi to Sardara which proved fatal, while according to the medical evidence there were seven injuries, three with blunt weapons and four with cutting weapons. But this portion in the statement of the accused is distinct and separate from the portion which deals with the attack by Ismail upon the accused and his hitting back in return. The other injuries might have been caused by some or all of the other accused who have been acquitted and with whom we are not concerned. There was no duty cast upon the accused while giving his statement to implicate his co-accused and attribute to them the other injuries. It may be pointed out here that a chhavi stained with human blood was picked up by the accused from the field of Rahman,

but this 'find' can hardly be used as a piece of evidence against the accused.

I am, therefore, of opinion that the case is covered by the Full Bench decision of the Allahabad High Court noted above and that, even if a portion of the statement of the accused dealing with the alleged accidental blow given by Sardara to the deceased be not true in view of the medical evidence, the rest of the statement concerning the duel between the accused and Ismail and the plea of self-defence arising out of it stands and must be considered on its merits. The position which emerges, therefore, is that the attack being opened by Ismail who seems to have gone forward to meet Ahman, the latter was justified in giving one or two lathi blows to him after he had received a blow himself on his head at his hands. One or more among the persons, who have been acquitted, might be responsible for the other injuries, but there is no reliable evidence to show that the accused Ahman had struck them. In this connexion the case in A I R 1935 Lah 671,² in which the Full Bench decision was relied upon, deserves careful consideration and is helpful. For the foregoing reasons and in view of the statement of the accused before the committing Magistrate, which he re-affirmed before the Sessions Judge, I give effect to the plea of self-defence and, on a general consideration of the record, set aside the conviction and sentence of the appellant Ahman and order that he be released forthwith.

Skemp, J.—The only reliable evidence against the appellant is (i) the medical evidence, (b) his production of the blood-stained chhavi from Rahman's field, and (c) the appellant's admissions in Court. In my judgment these are insufficient to bring home the charge of murder, or a lesser charge, and the appellant must be acquitted. I agree generally with the reasons given by my learned brother.

K.B./A.L.

Conviction set aside.

2. Sher Gul v. Emperor, A I R 1935 Lah 671 = 1935 Cr C 1001 = 156 I C 529 = 36 Cr L J 966 = 37 P L R 492.

1. Emperor v. Balmakund, A I R 1931 All 1 = 1931 Cr C 1 = 129 I C 258 = 32 Cr L J 362 = 1930 A L J 1481 = 52 All 1011 (F B).

A. I. R. 1937 Lahore 246

COLDSTREAM, J.

Phul Khan and another — Convicts — Appellants.

v.

Emperor — Opposite Party.

Criminal Appeal No. 785 of 1936, Decided on 7th August 1936, from order of Magistrate, First Class, Delhi, D/- 15th June 1936.

Penal Code (1860), S. 411 — Presumption—Accused found in possession of ornaments nine months after robbery—Ornaments produced being of kind used by ordinary people and also not bearing any special mark of identification — Held it was unsafe to draw presumption that accused were thieves or were retaining property dishonestly.

Accused who were suspected after the robbery were found in possession of certain ornaments nine months after the robbery. The ornaments were of a kind commonly used by ordinary people. There was no evidence that any of them bore any special mark of identification. The accused having been convicted for robbery :

Held : that it was unlikely that the accused would have kept the ornaments so long had they known that they were stolen articles especially when they were suspected. It was unsafe in those circumstances to draw the presumption that the accused were thieves or were retaining the property dishonestly. [P 246 C 2]

Parkash Chand for Qabul Chand—for Appellants.

Mohammad Amin Khan for Govt. Advocate—for the Crown.

Judgment.—This judgment will dispose of the two Appeals, Nos. 785 and 874 of 1936, the former submitted by Phul Khan and Surat through counsel and the latter by Wali Mohammad through the jail authorities. The three appellants were tried together on a charge under S. 394, the case against them being that on 27th June 1935 they had together robbed Sri Gopal, his wife Mt. Ram Kaur, and Chuni Lal on the high road between Delhi and Alipore. Sri Gopal, his wife and Chuni Lal were being driven in a tonga when they were attacked by four robbers armed with sticks who stopped the tonga, beat its occupants and robbed them of a number of ornaments.

Investigation was first made by Mir Zulfikar Hussain, Sub-Inspector, but was infructuous. Suspicion had fallen on Phul Khan and Surat and the Sub-Inspector had shown these two men to Sri Ram and Chet Ram, two of the witnesses of the robbery, but these witnesses had failed to identify them. Many months later the investigation was continued by another

Sub-Inspector, M. Mansab Ali Khan of Naugloi thana. The three appellants were then arrested and put up for identification at different parades. Phul Khan was said to have produced a silver hasli, one of the stolen articles, from his house and Surat is said to have produced some silver buttons and small bangles of silver from his house. Information given by Wali Muhammad led to the recovery of a pair of silver nevrīs (ankle ornaments), from another man Badlu. At their trial the three appellants declared that they had not taken part in the robbery. Phul Khan and Surat denied that they had produced the hasli and other silver ornaments found in their possession and Wali Muhammad denied that he had ever passed the nevrīs to Badlu. Badlu, I may note, was not produced as a witness though there was evidence that the nevrīs had been found with Badlu by Arjmand, Head Constable (P. W. 20).

The evidence of identification of Phul Khan and Surat has been rejected as unreliable by the Magistrate for the reasons he gives in his judgment. I agree with him that the identification evidence in the case of these two accused is of no value. The articles produced by Phul Khan and Surat are of a kind commonly used by ordinary people. There is no evidence that any of them bore any special mark of identification. They were found in Phul Khan's and Surat's possession about nine months after the robbery. It is, I think, unlikely that Phul Khan and Surat would have kept these articles so long had they known that they were stolen articles, especially as they themselves had been suspected shortly after the theft. In the circumstances I do not think it would be safe to draw the presumption that Phul Khan and Surat were either the thieves or were retaining the property dishonestly. I accept their appeal and acquit them. As regards Wali Muhammad the identification evidence appears to me very strong. Chuni Lal (P. W. 4) the goldsmith who was robbed in the tonga, identified Wali Muhammad as the man who actually tore off his earrings. There is in my mind no doubt of Wali Muhammad's guilt, and in view of his previous conviction and the nature of the present offence, I see no reason to interfere with his sentence and I dismiss his appeal.

S.C./D.S.

Order accordingly.

A. I. R. 1937 Lahore 247

COLDSTREAM AND ABDUL RASHID, JJ.

Shiv Charan Das — Defendant — Appellant.

v.

Hari Ram, Plaintiff and *others*, Defendants—Respondents.

First Appeal No. 906 of 1932, Decided on 22nd July 1935, from decree of Sub-Judge, First Class, Gujrat, D/- 30th March 1932.

Hindu Law—Debts—Joint family business — Debts contracted by manager — Other co-parceners are liable only to extent of their interest in joint family property—They are not personally liable unless they are contracting parties to debts or have subsequently ratified them.

Where the manager of a joint family business has incurred debts, the other co-parceners whether they be adults or minors are liable, but to the extent only of their interest in the joint family property. They are not liable personally unless, in the case of adult co-parceners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actual contracting parties or one to which they can be treated as being contracting parties by reason of their conduct or one which they have subsequently ratified: *A I R 1921 Lah 61* and *A I R 1935 Lah 735, Rel. on; A I R 1936 Lah 390, Disting.* [P 248 C 1, 2]

Mehr Chand Mahajan and *D. R. Sawhney*—for Appellant.*Badri Das* and *J. G. Sethi* — for Respondent (Plaintiff).

Abdul Rashid, J.—The facts, bearing on the question of law involved in this appeal, may be shortly stated. On 4th August 1927, Ram Piyara Mal, son of Dhanpat Rai, manager of the joint Hindu family firm known as Lala Jawahar Mal-Dhanpat Rai of Miani, executed a mortgage deed with respect to certain house property in favour of Hari Ram for a sum of Rs. 11,894-12-6. The mortgage debt was to carry interest at the rate of 10 annas per cent. per mensem. On the basis of this mortgage deed, Hari Ram sued the firm Jawahar Mal-Dhanpat Rai through Ram Piyara Mal, its manager, as well as Ram Ralaya, Har Parshad and Shiv Charan Das, sons of Dhanpat Rai, for recovery of Rs. 11,145-1-6 on 24th April 1928. The suit was contested by Ram Piyara Mal and his three brothers all of whom pleaded that the joint family was no longer in existence and that none of them, except the executant of the mortgage deed, was bound by it. On these pleadings the trial Court framed six issues, two of which were in the following terms:

(1) Did defendants Ram Ralaya, Har Parshad, Shiv Charan and their descendants separate from the joint family before the execution of the mortgage? If so, at what date, and with what effect? (6) Are Shiv Charan, Ram Ralaya and Har Parshad * * * liable personally on the mortgage? After a consideration of the entire evidence, the trial Court held that the defendants had failed to establish that they had separated from the joint family before the execution of the deed. It also held that it was unnecessary to decide issue 6 dealing with the personal liability of the defendants, as the plaintiff, if he succeeded, had first to proceed against the property mortgaged. On these findings, a preliminary decree for Rs. 11,145-1-6 was passed against all the defendants. This preliminary decree was followed by a final decree on 26th March 1930. In accordance with the terms of the final decree the mortgaged property was put up to auction and the sale was confirmed on 13th July 1931. After exhausting the mortgaged property, Rs. 9,974-7-0 still remained due to the decree-holder. The decree-holder, therefore, presented an application on 30th July 1931, under O. 34, R. 6, Civil P. C., praying that a decree for recovery of Rs. 9,974-7-0 may be passed against the other property and the persons of defendants 1 to 4, namely, Ram Piyara, Ram Ralaya, Har Parshad and Shiv Charan Das. The trial Court held that Ram Ralaya was not personally liable. The other three defendants were held personally liable and a personal decree for the recovery of Rs. 9,974-7-0 was passed against them. Ram Piyara and Har Parshad defendants have not appealed against the personal decree, and the present appeal has been preferred only by Shiv Charan Das. It was contended by the learned counsel for the appellant that in a joint Hindu family firm no partner is liable on a contract made by the manager, except to the extent of his share in the co-parcenary property, unless he is himself a contracting party or has ratified the contract entered into by the manager. It was urged that in order to make Shiv Charan Das personally liable, it must be established by the plaintiff that either Shiv Charan Das was a party to the deed of mortgage or that he subsequently ratified it, or that he can be treated as being a contracting party by reason of his conduct. Reference was made in this connexion to

para 240, Mulla's Hindu Law, Edn. 7, which may be reproduced in extenso:

The manager of a joint family business has an implied authority to borrow money, if such borrowing is necessary for a legitimate and proper purpose of the family business and to contract debts for that purpose. Where such debts have been incurred, the other co-parceners whether they be adults or minors, are liable, but to the extent only of their interest in the joint family property. They are not liable personally unless in the case of adult co-parceners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct or one which they have subsequently ratified.

It was strenuously urged on behalf of the appellant that in the case of an ordinary contractual partnership, it is not only the share of each partner in the partnership property which is liable for the payment of the partnership debts, but that the separate property of each partner is also liable. In the case of debts contracted by a manager of a joint Hindu family firm, in pursuance of his implied authority in the ordinary course of family business, there is a distinction between the liability of a manager and the liability of his coparceners. The manager is liable personally, but as regards the other co-parceners, they are liable only to the extent of their interest in the family property unless they are actual contracting parties or have ratified the contract of the manager. In A I R 1933 Lah 1018,¹ it was held that the law is different in the case of a partnership arising out of contract and a partnership arising out of law. In a Hindu joint family partnership, if debts are contracted by the manager of the partnership, other members are liable only to the extent of their share in the joint property, but not personally. It was laid down by a Division Bench of this Court in 2 Lah 159² that:

The manager of a joint family business has an implied authority to contract debts for the ordinary purposes of the family business. Where such debts have been incurred the other coparceners, whether they be adults or minors, are liable to the extent only of their interest in the joint family property. They are not liable personally unless, in the case of adult co-parceners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actual contracting parties or one to which they can be treated as being contracting parties by reason of their

conduct or one which they have subsequently ratified; and in the case of minor co-parceners, unless the contract has been ratified by them on attaining majority.

The same view of the law has been taken in another Division Bench ruling of this Court in 17 Lah 311.³ The rulings alluded to above fully approve of the view propounded in para. 240 of Mulla's Hindu Law. Reliance was placed on behalf of the respondent on a Division Bench ruling of this Court in Civil Appeal No. 1232 of 1934, dated 19th June 1935.⁴ It was urged that in the case of a joint Hindu family trading concern, all the members of the joint family were liable on a contract entered into by the manager for the purposes of carrying on the family business. It is however clear from a perusal of the judgment in Civil Appeal No. 1232 of 1934,⁴ that the facts of that case were completely different from the facts of the present case. In that case the adult coparceners, who were sought to be made liable on the contract entered into by the manager, had themselves been operating on the account with the Punjab National Bank to satisfy which the mortgage deed in favour of the Bank was executed. The adult co-parceners had therefore come into personal contact with the plaintiff Bank and had by their conduct ratified the contract entered into by the manager. Numerous authorities were cited by the respective counsel of the parties, but after carefully considering all the rulings relied upon, we are of the opinion that the law has been correctly laid down in 2 Lah 159.² The appellant can therefore be held personally liable only if the mortgage deed is one to which he is an actual contracting party, or one to which he can be treated as being a contracting party by reason of his conduct, or one which he has subsequently ratified.

The deed of mortgage had not been signed by Shiv Charan Das. The learned counsel for the respondent contended that the power-of-attorney, dated 3rd February 1928, executed by Shiv Charan Das, appellant, in favour of Ram-Piyara Mal shows that he was an active member of the Joint Hindu family firm up to 3rd February 1928, and that this amounts to his ratifi-

1. Murari Lal v. Ghudhumal, A I R 1933 Lah 1018=147 I C 590=34 P L R 967.

2. Bishen Singh v. Kidar Nath, A I R 1921 Lah 61=62 I C 800=2 Lah 159=76 P L R 1921.

3. Mutsaddi Lal v. Shakhir Chand, A I R 1935 Lah 735=161 I C 91=17 Lah 311=38 P L R 654.

4. Punjab National Bank v. Jagdish Sahai, A I R 1936 Lah 390=163 I C 114=38 P L R 733.

cation of the contract which forms the subject matter of the present appeal. The appellant was admittedly a member of the joint Hindu family firm Jawahir Mal-Dhanpat Rai, and so far as his liability for the debts of the firm is concerned, it is conceded that he is liable to the extent of his share in the joint family property. This power of attorney, in my opinion, merely shows that Shiv Charan Das allowed Ram Piyara Mal to sell the property to which Shiv Charan Das was entitled as a member of the joint Hindu family for the purpose of meeting the liabilities of the joint family firm. By doing so he did not acknowledge personal liability for the debts of the firm, but merely authorized his brother to sell his share in the landed property at Miani which he had obtained as a member of the joint Hindu family. In fact in the last sentence of this power of attorney, Shiv Charan Das expressly stated that Ram Piyara Mal would have no authority to contract debts in his name.

The learned counsel also drew our attention to a number of sale deeds executed by Ram Piyara Mal as a manager of the joint Hindu family, wherein he had stated that he was executing these sale deeds on his own behalf and on behalf of his brothers. The recital in the sale deeds by Ram Piyara Mal cannot possibly be regarded as ratification by Shiv Charan Das of the contract which forms the subject matter of the present litigation. Moreover, these sale deeds merely alienate Shiv Charan Das's share in the joint family property for the purpose of meeting the debts of the joint Hindu family firm, and it is not denied that Shiv Charan Das is liable to the extent of his share in the joint family property. In my opinion it has not been established that Shiv Charan Das ever ratified, either impliedly or expressly, the mortgage which has given rise to the present suit.

For the reasons given above, I would accept this appeal, set aside the personal decree, dated 30th March 1932, against Shiv Charan Das, appellant, and declare that the appellant is liable only to the extent of his share in the joint family property and is not personally liable in respect of the mortgage deed, dated 4th August 1927. The entire costs of the appellant will be payable by Hari Ram, respondent, in respect of the proceedings

initiated by Hari Ram's application, dated 30th July 1931.

Coldstream, J.—I agree.

S.C./D.S.

Appeal allowed.

A. I. R. 1937 Lahore 249

ABDUL RASHID, J.

Gyan Singh, Official Receiver and others—Creditors—Appellants.

v.

Sajjada and another—Respondents.

First Appeal No. 91 of 1936, Decided on 12th June 1936, from order of Dist. Judge, Gujranwala, D/- 8th January 1936.

Provincial Insolvency Act (1920), S. 75 (3)—Transfer by person adjudicated insolvent—Application to set it aside as fraudulent dismissed—Official Receiver appealing under S. 75 (3) against order without leave of District Court and without making prayer for leave in grounds of appeal—No circumstances showing failure due to bona fide mistake—Appeal held incompetent as filed without due diligence—Leave to file appeal held could not be granted at that stage.

A person within two years of his adjudication as insolvent, transferred some of his property to his wife in lieu of dower. The Official Receiver applied to set aside the fraudulent transfer and his appeal being dismissed by the District Court, appealed against the order without obtaining leave of the District Court for filing an appeal under S. 75 (3) and without making a prayer for leave in the grounds of appeal. There were no circumstances to show that the failure of the Official Receiver to obtain leave of the District Court was due to a bona fide mistake, i. e., a mistake which occurred in spite of the exercise of due care and caution :

Held : he acted without due diligence in filing appeal without obtaining leave of the District Court and without making a prayer for leave in the grounds of appeal. Hence the appeal was incompetent. Nor could leave be granted at that stage : *A I R 1927 Lah 424* and *A I R 1934 Lah 33, Expl.*; *A I R 1933 Lah 642, Dissent.*

[P 250 C 2]

Jhanda Singh—for Appellants.

Chaudhri Asadullah Khan and T. D'Souza—for Respondents.

Judgment.—One Sajjada was adjudicated an insolvent on 23rd March 1935. Mr. Gyan Singh, Official Receiver, Gujranwala, presented an application under S. 53, Insolvency Act, on 30th April 1935, stating that Sajjada had gifted 2 squares out of his 8 squares of land to his wife Mt. Imam Bibi in lieu of dower, and that as the gift was a fraudulent transfer and had been made within two years of the adjudication, it should be annulled. The application of the Official Receiver was dismissed by the

learned District Judge in the exercise of his insolvency jurisdiction on 8th January 1936. Against this decision the Official Receiver has preferred an appeal to this Court. The learned counsel for the respondents raised a preliminary objection to the effect that this appeal was incompetent as the Official Receiver had not obtained the leave of the District Court for the filing of the appeal under S. 75 (3), Provincial Insolvency Act. It was further urged by the learned counsel that the grounds of appeal to this Court did not contain a prayer that leave to appeal be granted by the High Court. In support of his contention the learned counsel relied on a Single Bench ruling of this Court reported in 103 I C 623.¹ In that case a similar preliminary objection was raised, and the counsel for the appellant contended that sanction should be deemed to have been granted by the Division Bench by admitting the appeal to a hearing. It was held by Jai Lal, J. that the Division Bench, by admitting the appeal, could not be regarded to have awarded sanction for the filing of the appeal as this point was not before the Division Bench. The counsel for the appellant in that case then asked that permission to file an appeal be granted at that stage but this request was not acceded to. In the present case there was no prayer in the grounds of appeal that the High Court may grant leave for the filing of the appeal. Moreover, the appeal in the present case was preferred by the Official Receiver, and it cannot be held that he acted with due diligence in filing an appeal without obtaining the leave of the district Court, or requesting his counsel to make a prayer for leave in the grounds of appeal. The learned counsel for the appellant relied on a Single Bench ruling of this Court reported in A I R 1934 Lah 33.² In that case Dalip Singh, J. held that as no application for leave to appeal was made to the Division Bench admitting the appeal, it could not be inferred that leave was granted by the Division Bench simply because the appeal was admitted. The learned Judge was, however, of the opinion that that was a fit case in which leave should be granted, and he did so after extending the time under S. 5, Lim.

Act, read with S. 78, Provincial Insolvency Act. The judgment does not indicate why the case was regarded as a fit case for the exercise of discretion by the learned Judge under S. 5, Lim. Act, and S. 78, Provincial Insolvency Act. It was held by Currie, J. in A I R 1933 Lah 642³ that where an appeal only lies under the provisions of S. 75 (3), Provincial Insolvency Act, the leave of either the District Judge or of the High Court is necessary, but if such appeal has been admitted to a hearing by the High Court it should be considered that the necessary leave has been granted. With all due respect I dissent from the view expressed in this ruling. The learned counsel for the appellant has not brought any circumstances to my notice which may show that the failure of the Official Receiver to obtain leave of the District Court for filing of the appeal was due to a bona fide mistake, that is, a mistake, which occurred in spite of the exercise of due care and caution. I, therefore, do not see any reason to grant leave to appeal at this stage. For the reasons given above, I uphold the preliminary objection and dismiss this appeal with costs.

V.B.B./D.S.

Appeal dismissed.

3. Lorind Chand Parama Nand v. Mohammad Akram Khan, A I R 1933 Lah 642=145 I C 474=34 P L R 827.

A. I. R. 1937 Lahore 250

TEK CHAND, J.

Mt. Matto—Plaintiff—Appellant.

v.

Fattu and *another* — Defendants — Respondents.

Second Appeal No. 1038 of 1936, Decided on 7th January 1937, from decision of senior Sub-Judge, Kangra, D/- 16th April 1936.

(a) Custom (Punjab) — Gift — Kangra District—Gift by sonless widow to son-in-law—Son-in-law dying leaving minor son who also died — Property held reverted to donor widow and did not pass to collaterals of deceased son of donee son-in-law.

A sonless widow made a gift pure and simple to her resident son-in-law who was rendering services to her and the son-in-law died and was succeeded by the minor son who also died shortly afterwards. The collaterals of the deceased son of the son-in-law having taken possession of the property the widow donor sued for possession:

Held: that the property did not become an absolute property of the son-in-law and could not devolve on the collaterals, that the custom in the

1. Thakur Singh v. Ganga Singh, A I R 1927 Lah 424=103 I C 623=9 L L J 257.

2. Mangat Rai v. Mohan Lal, A I R 1934 Lah 33=149 I C 935.

Kangra district, in such cases was in favour of the reverter of the property to the donor or his or her line and the widow therefore was entitled to possession: 54 P R 1897 and 12 P R 1892 (F B), *Foll.* [P 252 C 1]

(b) Punjab Courts Act (1918), S. 41 (3)—Second appeal—Lower appellate Court failing to decide real question and basing decision on question of custom which did not arise—Second appeal held competent without certificate.

In a case where the lower appellate Court has based its decision on a question of custom which did not arise and has failed to consider the real point involved in the litigation, the matter can unquestionably be agitated in second appeal without a certificate under S. 41 (3), Punjab Courts Act. [P 252 C 2]

Krishna Swarup—for Appellant.

Mehr Chand Sud—for Respondents.

Judgment.—The property in dispute, which consists of agricultural land, 137 kanals 18 marlas in area, belonged originally to one Gur Sahai, a Ghirth of Tikka Kaloha in Dehra tahsil Kangra District. Gur Sahai died sonless, leaving a widow Mt. Matto, plaintiff-appellant, and a daughter. On Gur Sahai's death Mt. Matto succeeded to his property on the usual widow's life estate. On 23rd February 1915, Mt. Matto appeared before the village patwari and reported that, about a year before, she had gifted the land to her son-in-law Shibbu, who was in possession since Rabi 1915. There was no mention in the report that the gift was in any way conditional. The mutation was sanctioned by the revenue officer on 19th March 1915, who stated that the donee Shibbu was in actual possession and incidentally mentioned that he rendered services to the widow and agreed to do so in future.

The donee Shibbu died sometime in 1922 and the land devolved on his minor son Malhu. Malhu died without issue or widow in 1930. The daughter of Mt. Matto had predeceased Malhu; the exact date of her death is not clear on the record. On Malhu's death mutation was effected in favour of the defendants who are his collaterals and are not connected with Mt. Matto or her husband Gur Sahai in any way. The present suit was instituted by Mt. Matto against the collaterals of Malhu for a declaration that she was in possession of the land in dispute as owner, as the gifted property had reverted to her on the line of the donee becoming extinct. The suit was resisted by the defendants on the ground that the gift

was an absolute one, as it was one of the conditions of the gift that the donee would pay the debts of the donor and that he had actually done so. It was accordingly urged that the gifted property did not revert to the donor. No evidence, however, was led to prove that it was one of the conditions of the gift that the donee would pay the debts of the donor or that any such debts were paid, or that any debts were in fact due at all. The learned trial Judge held that on the termination of the line of donee the land reverted to the donor according to the principles laid down in the leading Full Bench case, 12 P R 1892.¹ He further held that the gift was apparently made for the benefit of the plaintiff's daughter and her issue, and as her line had become extinct the property would revert to the plaintiff. The learned Judge, however, found that the plaintiff was not in possession as erroneously alleged by her, and therefore, he allowed an amendment of the plaint so as to convert the suit into one for possession, and passed a decree for possession of the land in favour of the plaintiff.

On appeal the learned Senior Sub-Judge has reversed the decision and dismissed the suit. In an unnecessarily lengthy judgment, he has tried to make a simple case complicated and has entered into an irrelevant discussion on matters which had no bearing whatever on the case before him. The learned Judge has observed that the gift in question came in the category of hiba-bil-iwaz, and following a Division Bench judgment of this Court reported in 9 Lah 428=A I R 1928 Lah 516² he held that such a gift was absolute. Now hiba-bil-iwaz is a technical expression of Mohammedan law, and it is always dangerous to import such technical terms into decisions of simple cases under the Customary law. In the case relied upon by the learned Judge the gift was by a Gardezi Sayed of Multan City to a prostitute, whom he had married, and had been made in lieu of dower. The learned Judges held that such a gift was hiba-bil-iwaz and passed an absolute estate to the donee, which, on her death, it devolved on her heirs and not the heirs of the husband. Obviously, this case has not got the remotest connexion with the

1. Sitaram v. Rajaram, (1892) 12 P R 1892 (F B).

2. Fateh Ali Shah v. Mahomed Bakhsh, A I R 1928 Lah 516=119 I C 258=9 Lah 428.

case before us. The learned Judge then referred to the Answer to Question 54 of Middleton's Customary Law of the Kangra District. That Question and Answer again have nothing to do with the point involved in this case, in which the departed gift is by a widow to her son-in-law, and the question is whether on the extinction of the line of the son-in-law and the daughter the property reverted to the donor. Question 54 deals with the case of a male proprietor who has died without leaving male lineal descendants or widow or daughter or descendants through a daughter, and lays down the rule of succession in those circumstances. On this point again the learned Judge has entirely misdirected himself.

Before me, the learned counsel for the respondents relied upon the Answer to Question 94 of Middleton's Customary Law, and Ex. D-4 which is a vernacular copy of the *riwaj-i-am*, but, as has been rightly pointed out by the learned Senior Subordinate Judge, these answers relate to irrevocability of gifts and not to the reversion of the property on the extinction of the line of the donee. If, however, this answer applies at all to the facts of this case, as contended by the learned counsel for the respondents, then it would support the appellant; for if the gift was conditional on services being rendered to the appellant in her lifetime and the condition failed owing to the death of the donee and his son and the extinction of his line, then the condition failed and the gift could be revoked by the donor. The case is really a very simple one. It was a gift pure and simple made by a sonless widow to her resident son-in-law who was rendering services to her. The son-in-law died and was succeeded by his minor son who also died shortly afterwards. In these circumstances I fail to see how it can be said that the land became the absolute property of the son-in-law and on his death devolved on his collaterals. The custom in the Kangra District in such cases is decidedly in favour of the reverter of the property to the donor, or his or her line: see 54 P R 1897,³ and is in accord with the rule laid down in 12 P R 1892.¹ In my view the trial Judge had rightly held that the plaintiff was entitled to possession of the property. Before concluding, it seems to me necessary to state

that a preliminary objection was raised by the learned counsel for the respondents that this second appeal was incompetent as the learned Senior Subordinate Judge had decided the case on a question of custom and no certificate under S. 41 (3), Punjab Courts Act, had been obtained. This objection is obviously without any force. In this case the learned Senior Subordinate Judge has based his decision on a question of custom which did not arise and has failed to consider the real point involved in the litigation. This matter can unquestionably be agitated in second appeal without a certificate. I accept the appeal, set aside the judgment and decree of the learned Senior Subordinate Judge and restore that of the Court of first instance granting the plaintiff a decree for possession of the land in suit. The appellant shall get his costs in all Courts.

S.C./D.S.

Appeal allowed.

* A. I. R. 1937 Lahore 252

TEK CHAND, J.

Chatar Bhuj and another—Plaintiffs—Appellants.

v.

Municipal Committee, Bhawani, Defendant and others, Plaintiffs—Respondents.

Second Appeal No. 296 of 1936, Decided on 12th November 1936, from decree of Dist. Judge, Hissar, D/- 3rd December 1935.

* Jurisdiction—Civil Court—By statute Municipal Committee vested with power to improve drainage—its act can be questioned in civil Court only if it is not bona fide or is oppressive, wanton or capricious.

Where a Municipal Committee is invested by statute with power of executing works for improving the drainage of the town, it is for the Committee to determine as to how the work can best be done, and any act done or intended to be done by it in furtherance of this object can only be questioned in a civil Court if it is shown that the Committee is not acting bona fide or that the act complained of is oppressive, wanton and capricious. [P 253 O 1]

Bhagwat Dayal—for Appellants.

Gullu Ram—for Respondent (Defendant).

Judgment.—The admitted facts are that in 1934 the Municipal Committee, Bhawani, had in hand a scheme for improving the drainage system of the town. The work was being executed in

3. Bhotu v. Lehu, (1897) 54 P R 1897.

collaboration with the Public Health Department of the Punjab Government. According to this scheme, the streets and the drains were to be made pucca. Formerly the water of the drains in Mohollas EA, CDA and BA used to pass through the public street AF, as shown in the plan attached to the plaint. In the new scheme the direction of the drain has been changed, and the water of all these streets passes through the public street AF, along which the houses of the plaintiffs are situate. On 11th February 1935 the plaintiffs instituted a suit against the Committee for a perpetual injunction restraining the Committee from changing the course of the drain. The suit was dismissed by the trial Judge on the ground that it was not within the jurisdiction of the civil Courts. This order was affirmed on appeal by the District Judge. The plaintiffs have come up in second appeal. It is admitted that the Municipal Committee is invested by statute with the power of executing works for improving the drainage of the town. It is, therefore, for the Committee to determine as to how the work can best be done, and any act done, or intended to be done by it, in furtherance of this object can only be questioned in a civil Court, if it is shown that the Committee is not acting bona fide, or that the act complained of is oppressive, wanton or capricious. There is no allegation in the plaint that this was so. In the circumstances the suit is clearly not maintainable and has been rightly dismissed. The appeal, therefore, fails and is dismissed. In view of the fact, however, that the Municipal Committee had passed a resolution on 30th December 1934 requesting the Public Health Department of the Punjab Government to change the course of the drain and this resolution was not cancelled till after the institution of the suit, I leave the parties to bear their own costs throughout.

V.B.B./D.S.

*Appeal dismissed.***A. I. R. 1937 Lahore 253**

SKEMP, J.

Kesar Singh — Appellant.

v.

Karam Chand — Respondent.

Execution Second Appeal No. 1046 of 1936, Decided on 15th January 1937, from order of Senior Sub-Judge, Sargodha, D/- 17th June 1936.

Civil P. C. (1908), S. 58—Applicability—Words 'such detention' in proviso (1) and 'detention under this section' in proviso (2) mean 'detention in civil prison'—Civil prison means civil jail and not Court-house—Detention in Court-house cannot be regarded as detention in civil prison and S. 58 does not apply.

Words 'such detention' in proviso (1) and 'detention under this section' in proviso (2), S. 58 refer to and mean 'detention in civil prison'. Civil prison means civil jail and not Court-house. Detention therefore in the Court-house cannot be said to be detention in a civil prison.

[P 254 C 1]

A judgment-debtor was committed to the civil prison in execution of a decree but was released during the pendency of the appeal by him against the decree. The decree-holder withdrew the balance of the subsistence allowance deposited by him on release of the judgment-debtor. On dismissal of his appeal he was detained by the appellate Court for the whole day but was released as no subsistence allowance was deposited by the decree-holder. He was ordered to appear before the lower Court on a fixed date and on appearance it was contended by the judgment-debtor that he could not be re-arrested in view of proviso (2), S. 58 :

Held: that as at the time of the decree-holder's omission to pay the subsistence allowance the judgment-debtor was not detained in the civil prison but in the Court-house, S. 58 did not apply. The judgment-debtor was not therefore exempt from being committed to the civil prison to undergo the remaining term of imprisonment : *A I R 1929 Lah 361, Rel. on.*

[P 254 C 1]

Roop Chand—for Appellant.*Krishen Swaroop*—for Respondent.

Judgment.—The facts leading to the present execution appeal are as follows: The judgment-debtor was committed to the civil prison in execution of a decree on 9th November 1935. On 22nd December 1935 his release pending appeal was ordered by the appellate Court. The decree-holder then withdrew the balance of the subsistence allowance which he had provided for the judgment-debtor in the civil prison. The judgment-debtor's appeal was rejected on 11th March 1936 and he was forthwith taken into custody again. The Nazir kept him at the Court until 4-20 that afternoon when he reported that no subsistence allowance had been deposited as required by law. The decree-holder was not present personally; his pleader was sent for and stated that he had no funds. The judgment-debtor was then released and ordered to appear before the lower Court on 23rd March 1936. He then pleaded that he could not be re-arrested by virtue of sub-s. (2), S. 58, Civil P. C. The lower Courts, relying on

AIR 1929 Lah 361,¹ repelled this contention. The judgment-debtor has come here on second appeal. The lower appellate Court wrote an excellent judgment holding that proviso (1), S. 58, Civil P. C., did not apply. S. 58 begins :

Every person detained in the civil prison in execution of a decree shall be so detained,

Proviso (1) is :

He shall be released from such detention before the expiration of the said period (iv) on the omission by the person, on whose application he has been so detained, to pay subsistence allowance.

Sub-section (2) under which he now comes is :

A judgment-debtor released from detention under this section shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

It is clear that 'such detention' in proviso (1) refers to and means detention in the civil prison; so also does 'detention under this section' in sub-s. (2). At the time of the decree-holder's omission to pay subsistence allowance he was not detained in the civil prison and therefore the section does not apply. I have no doubt that the term 'civil prison' means the civil jail and not a Court-house and that any reasoning whereby detention in a Court-house could be regarded as an extension of detention in the civil prison is wrong. 'Prison' is not defined in the Civil Procedure Code. It is defined in the Oxford Dictionary as originally:

The condition of being kept in captivity or confinement; forcible deprivation of personal liberty; hence, a place in which such confinement is ensured; specially such a place properly arranged and equipped for the reception of persons who by legal process are committed to it for safe custody while awaiting trial or for punishment; a jail, further, "with 'a' or 'the', referring more distinctly to a material structure." A similar conclusion was come to by Dalip Singh, J. in AIR 1929 Lah 361,¹ although the reasoning is not quite the same. The appellant's counsel relied on rulings under the Code of 1882 which were also quoted before the learned Senior Subordinate Judge. S. 58, sub-s. (2) is worded differently from the final paragraph in the corresponding S. 340 of the Code of 1882, and in my opinion those rulings are obsolete. I, therefore, reject this appeal with costs and hold that the judgment-debtor is not exempt from being committed to the civil prison to undergo the remainder of the term of six months' imprisonment.

K.B./A.L.

Appeal dismissed.

1. Kanshi Ram v. Kanshiram Mitter Sen, AIR 1929 Lah 361=118 IC 531.

A. I. R. 1937 Lahore 254

ADDISON AND DIN MOHAMMAD, JJ.

Tara Singh—Plaintiff—Appellant.

v.

Mt. Sahib Devi and others — Defendants—Respondents.

First Appeal No. 223 of 1936, Decided on 18th January 1937, from decree of Sub-Judge, First Class, Lahore, D/- 26th February 1936.

Partnership — Dissolution of — Suit for accounts — In suit for accounts till accounts are taken no particular amount can be said to be due by one partner to his co-partner—Partner suing for accounts is not entitled to interest on his share of profits from date of dissolution but is so entitled from date of final decree.

A suit for accounts on dissolution of partnership on the expiry of the fixed term for which it is formed, differs from a suit for recovery of a debt in that in the former till accounts are taken no particular amount can be said to be due by one partner to his co-partner, while in a suit for debt, the amount can be said to be due on the date of the filing of the plaint. A partner suing for accounts is not therefore entitled to any interest on the share of the profits found due to him, from the date of the dissolution of the partnership, but he is so entitled from the date of the final decree passed in his suit for accounts : *AIR 1930 P C 185, Rel. on.* [P 255 C 1, 2]

Achhru Ram and Indar Dev Dua—for Appellant.

Narotam Singh and H. J. Rustomji—for Respondents.

Addison, J.—A partnership was entered into between the plaintiff Tara Singh on the one side and Teja Singh and Teja Singh's son Sobha Singh on the other side. The partnership was fixed from 1st April 1924 to 31st March 1925, the shares of the two sides being equal. The present suit was instituted by the plaintiff against Teja Singh and Sobha Singh on 1st May 1927 for rendition of the accounts of the partnership which had automatically dissolved on 31st March 1925. A preliminary decree was granted on 8th August 1928. Thereafter various Commissioners were appointed to go into the accounts. In the meantime Teja Singh died and is now represented by his widow Mt. Sahib Devi and three sons. For various reasons the accounts were not settled for a long time and at length on 20th March 1935 certain arbitrators were appointed to fix what was due. They gave their award on 16th January 1936. Their finding was that Rs. 1,544 were due to the plaintiff as capital, Rs. 3,256 as profits and Rs. 550 as

costs of the litigation up to the date of the award. The total of these three sums is Rs. 5,350. The question of costs after the award was left to the Court as well as the question of interest.

The trial Judge allowed the plaintiff his costs subsequent to the award. He also allowed interest on the sum of Rs. 1,544 at 9 per cent. per annum, but held that the defendants were only liable for half that amount as their share of the partnership was half. He disallowed interest on the sum of Rs. 3,256 which represented the profits to which the plaintiff was entitled. Against this decision the plaintiff has appealed as regards interest. It was admitted by the learned counsel appearing for the appellant that he was only entitled to half interest at 9 per cent. per annum on capital up to 31st March 1925, the date of the dissolution of the partnership, but he urged that after that date he was entitled to higher interest by way of damages from the defendants as they should have returned his capital then. He was allowed interest at $4\frac{1}{2}$ per cent. per annum on capital advanced by him up to the date of the decree and we see no reason to increase that rate. There is no force therefore in this part of the appeal. The appellant's counsel however strenuously contended that he was entitled to interest on the sum of Rs. 3,256 which represents his share of the profits from 1st April 1925 till the date of realization. We are however of opinion that he is not entitled to this on the authority of 58 Cal 208.¹ There, a decree was given which allowed interest from the date of the plaint. The defendants appealed to His Majesty in Council against that part of the order while the plaintiffs appealed by way of cross-appeal against the disallowance of interest on the amounts overdrawn by the defendants.

As regards the cross-appeal, their Lordships remarked that no case was made out or even alleged against the defendants which should justify a departure from the ordinary rule that a partner was not charged with interest in respect of overdrawings. This has no connexion with the present case. As regards the appeal of the defendants however, which was against the allowance of interest from the date of the plaint, their Lordships remarked that they were unable to accept

the correctness of the view that interest should be allowed to the plaintiffs from the date of the plaint. They said that this was not an action to recover a debt of which it could be said that it was due at the date of the plaint. It was an action to dissolve and wind up the affairs of a partnership, and until the accounts had been taken it was impossible to say what, if anything, was due from any partner to his co-partner. In their opinion, therefore, interest should only be allowed to the plaintiffs from the date of the final decree. This applies fully to the present case. It follows that the plaintiff was only entitled to interest from the date of the final decree, but as the sum found due was paid within a month or two of the final decree we see no reason to accept the appeal to the extent of allowing interest for a month or two.

We therefore dismiss this appeal but make no order as to costs here.

K.B./A.L. *Appeal dismissed.*

* A. I. R. 1937 Lahore 255

JAI LAL, J.

Hem Raj—Decree-holder—Appellant.

v.

Asa Ram and others, Judgment-debtors and another, *Garnishee*—Respondents.

Execution First Appeal No. 201 of 1936, Decided on 25th November 1936, from order of Sub-Judge, First Class, Dera Ghazi Khan, D/- 18th March 1936.

* Civil P. C. (1908), O. 21, R. 46 — Decree-holder attaching on 19th February 1933 judgment-debtor A's debt due from B, before debt is barred—Executing Court investigating A's claim against B under O. 21, R. 63 (A), Civil P. C., in September or October 1933 — A's right to debt from B barred on 4th July 1934—Final order in investigation passed in March 1936 — Decree-holder's right to recover A's debt from B is not barred as crucial date is date of attachment of A's debt or date when Court ordered investigation under O. 21, R. 63 (A)—Every subsequent order relates back to either of those dates—Prolongation of proceedings is immaterial.

In execution a decree-holder attached on 19th February 1933 a debt due to A, judgment-debtor from B, the garnishee before the right of A to sue for his debt from B had become barred. The Court proceeded to investigate the claim of A against B in September or October 1933 under O. 21, R. 63 (A) when also the debt due to A was not barred. The investigation proceedings continued till 1936 and a final order was passed in

1. Suleman v. Abdul Latif, A I R 1930 P C 185 = 124 I C 891 = 57 I A 245 = 24 S L R 328 = 58 Cal 208 (P C).

March 1936, when the right of *A* for debt against *B* had become barred on 4th July 1934 apart from proceedings under O. 21, R. 63 (A). The executing Court refused to order the garnishee *B* to pay the amount in March 1936 :

Held : that the crucial date in such cases was either the date of attachment, which gave a right to the attaching decree-holder to claim an order against the garnishee *B* for payment, or in any case the date when the Court decided to investigate the claim of the judgment-debtor *A* against *B*. Any order, which might subsequently be passed must relate back to the date of attachment or to the date when the Court decided to investigate the claim. Prolongation of proceedings was not material for purposes of limitation. Attachment having taken place on 19th February 1933, before the debt had become barred and the Court having started investigation under O. 21, R. 63 (A) in September or October 1933, proceedings about order of payment of debt were instituted at the latest in September or October and hence it was competent to the Court to order the garnishee to pay the amount in spite of the expiry of limitation after attachment or at any rate during investigation under O. 21, R. 63 (A). [P 256 C 2]

Mukand Lal Puri — for Appellant.

Shambu Lal Puri — for Respondent (Garnishee).

Judgment.—The appellant Bhai Hem Raj obtained a money decree against Asa Ram for a comparatively big amount, and in execution of this decree he attached some debts alleged to be due to his judgment-debtor. One of the debts so attached was said to be due from Dewa Ram, respondent. The application for attachment of this debt was made on 19th February 1933, the order of attachment was made on 27th February 1933 and it was served upon Dewa Ram on 8th June 1933. Some time in the month of September or October 1933 the Court decided to proceed with the investigation of the claim of Asa Ram against the garnishee Dewa Ram. These proceedings continued till the commencement of 1936. Evidence was recorded in February 1936 and on 18th March 1936 the final order was passed. On the dates when the proceedings were held in the beginning of 1936, the right of Asa Ram to sue for the recovery of the debt from Dewa Ram had become barred by time, if time is computed normally from the date on which the debt was payable to Asa Ram. Asa Ram's right to recover the debt apart from the proceedings under O. 21, R. 63 (A), Civil P. C., became barred by time on 4th July 1934. The executing Court, therefore, held on 18th March 1936 that 'limitation is not checked by attachment' and consequently he refused to order the

garnishee to pay the amount. The decree-holder has appealed against this order.

The matter is not free from difficulty, but after careful consideration I am of opinion that the attachment having taken place before the expiry of the period of limitation and the Court having started investigation into the claim of the judgment-debtor under O. 21, R. 63 (A), it must be assumed that the proceedings about an order of payment under O. 21, R. 63 (A) were instituted in the executing Court at the latest in September or October 1933 when admittedly the debt due to the judgment-debtor had not become barred by time. The crucial date in such cases is either the date of attachment, which gives a right to the attaching decree-holder to claim an order against the garnishee for payment or in any case the date when the Court decides to investigate the claim of the judgment-debtor against the garnishee. Any order, therefore, which may subsequently be passed must relate back to the date of attachment or to the date when the Court decided to investigate the claim. The prolongation of the proceedings is, in my opinion, immaterial for the present purpose. This is the only point that was urged before me. No other point was raised by counsel on either side. I must, therefore, assume that the Court properly proceeded to hold an investigation under O. 21, R. 63 (A) and in pursuance of those proceedings it was competent to make an order against the garnishee to pay the amount in Court and that the parties aggrieved from such an order are entitled to appeal. On this assumption, in my opinion, this appeal must succeed because the expiry of the limitation after attachment or at any rate, during investigation under O. 21, R. 63 (A) does not prevent the Court from passing an order for payment.

I, therefore, accept this appeal, set aside the order of the executing Court and direct it to order the garnishee to pay the debt due from him to the judgment-debtor Asa Ram in Court under O. 21, R. 63 (A), Civil P. C. There will be no order as to the costs of these proceedings on account of the difficult question of law involved.

V.B.B./D.S.

Appeal accepted.

A. I. R. 1937 Lahore 257

JAI LAL, J.

Fazal Din and another — Plaintiffs — Appellants.

v.

Charan Das and others—Defendants—Respondents.

Second Appeal No. 1737 of 1935, Decided on 27th November 1936, from decree of Senior Sub-Judge, Gurdaspur, D/- 6th June 1935.

(a) Custom (Punjab)—Succession—Land in Pathankot tahsil—Owner of land dying without any heirs—Village community has preferential claim of succession to land.

According to the custom prevailing in the Pathankot tahsil as stated in the Riwaj-i-am of 1911-12, when an owner of land dies intestate and without any heirs, the village community has a preferential claim of succession to the land.

[P 257 C 2]

(b) Riwaj-i-am — Later riwaj-i-am carries more weight than previous one.

The later riwaj-i-am must carry more weight than the previous one on the ground that originally a statement of custom in the riwaj-i-am is enforceable only during the currency of the settlement.

[P 257 C 2]

(c) Record of Rights — Evidentiary value—Entry of certain person as owner raises presumption of ownership of such person—Presumption is rebuttable.

Where a certain person has been entered in the revenue records as owner of certain land, there arises a presumption of ownership of such land in his favour but such presumption is rebuttable at the instance of those who contest his ownership.

[P 258 C 1]

Mehr Chand Mahajan—for Appellants.

Chiranjiva Lal Aggarwal—for Respondents 1 and 3.

Judgment.—The land in dispute originally belonged to one Hussain Bakhsh who was assumed to have died childless and without any legal heirs. His land was mutated, half in favour of the Crown on account of escheat, and half in favour of the appellant, who is a member of the proprietary body in the village in which the land is situated. Hussain Bakhsh during his lifetime had mortgaged the land with possession to the respondent. After the mutation in his favour the appellant instituted a suit for redemption of half the land on payment of half the mortgage money. This suit was contested on the ground that the appellant was not an owner of the land and the mutation of half the land in his favour was opposed to custom. The learned Senior Subordinate Judge has held that the appellant is not

entitled to redeem the land because he is not the owner thereof, but has granted a certificate under S. 41, Punjab Courts Act, to enable the appellant to appeal to this Court. The question depends merely on the statement of custom in the riwaj-i-am. Answer to Question 31 in the riwaj-i-am of 1911-12 is quite clear on the point. The question was :

Enumerate in the order of their succession the persons entitled to the estate of a man who dies intestate, leaving no relations.

The reply was :

All the tribes of the Shakargarh tahsil state that in the absence of all relations including daughters and sisters and their descendants the land should be recorded as Government property. Those of the Pathankot tahsil state that the village community has a preferential claim. Those of the other tahsils state that the contingency of a man having no collaterals in his own village or any other is inconceivable.

The land in dispute is situate in the Pathankot tahsil. It is therefore clear that according to the custom in that tahsil as recorded in answer to Question 31 the village community has a preferential claim and it is on this ground that the present appellant claims a right to redeem the respondent's land. On behalf of the respondent reference is made to answer to Question 31 in the previous riwaj-i-am of 1893. According to that the custom was that the property of an intestate leaving no relations is to devolve to Government excepting in Batala where the village community has got a preferential claim and that only if the deceased was a member of the same community. The learned Judge below has preferred the statement of custom in the riwaj-i-am of 1893 to that in the riwaj-i-am of 1911-12 on the ground that the later riwaj-i-am was not so carefully prepared. I see no justification for this remark. On the other hand, if the answer to Question 31 is to constitute a guide in this respect the later riwaj-i-am is more detailed. But the learned counsel says that this riwaj-i-am does not make any distinction when the deceased was a member of the same community as the claimant. This, in my opinion, does not make the answer given in the riwaj-i-am of 1911-12 indefinite. The latest authority of this Court is that the later riwaj-i-am must carry more weight than the previous one and this is on the ground that originally a statement of custom in the riwaj-i-am is enforceable only during the currency of the settlement.

A further ground on which the appellants' claim can be sustained is that in the revenue records he is entered as the owner of the land which he seeks to redeem and there is a presumption of ownership in his favour, which has to be rebutted by the respondent, who has failed to do so. It is noticeable that the Government has made no claim to the proprietorship of the land in suit, and the plea of the respondent is that the Government is the owner of the land and not the appellant. I hold therefore that the custom relied upon by the appellant has been proved and, accepting this appeal, I decree the suit with costs throughout.

Three months for redemption from 5th November 1936.

K.B./A.L.

Appeal allowed.

A. I. R. 1937 Lahore 258

TEK CHAND, J.

Mughli—Defendant—Appellant.

v.

Ladha Mal and others, Plaintiffs and another, Defendant—Respondents.

Second Appeal No. 793 of 1936, Decided on 21st December 1936, from decree of Dist. Judge, Gujranwala, D/- 30th March 1936.

Punjab Tenancy Act (16 of 1887), Ss. 50 and 77 (3) (g)—Landlord, in case of co-sharer landlords, means co-sharer landlords collectively—Possession of land forcibly taken by some of the co-sharer landlords—Suit by occupancy tenant to recover possession more than one year after dispossession—Suit is governed not by S. 50 but by Limitation Act—Jurisdiction of civil Court is not barred.

Sections 77 (3) (g) and 50 relate to suits between the landlord and tenant and in cases where the land is owned by a number of persons jointly, landlord in these sections means all the co-owners collectively. [P 258 C 2]

Where some of the co-sharer landlords took forcible possession of the land in possession of the occupancy tenants, and it was not shown that the possession was taken on behalf of all the co-sharer landlords, and the occupancy tenant brought a suit for the recovery of possession more than one year after dispossession:

Held: that S. 50 was inapplicable as in taking forcible possession all the co-sharer landlords did not act collectively. The suit was governed by the Limitation Act and was not barred. The jurisdiction of the civil Court was also not barred: *A I R 1928 Lah 895, Foll.; 11 P R 1886; 16 P R 1887 and 3 P R 1889, Ref.* [P 259 C 1]

Amar Nath Chona—for Appellant.

Qabul Chand for M. L. Puri—for Respondents (Plaintiffs).

Judgment.—The land in dispute was owned jointly by 15 persons, under whom the plaintiffs held it as occupancy tenants. Some years ago the land became the subject of river action, and was submerged. Up to the date of submersion the plaintiffs were admittedly in possession as occupancy tenants. The land re-appeared about three years before the institution of the suits, when the defendants, who are only two out of the 15 persons jointly owning the land, took forcible possession of it. The present suit was instituted by the occupancy tenants in the civil Court for possession of the land. The defendants pleaded that the civil Court had no jurisdiction to entertain the suit as laid down in S. 77 (3) (g), Punjab Tenancy Act, and that the suit was barred by time under S. 50 of the Act having been instituted more than one year from the date of dispossession. The trial Judge found against the defendants on both the points and decreed the suit. On appeal before the District Judge the question of limitation was the only question raised. The learned Judge held that S. 50 was inapplicable as all the co-sharer landlords had not acted collectively and the defendants had not taken possession on behalf of the other co-owners. He accordingly held that the dispossession of the plaintiffs was not by 'the landlord' and therefore S. 50 could not apply. He held that the case was governed by the ordinary law of limitation under which the plaintiffs had 12 years from the date of the re-appearance of the land to sue for recovery of possession.

The defendants have come in second appeal and on their behalf both the pleas of jurisdiction and limitation have been urged again before me. After hearing counsel I see no force in these contentions. It is well established that S. 77 (3) (g) and S. 50, Punjab Tenancy Act, relate to suits between the 'landlord' and 'tenant' and in cases where the land is owned by a number of persons jointly, 'landlord' in these sections means all the co-owners collectively. In the present case the defendants are co-sharers to the extent of 2/15ths of the land, and it is not alleged nor shown that they took possession on behalf of all the landlords. The latest ruling of this Court is *A I R 1928 Lah 895*¹ in which this view was taken. The

1. *Diwan Singh v. Ralla*, *A I R 1928 Lah 895*—110 I O 538.

earlier rulings bearing on the point are 11 P R 1886,² 16 P R 1887³ and 3 P R 1889.⁴ I hold therefore that the jurisdiction of the civil Courts is not barred, nor is S. 50 applicable. The case is governed by the Indian Limitation Act under which it is well within time. The appeal fails and is dismissed with costs.

B.D /D.S.

Appeal dismissed.

2. Baishno Das v. Rupchand, (1886) 11 P R 1886.

3. Ghasita v. Karam Shah, (1887) 16 P R 1887.

4. Mian Singh v. Fatha, (1889) 3 P R 1889.

* * A. I. R. 1937 Lahore 259

TEK CHAND AND DALIP SINGH, JJ.

Firm Sheikh Mohammad Ismail Maula Bakhsh—Plaintiffs—Appellants.

v.

Mian Abdul Majid Khan and another—Defendants—Respondents.

Second Appeal No. 2083 of 1934, Decided on 14th July 1936, from decree of Addl. Dist. Judge, Lyallpur, D/- 30th August 1934.

* (a) Negotiable Instruments Act (1881), S. 76 (d)—S. 76 (d) applies only to bills of exchange and cheques and not to promissory notes — “Maker” is used in general sense as applying to promissory notes, negotiable instruments and cheques—“Drawer” is used in restricted sense as applying to bills of exchange and cheques only.

Throughout the Act, a clear distinction has been made between the words “maker” and “drawer”, the former word being used in a more general sense as applying to promissory notes, negotiable instruments and cheques, while the word “drawer” is restricted to bills of exchange or cheques only, and is nowhere used in connection with promissory notes. Therefore the operation of Cl. (d) of S. 76 is limited to bills of exchange and cheques only and does not extend to promissory notes: *A I R 1925 Sind 241, Disting.*; *A I R 1935 Lah 153, Dissent.* [P 260 C 2; P 261 C 1]

* * (b) Promissory Note — Presentation—Necessary when promissory note is payable on demand at a “specified place”.

In view of the provisions of Ss. 64 and 69, Negotiable Instruments Act, 1881, presentment is necessary to charge the maker of a promissory note payable on demand, only if the note is payable at a specified place. [P 262 C 1]

* * (c) Negotiable Instruments Act (1881), Ss. 64 and 69—Specific place includes city, town or village —Presentation of promissory note necessary if maker has residence or place of business in specified city, town or village—Otherwise mere possession of note is sufficient.

A city, town or village at large, may be taken to be a specified place within the meaning of

Ss. 64 and 69, Negotiable Instruments Act, but its presentment is only necessary, or indeed reasonably possible, if the maker has his residence or place of business there. In the absence of such residence or place of business the mere possession of the promissory note by the promisee in the city, town or village mentioned would be sufficient: *Hardy v. Woodroffe*, (1819) 2 Starkie 319; *A I R 1935 Lah 623* and *A I R 1935 Pesh 132, Considered.* [P 263 C 1, 2]

Jagan Nath Aggarwal and Asa Ram Aggarwal—for Appellants.

S. Sewa Ram Singh—for Respondents.

Tek Chand, J.—On 19th July 1930 Abdul Majid Khan, defendant 1, and his wife, Mt. Umrao Begum, defendant 2, executed a promissory note in favour of Durga Das Tangri, defendant 3, for Rupees 4,000 bearing interest at Re. 1.8 0 per cent per mensem. The promissory note was payable on demand at Lyallpur. On 8th October 1931 Durga Das, defendant 3, assigned the promissory note to the plaintiff firm Mohd. Ismail Moula Bakhsh. On the same day the plaintiff sent a notice of demand by post, which was received by defendant 1 on the following day. The defendant having failed to pay, the plaintiff instituted a suit for recovery of Rs. 4,894, made of Rs. 4,000 principal and Rs. 894 interest, and also asked for future interest at the stipulated rate from the date of institution of the suit till realization. In her written statement, Mt. Umrao Begum, defendant 2, admitted the execution of the promissory note and receipt of consideration, but pleaded that the money had remained in possession of her husband, Abdul Majid Khan, who had spent it according to his own choice and, therefore, he alone was liable. Abdul Majid Khan admitted having signed the promissory note but stated that he did so merely as a witness to identify defendant 2, who was the only executant of the document. He further pleaded that the promissory note was without consideration. He denied the factum and validity of the assignment by Durga Das, defendant 3, in favour of the plaintiff. Lastly he pleaded that there had been no presentment of the promissory note and, therefore, the plaintiff was not entitled to sue thereon.

The trial Judge found that the promissory note had been duly executed by both the defendants jointly, that consideration had passed, and that the assignment by defendant 3 in favour of the plaintiff was valid. He found that the plaintiff's allega-

tion that the promissory note had been duly presented to defendant 1 at Lyallpur on 8th October 1931 was unproved. He held, however, that presentment was not necessary in view of the provisions of S. 76 (d), Negotiable Instruments Act, as the defendants did not suffer any damage for want of such presentment, defendant 1 having admitted in the witness-box that even if the promissory note had been presented to him, he would not have paid the amount due, as he had not received any consideration for it. In support of this conclusion, the learned Subordinate Judge referred to A I R 1925 Sind 241.¹ In the result he passed a decree for Rs. 4,894 against both the defendants with future interest at the stipulated rate from the date of the institution of the suit till realization. In view of his finding that the plaintiff's evidence as to the actual presentment of the promissory note was unsatisfactory, he allowed him one-half of the costs of the suit. Mt. Umrao Begum, defendant 2, submitted to the decree and did not go in appeal. Abdul Majid Khan appealed to the Additional District Judge, who upheld the findings of the trial Court as to the execution of the promissory note by both the defendants and the passing of the consideration. He also agreed with the trial Court in holding that actual presentment of the promissory note had not been proved. He, however, held that S. 76 (d), on which the learned Subordinate Judge had relied, was inapplicable as it referred to the "drawer" of a bill of exchange and not the "maker" of a promissory note.

He further held that under S. 64, Negotiable Instruments Act, presentment of the promissory note was necessary as it was payable at a "specified place", and as this had not been done he accepted the appeal, and setting aside the decree of the Subordinate Judge, so far as defendant 1 was concerned, dismissed the suit against him. It was noted in the decree of the Additional District Judge, that the decree of the trial Court stood against defendant 2 who had not appealed.

The plaintiff has come in second appeal and on his behalf, the judgment of the learned Additional District Judge has been assailed substantially on three grounds. It has been argued: (a) that the note in

dispute was not payable at a "specified place," and, therefore, under the exception to S. 64, its presentment to the maker was not necessary; (b) that defendant 1 having denied consideration, presentment was unnecessary under S. 76 (d); (c) that in any event, the executants not having a fixed abode or place of business in the town of Lyallpur, all that was required of the creditor was to have the promissory note in his possession at Lyallpur at any time that the makers, or either of them, called to make payment, and as the note remained with Durga Das and, subsequent to its assignment, with the plaintiff, till the institution of the suit, the requirements of the law were fulfilled, and all other issues having been found in favour of the plaintiff, his suit should have been decreed. I shall first deal with the second point, as the first and third points are inter-connected and it will be convenient to consider them together. Cl. (d) of S. 76 holds presentment unnecessary

as against the drawer, if the drawer could not suffer damage for the want of such presentment.

Now S. 7, Negotiable Instruments Act, defines "drawer" as the maker of a bill of exchange or cheque. Obviously this definition must be followed in construing the various provisions of the Act, unless there is anything in the context to the contrary. Throughout the Act, a clear distinction appears to have been made between "maker" and "drawer", the former word being used in a more general sense as applying to promissory notes, negotiable instruments and cheques, while the word "drawer" is restricted to bills of exchange or cheques only, and is nowhere used in connexion with promissory notes. This will become clear from a reference to Ss. 26 (1) and (2), 30, 32, 37, 43, 44, 51, 69, 70, 118, 134 and 136 of the Act. In all these sections "drawer" or "drawee" has always been used in connexion with bills of exchange and cheques, and "maker" is used either generally for all kinds of negotiable instruments, or with special reference to promissory notes in contradistinction to bills of exchange and cheques. It is significant that in Cl. (a) of S. 76 itself, the words "maker, drawee or acceptor" are used, but in Cl. (d) the word "drawer" only is mentioned. This clearly shows that the Legislature did not intend to use "drawer" and "maker" as synonymous terms. It follows, therefore, that the intention was to limit the operation

1. Bhawanji Narsi v. Assan Pitambardas, A I R 1925 Sind 241=86 I C 357=19 S L R 12.

of Cl. (d) to bills of exchange and cheques only and not to extend it to promissory notes. The learned Subordinate Judge has referred to A I R 1925 Sind 241¹ but in that case the instrument, which was the subject of dispute, was a bill of exchange and was clearly covered by Cl. (d) of S. 76. That case, therefore, is no authority for the proposition that Cl. (d) applies to promissory notes also. The learned Subordinate Judge has observed that the same principle should apply to promissory notes, but in considering the plain words of a statute, it is not permissible to extend its operation on this ground to instruments which appear to have been excluded specifically from its terms.

Mr. Jagannath has drawn our attention to a Single Bench decision of this Court reported as A I R 1935 Lah 153² which certainly supports his contention. In that case, it was held by Abdul Rashid, J., that the definition of "drawer" in S. 7 was not exhaustive and that the "maker" of a promissory note could also be called a "drawer" and consequently no presentment was necessary if the maker of the promissory note could not suffer damage for want of such presentment. No reasons are given for this conclusion, and the only authority cited by the learned Judge is a remark in Chalmers' Bills of Exchange, Edn. 10, p. 325. This remark, however, appears in that book in quite a different context. In the commentary on S. 88, (English) Bills of Exchange Act, relating to the liability of the maker of a promissory note, the learned author says:

The maker of a promissory note is the principal debtor in the instrument. The maker is sometimes called the drawer, but the primary and absolute liability of the maker of a note must be distinguished from the secondary and conditional liability of the drawer of a bill of exchange.

The author then cites the case of (1836) 6 N & M 723³ where it was held that the endorser of a promissory note does not stand in the situation of maker relatively to the endorsee. It will be seen that the quotation from Chalmers' book has no bearing on the question of the presentment of promissory notes, and is no authority for the proposition for which it was cited. It may be that in some old

English cases the words "maker" and "drawer" were used indiscriminately, but with all respect I think that this cannot justify our extending the plain meaning of the word "drawer" as defined in a Statute of the Indian Legislature. I would therefore, respectfully dissent from the conclusion of the learned Judge in the case cited and hold that S. 76 (d) is inapplicable to cases of promissory notes. Agreeing with the learned Additional District Judge on this point, I overrule this contention of the appellant's learned counsel. Before considering the first and third questions raised on behalf of the appellant it is necessary to state a few facts which are no longer in dispute. As already mentioned the promissory note expressly stated that the amount borrowed shall be paid on demand with interest at the rate of Rs. 1-8-0 per cent per mensem to the said Lala Durga Das Tangri, or order, at "Lyallpur".

It is admitted that both the executors, Abdul Majid Khan and Mt. Umrao Begum have their permanent residence in Kapurthala. Abdul Majid Khan owns some squares of land in the Lyallpur district, but he has no property in the town of Lyallpur, nor has he any fixed abode or place of business there. He has deposed that he and his wife were at the house of Chaudhri Mohammad Din, Secretary District Board, at the time of the execution of the promissory note. He also admitted that he was not at Lyallpur on 8th October 1931 but arrived there by chance on the morning of the 9th of October when the notice of demand sent by post by the plaintiff was delivered to him at the house of his sister. The provisions of the law bearing on the point are contained in S. 64 and S. 69, Negotiable Instruments Act. These sections are not very happily drafted or arranged and some confusion has arisen owing to the fact that the "Exception" to S. 64 is really not an exception to the rule enunciated in the main part of that section. It is an independent provision, which might well have been enacted as a separate section. The first part of S. 64 contains the general rule that:

Promissory notes . . . must be presented for payment to the maker . . . by or on behalf of the holder as hereinafter provided.

Section 69 provides that a promissory note . . . made payable at a specified place must, in order to charge the maker . . . thereof, be presented for payment at that place.

The exception to S. 64 lays down that:

2. Shiv Nath v. Bishambar Das, A I R 1935 Lah 153=1935 Cr O 239=152 I O 1006=36 Cr L J 217=37 P L R 81.

3. Gwinnell v. Herbert, (1836) 6 N & M 723=5 A & E 436=2 H & W 194=5 L J K B 250.

Where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof.

From these provisions it is clear that in order to charge the maker of a promissory note payable on demand, presentment is necessary only if the note is payable at a "specified place". The question for determination is what is the meaning of a "note payable at a specified place"? Does it mean a note payable at a certain premises, like a house, shop, office, business-place or other building, so particularized that the promisee can know where to present it? Or does it include in its purview instruments, in which the place of payment is not so particularized, but which is merely described as payable at a town at large, of whatever size, where it may or may not be possible for the promisee, after reasonable search, to find the maker? Unfortunately the Negotiable Instruments Act does not contain any definition of the expression "specified place," and there is a singular dearth of authority bearing on the point both in India and England. The corresponding provision in England, on which the Indian Act is largely based, is in S. 45 (4), Bill of Exchange Act, 1882 (45 & 46 Vict., C. 67), but that Act also is silent on the point. Nor do the well-known text books on the Bills of Exchange or the Law Merchant afford any assistance. In the English language the word "place" appears to have different meanings, according to the context, two of which are (1) a village, town or city and (2) a building or part of a building (see Murray's New English Dictionary, Vol. 7, p. 926 and Webster's Dictionary, p. 1646). The only English reported case which we have been able to find is (1818) 2 Starkie 319,⁴ where one of the pronotes in dispute was payable at Guildford (which, I understand, is a town of some size) there being no specification of any particular premises. It was assumed that the note was payable at a specified place and its presentment was necessary, but in view of the fact that the maker was not actually residing at Guildford at the due date, but was in London, and the promisee had made enquiries from two principal banking houses at Guildford who had stated that the maker had no account with them, it was held in a very brief judgment that

actual presentment to him was not necessary.

In India the question has been considered at some length by Beckett, J., in a Single Bench case reported in A I R 1935 Lah 623.⁵ There the promissory note was payable at Sialkot and it was found that neither the maker nor the promisee were residing therein. The lower Courts had held that Sialkot was a "specified place" within the meaning of S. 69 of the Act, and as there had been no presentment in the ordinary sense of the term, they had dismissed the suit. On second appeal the learned Judge held, however, that a large town of the size of Sialkot could not be called a

specified place for payment, any more than it would be possible to hold that British India was a specified place if the note had been made payable in British India.

He proceeded to observe that :

If there is to be presentment in the ordinary sense of the word, there must be some quite definite place where the holder of the note can attend with a reasonable chance of finding the maker of the note. In other words, the place specified for payment must be equivalent to what would be called in ordinary language an "address", which would enable the maker to be found by the exercise of reasonable diligence provided that the holder himself chooses to attend at the place named for payment.

The learned Judge then went on to say :

Whether the place named for payment in a negotiable instrument constitutes a specified place for this purpose must be a question to be decided according to the circumstances of each case. If the maker of the pronote has an ordinary place of business known to the parties concerned, the mere entry of the town in which it is situated may provide a sufficient address but if the town is large and there are no other means of ascertaining where the maker is to be found, then there is no place at which the holder can be expected to attend for the purpose of presenting the note for payment.

Applying these rules to the facts of the case before him, the learned Judge held that presentment was not necessary. In A I R 1935 Pesh 132,⁶ a note payable 'in Peshawar' was held to be payable at a specified place, and its non-presentment there was considered to be fatal to the maintainability of the suit by the promisee for recovery of the amount from the maker. There is no discussion of the point in the judgment and it seems to have been taken for granted that a big town like

5. Mehr Bakhsh v. Hari Chand, A I R 1935 Lah 623=160 I O 536.

6. Sher Mahomed Khan Zamanuddin Khan v. Mian Haji Ahmad Gul Abdul Aziz, A I R 1935 Pesh 132=158 I O 89.

4. Hardy v. Woodroffe, (1818) 2 Starkie 319=20 R R 689.

Peshawar was a specified place. It is not clear from the report whether the maker resided, or had a place of business, in Peshawar. The only other Indian case, which I have been able to find, is 38 Bom L R 395.⁷ There the promissory note in question contained the following provision: "Money to be payable at Poona, Bombay or elsewhere". Blackwell, Offg. C.J. observed that the expression "specified place" in S. 69 meant

a place so particularised that the promisee can know where he must present the promissory note for payment.

He then proceeded to hold that :

The words of the promissory note do not, in my opinion, fall within the section at all. It is true that the promissory note provides that it is payable at Bombay or Poona, and of course the promissory note could have been presented at Bombay or Poona; but the promissory note is not payable only at Bombay or Poona, being payable 'elsewhere', that is at a place not specified and it does not make it incumbent upon the promisee to present it at any specified place.

He accordingly held that the case fell within the exception to S. 64 and presentment was not necessary. In America, where the provisions relating to presentment as contained in the negotiable instrument laws of most States are identical with those of the Indian Act, there appears to be considerable judicial authority on the point, which is summarized in the following words in Corpus Juris, Vol. 8, p. 553, para. 768 :

Where a bill or note merely designates a particular city at large as the place of payment, without naming any particular place therein, the paper should be presented in such city at the residence or place of business of the maker if he has any, or upon him personally if he can be found, but if he has no residence or place of business there and is not found after the exercise of reasonable diligence having the paper in such city on the day it becomes due is a sufficient presentment.

See also to the same effect Chancellor Kent's Commentaries on American Law Vol. 3, p 129. With the utmost deference, I venture to think that the above paragraph contains an accurate exposition of the law. It follows that a city, town or village at large, may be taken to be a specified place within the meaning of Ss. 64 and 69, Negotiable Instruments Act, but its presentment there would only be necessary, or indeed reasonably possible, if the maker has his residence or place of business there. In the absence of such

residence or place of business the mere possession of the promissory note by the maker in the city, town or village mentioned, would be sufficient. In the present case, as already stated, the contesting defendant did not reside at Lyallpur, nor had he a place of business there, nor was he actually present at Lyallpur on the date in question. In these circumstances, presentment to him was not necessary, the promissory note being admittedly in the possession of the plaintiff at Lyallpur at the time.

As all other points have been decided in favour of the plaintiff, he is entitled to a decree for the sum claimed. For the foregoing reasons I would accept the appeal, set aside the judgment and decree of the Additional District Judge and restore that of the trial Court, decreeing the plaintiff's suit against both defendants for Rs. 4,894 with future interest at the agreed rate from the date of the institution of the suit till realization. I would also give the plaintiff one-half of his costs in the trial Court from both the defendants and one-half of his costs from Abdul Majid Khan, defendant 1, alone in the District Court and this Court.

Dalip Singh, J.—I agree.

K.B./V.V.

Appeal allowed.

* A. I. R. 1937 Lahore 263

JAI LAL, J.

Nabi Bakhsh — Judgment-debtor — Appellant.

v.

Ida, Decree-holder and *another*, Judgment-debtor—Respondents.

Second Appeal No. 610 of 1936, Decided on 3rd November 1936, from order of Senior Sub-Judge, Sialkot, D/- 11th February 1936.

* (a) Practice—Appellate Court — Duty of —Appellate Court refusing to consider a certain document not before it on record but filed in previous execution of same decree — Appellate Court is bound to consider such document as it must be deemed to be on record.

A house was attached in execution of a money decree passed against the estate of one *I. N.*, the son and legal representative of *I.*, raised an objection that he was the owner of the house. The objection was dismissed. In appeal some document of mutation which was filed in the previous execution of the same decree but which was not before the Court in the present execution was relied upon by *N* as proving his ownership of

7. *Dorabji Nowrooji v. Jamshedji Pestonji*. A I R 1936 Bom 218=163 I O 300=38 Bom L R 395=60 Bom 796.

the house. The appellate Court declined to look into the document as the record of the previous execution proceedings was not before the Court and dismissed the appeal. On second appeal:

Held: that the lower appellate Court was not justified in refusing to consider the document as *N* was entitled to rely on it. It was bound to consider it when it was on record in the previous execution. [P 264 C 1, 2]

(b) Appeal—Necessary party—Auction-purchaser—Objection to attachment by legal representative of judgment-debtor dismissed—Sale held after dismissal—Stranger auction-purchaser is not necessary party to appeal from order of dismissal.

An objection to attachment under S. 47, Civil P. C., by the legal representative of the judgment-debtor was dismissed and the property was then put to sale and purchased by a third person in auction-sale. In appeal from the order of dismissal of the objection, the auction-purchaser was not added as a respondent:

Held: that the auction-purchaser was not a necessary party to the appeal, as his right came into existence after the matter had been decided by the trial Court. [P 265 C 1]

Barkat Ali—for Appellant.

Khalifa Shuja-ud-Din — for Respondent (Decree-holder).

Judgment.—A money decree was passed against the estate of Imam Din. His son Nabi Bakhsh was his legal representative at the time when the decree was passed. In execution of the decree a house, which is the house in dispute, was attached by the decree-holder and Nabi Bakhsh raised an objection that he was the owner of the house and not his father Imam Din. Evidence was led by him in support of this objection which was ultimately dismissed. He preferred an appeal to the Senior Subordinate Judge who affirmed the decision of the executing Court and dismissed his appeal. Nabi Bakhsh has consequently presented a second appeal in this Court.

It appears from the judgment of the Senior Subordinate Judge that reliance was placed on behalf of the appellant on mutation No. 590 which is in favour of the appellant Nabi Bakhsh and is claimed to include the house in dispute. The Senior Subordinate Judge, however, declined to look at this document on the ground that it was not on the record. The document however had been placed on the record in previous proceedings relating to the execution of this decree. It may be that at the time when the case was argued the record of the previous execution proceedings was not before either the executing Court or before the

Senior Subordinate Judge but if the appellant intended to rely upon a document which was already on the record he was entitled to do so. In my opinion, therefore, the refusal of the Senior Subordinate Judge to consider the effect of mutation No. 590 on the present dispute is not justified.

It is then contended by the appellant that the Senior Subordinate Judge was wrong in not remanding the case for recording the replies of the Patwari to the interrogatories sent by the appellant. It appears that the interrogatories were submitted by the appellant during the course of the hearing of the objection and cross-interrogatories were filed by the respondent. But before the replies were received the evidence of the parties was closed but no reference was made to these interrogatories and finally the parties proceeded to arguments on the existing record and the objection was disallowed by the executing Court. In my opinion under the circumstances the appellant was not entitled to claim a remand in the Court of the Senior Subordinate Judge on appeal considering that he closed his case in spite of the fact that the interrogatories had not been answered by the Patwari. The only inference is that at that time he did not consider that it was necessary to rely on the evidence of the Patwari.

An application has been made in this Court by the appellant praying that a map of the locality prepared by the Patwari at his instance be placed on the record and treated as additional evidence in this case. In other words the prayer is to admit additional evidence in this Court. The document which is sought now to be produced is not a copy of the revenue records. It is a plan especially prepared by the Patwari according to the instructions of the appellant and probably in order to admit it in evidence it would be necessary to examine the Patwari to have the correctness of the plan proved. In my opinion there is no ground made out by the appellant for admission of additional evidence and I refuse to admit the plan in question in evidence at this stage. A preliminary objection is raised on behalf of the respondent that this appeal is not competent because subsequent to the decision of the objection by the executing Court the property was sold

and purchased by some other person. That person, however, was not impleaded as a respondent in the Senior Subordinate Judge's Court nor has he been impleaded as a party to this appeal. It is, therefore, contended that this appeal is not competent. Proceedings in this case, however, have arisen out of the objection raised by the judgment-debtor or the legal representative of the judgment-debtor under S. 47, Civil P. C. In my opinion the auction-purchaser under the circumstances is not a necessary party to this appeal specially because his right came into existence after the matter had been decided by the trial Court against the appellant. I therefore overrule the preliminary objection.

The result of the above discussion of this appeal is that in my opinion the Senior Subordinate Judge has failed to consider a document which, it is claimed on behalf of the appellant, has an important bearing on the decision of the question at issue. I of course express no opinion whether this contention of the appellant is well founded but the document is on the record and the learned Senior Subordinate Judge was bound to consider it. Accordingly I remand the case to the Senior Subordinate Judge under O. 41, R. 25 with direction to re-hear the appeal and submit a finding to this Court after taking into account mutation No. 590 whether the house in dispute has been proved to belong to the objector Nabi Bakhsh. Return shall be made within two months from today and the parties will have the usual ten days for objections. Parties to appear before the Senior Subordinate Judge on 3rd December 1936.

K.B./A.L.

*Case remanded.***A. I. R. 1937 Lahore 265**

AGHA HAIDAR, J.

Ram Chand—Judgment-debtor—Objector—Appellant.

v.

Co-operative Society, Kharar — Plaintiff—Respondent.

Second Appeal No. 1593 of 1935, Decided on 10th June 1936, from order of Dist. Judge, Hoshiarpur, D/- 28th June 1935.

(a) Civil P. C. (1908), S. 60 (c)—Agriculturist — Proviso to S. 60 is imperative —

Definite decision of Court is necessary that judgment-debtor is not agriculturist—Otherwise property is immune from attachment.

The proviso to S. 60 of the Code is imperative inasmuch as it prohibits the Court from levying execution against properties detailed in the section and the proviso. The provisions of law in S. 60 being thus stringent, on an objection to attachment under S. 60 of the Code unless there is a definite decision by the Court that either the judgment-debtor was not an agriculturist or the property did not belong to him and was not occupied by him, the house or other building would be immune from the process of execution and attachment : *A I R 1930 All 727* and *A I R 1935 Lah 942, Rel. on.* [P 266 C 1]

(b) *Res judicata* — Heard and finally decided—Principle does not apply unless there is finding either express or by necessary implication.

Before the doctrine of *res judicata* is invoked in aid, there must be some finding, either express or by necessary implication, deciding the question one way or the other. Where an objection to attachment is made by the judgment-debtor and he agrees that if he fails to pay the decretal amount on a certain date his objection should be dismissed and on his failure the objection is dismissed without any decision thereon, the dismissal will not operate as *res judicata* to his raising the objection again as the previous dismissal is without a finding on the objection one way or the other. [P 266 C 1, 2]

Mohammad Amin—for Appellant.

Judgment.—This appeal arises out of certain execution proceedings. A decree was obtained by the Co-operative Society of Kharar, through one Hari Singh, against Ram Chand, appellant. In execution of his decree the decree-holder attached certain houses belonging to the judgment-debtor. The judgment-debtor raised objections on 4th December 1933, on the ground that he was an agriculturist and the houses under the provisions of S. 60, Civil P. C., were not liable to attachment and sale. On 2nd August 1934, the judgment-debtor, Ram Chand, made a statement that he would pay the decretal amount by 5th October 1934, failing which his objections would stand dismissed with costs. Payment was not made and the objections were accordingly dismissed. Subsequently in the course of execution proceedings against these houses Ram Chand repeated his objections under Ss. 60-47, Civil P. C. These objections were dismissed by the trial Court. He went up in appeal and the learned District Judge held that the judgment-debtor was precluded by the principles of *res judicata* from raising the objections, when they had once been dismissed on the basis of his own statement, dated 2nd August

1934. He accordingly dismissed the appeal. The judgment-debtor has come up in appeal to this Court and the point which has been taken on his behalf is that the question, whether the houses were exempt under the provisions of S. 60, Civil P. C., had not been finally heard and decided and that it was therefore competent to him to raise this question. In my opinion this contention is well founded. The legislature has laid down in clear and unmistakable language that certain properties shall not be liable to attachment or sale, and one of these properties is mentioned in Cl. (c) of S. 60, Civil P. C., in these terms :

Houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him.

The policy of the Legislature is re-stated in the amendment introduced by S. 35, Punjab Relief of Indebtedness Act (local Act 7 of 1934). A Division Bench of the Allahabad High Court in 127 I O 447¹ has laid down that :

When attachment and sale of the property is once prohibited by law and though objection has not been taken in the execution department by the judgment-debtor, if the Court had otherwise become cognizant of the fact that the property attached was the house of an agriculturist, it would have been its duty to withdraw the attachment.

This, according to the learned Judges, followed from the language of S. 60, Civil P. C. The learned Judges observed that the proviso to S. 60, Civil P. C., was imperative, inasmuch as it prohibits the Court from levying execution against the properties detailed in the section and the proviso. I have followed this case sitting singly in A I R 1935 Lah 942.² It would thus appear that the provisions of law are stringent and unless there is a definite decision by the Court that either the judgment-debtor was not an agriculturist or the property did not belong to him and was not occupied by him, the house or other building would be immune from the process of execution and attachment. In the previous application there was no decision at all. Before the doctrine of res judicata is invoked in aid, there must be some finding, either express or by neces-

sary implication, deciding the question one way or the other. There was no such finding in the present case and the objections were dismissed because the judgment-debtor had failed to pay up the decretal amount by 5th October 1934. In my opinion the Courts below were in error in shutting out the judgment-debtor from raising the plea and proving the points taken by him in his objections regarding the applicability of S. 60, Civil P. C. I would therefore allow the appeal, set aside the orders of the two Courts below and remand the case to the original Court for recording evidence and disposing of the case according to law. Costs here and hereafter shall abide the result. It is to be regretted that the respondent was not represented at the hearing.

K.B./A.L.

Case remanded.

A. I. R. 1937 Lahore 266

JAI LAL, J.

Hidayat Ullah — Defendant — Appellant.

v.

Mohammad Ali and others — Plaintiffs — Respondents.

Second Appeal No. 532 of 1936, Decided on 8th October 1936, from decree of Dist. Judge, Jullunder, D/- 12th February 1936.

(a) Evidence Act (1872), S. 112—Child born to wife during continuance of valid marriage alleged by husband to be illegitimate—Mere statement by husband that child is not his, is not sufficient to establish illegitimacy.

A statement by person, merely containing an assertion that a child born to his wife during the continuance of a valid marriage between them is not his child, is not sufficient under S. 112 to establish illegitimacy of the child, when it is not established that the husband had no access to his wife during the period in which the child could be begotten. [P 267 O 2]

(b) Evidence Act (1872), S. 112—Whether husband is competent to give evidence showing that child born to his wife during wedlock is illegitimate (*Quaere*).

Quaere.—Whether a husband is competent to give evidence tending to show that a child born to his wife during the continuance of a valid marriage is illegitimate in a suit in which the question as to his legitimacy arises: 163 I O 749 (F B), Ref. [P 267 O 2]

(c) Evidence Act (1872), S. 112—Legitimacy of person challenged—Mere finding that husband remained outside for long periods and that on return after one such period, he was

1. Aidal Singh v. Khazan Singh, A I R 1930 All 727=127 I O 447=1930 A L J 1244.

2. Mohammad Din v. Hirda Ram, A I R 1935 Lah 942=160 I O 749.

dissatisfied with conduct of his wife and denied paternity of the child born to her, is not sufficient for purposes of S. 112 — It must be definitely proved that during that period there was no occasion for wife to meet her husband.

Where the legitimacy of a person is challenged in a suit, a mere finding to the effect that the husband, after the marriage, remained outside for long periods, that on his return from one of these periods of absence, he found cause to be dissatisfied with the conduct of his wife and denied his paternity of the child born to her, is not sufficient to meet with the requirements of S. 112. In order to fulfil the requirements of S. 112, it is necessary to prove that during the period there was no occasion for the wife to meet her husband.
[P 268 C 2; P 269 C 1]

Harnam Singh — for Appellant.

Mohammad Monir — for Respondents.

Judgment. — This appeal is by the defendant, Hidayat Ullah. He claims to be the legitimate son of Mohammad Ishaq. The respondents denied that he is a legitimate son of Mohammad Ishaq and claimed the estate of Mohammad Ishaq. The trial Judge held that Hidayat Ullah had been proved to be the legitimate son of Mohammad Ishaq and dismissed the suit for a declaration brought by the respondents against him.

The learned District Judge however on appeal came to the contrary conclusion and held that it had been proved that Hidayat Ullah was not the son of Mohammad Ishaq. Both the Courts are however agreed in holding that Hidayat Ullah was born to Mt. Raiban, between whom and Mohammad Ishaq there was a valid marriage at the time when Hidayat Ullah was born. The learned District Judge however has come to the conclusion that it has been shown that Mohammad Ishaq and Mt. Raiban had no access to each other at any time when he could have been begotten. This conclusion is based mainly on two documents: one is a statement by Mt. Raiban that Hidayat Ullah was not a son of Mohammad Ishaq. The learned counsel for the respondents has conceded that this statement is not admissible because Mt. Raiban is alive and she has not been produced as a witness in this case. The other document on which the learned District Judge has relied, and on which the counsel for the respondents also relies before me, is a statement made by Mohammad Ishaq, who is now dead, that Hidayat Ullah was not his son. This statement was made in the course of litigation between Mt. Raiban and Moham-

mad Ishaq. The latter had instituted a suit for restitution of conjugal rights against Mt. Raiban and in the course of the trial of that suit, he made a statement professing his willingness to maintain Mt. Raiban but not Hidayat Ullah on the ground that the latter was not his son. This statement the learned counsel for the respondents contends is admissible under S. 32, Evidence Act, having been made by a deceased person, but the appellant's counsel contends that this statement was made at a time when controversy as to the legitimacy of Hidayat Ullah had started and therefore it is not admissible.

I do not think it is necessary to give any finding on this aspect of the case because in my opinion this statement is not sufficient to bring the case of the respondents within S. 112, Evidence Act, which provides that any person born during the continuance of a valid marriage between his mother and any man shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. In the statement of Mohammad Ishaq beyond asserting that Hidayat Ullah is not his son, it is not established that he had no access to Mt. Raiban at any time when Hidayat Ullah could have been begotten. Legally therefore this statement is not sufficient to establish the illegitimacy of Hidayat Ullah. I am further doubtful whether Mohammad Ishaq, if he had been alive and called as a witness, was competent to give evidence as to the illegitimacy of his son. This was held in divorce suit No. 5 of 1935 by a Full Bench of the Calcutta High Court in 163 I C 749.¹ Then the learned counsel contends that in any case the learned District Judge has relied upon oral evidence and that evidence conclusively proves that Mohammad Ishaq had no access to Mt. Raiban at any time when Hidayat Ullah could have been begotten. There is no discussion of this evidence in the judgment of the learned District Judge. All that he says about oral evidence is as follows:

The plaintiffs have done the next best thing, that is to say, they have shown on the record that after his marriage to Mt. Raiban, Mohammad Ishaq remained outside the village for long periods, that on his return from one of these

1. *Sweeney v Sweeney*, (1935) 163 I C 749=62 Cal 1080=39 C W N 1047 (F B).

periods of absence, he found cause to be dissatisfied with the conduct of Mt. Raiban, and denied paternity of the child Hidayat Ullah. . . .

Now, this is again not a finding which is sufficient to meet with the requirements of S. 112, Evidence Act. I have examined the oral evidence on which this observation of the learned District Judge is made. That evidence also is not definite enough. The witnesses have stated that Mohammad Ishaq after his marriage to Mt. Raiban had gone to Bombay and from there he had gone to London and that he returned after two or two and half years after the birth of Hidayat Ullah. In my opinion in order to fulfil the requirements of S. 112, it was necessary for the witnesses to make definite statements that during the interval there was no occasion for Mt. Raiban to meet Mohammad Ishaq, in other words that Mt. Raiban did not go with Mohammad Ishaq or that Mohammad Ishaq did not return to the village in the meantime. As it is, the statements are inconclusive. Incidentally it may be remarked that the evidence is not quite consistent as to the place of the birth of Hidayat Ullah. In my opinion therefore circumstances have not been established which would take the case out of the ordinary conclusion to be derived from the birth of Hidayat Ullah during the existence of a valid marriage between Mohammad Ishaq and Mt. Raiban. I accept this appeal set aside the decree of the learned District Judge and restore that of the trial Judge with costs throughout.

R.M./R.K.

Appeal allowed.

A. I. R. 1937 Lahore 268

JAI LAL, J.

Mohammad Khan — Plaintiff—Appellant.

v.

Co-operative Society, Khawaspur — Defendant—Respondent.

Second Appeal No. 414 of 1936, Decided on 12th October 1936, from decree of Dist. Judge, Amritsar, D/- 11th January 1936.

(a) Award — Arbitration—Award—Objection taken to referring Court's jurisdiction to entertain suit but no objection raised to award—Court passing decree in terms of award—Award cannot then be challenged.

When an objection was taken to referring Court's jurisdiction to entertain suit but no objec-

tions to award were filed by either of the parties the Court has no option but to give a decree in accordance with the award, and it is not open to either party to object to the validity of the award on any ground by appeal or by revision : *A I R 1928 Lah 730, Disting.* [P 269 C 1]

(b) *Co-operative Societies Act (1912), S. 43 (1), R. 18 (Punjab)* — Suit between society and members—Civil Court has no jurisdiction.

Civil Court has no jurisdiction to entertain a suit between a Society and its members, etc., by virtue of R. 18 framed by the Punjab Government under S. 43 (1), *Co-operative Societies Act* : *A I R 1924 Lah 418, Disapproved but followed.*

[P 269 C 2]

Mohammad Monir—for Appellant.

Abdul Rahman—for Respondent.

Judgment. — The appellant, Mian Mohammad Khan, instituted a suit against the Co-operative Society, Khawaspur, for recovery of some money alleged to have been illegally recovered from him by the Society. A preliminary objection was raised by the Society that the civil Court had no jurisdiction to entertain the suit, but this objection was decided against the Society by the trial Judge, who held that he had jurisdiction to entertain the suit. Subsequently the dispute between the parties was referred to arbitration. The arbitrator gave an award against the Society and as neither party raised any objection to the award within the prescribed time the Court passed a decree against the Society in accordance with the award. Against the decree an appeal was preferred to the learned District Judge who has accepted it holding that the award was invalid because there was an objection to the inherent jurisdiction of the trial Court to entertain the suit. The appeal was consequently accepted and the suit dismissed. The plaintiff has presented this second appeal. A preliminary objection is raised on behalf of the defendant that the plaintiff is not entitled to appeal because he has transferred his rights under the decree granted to him by the trial Court to another person and especially because the respondent himself had a decree against the appellant and sought to attach the decree obtained by the latter in execution of that decree, but the application for attachment was dismissed on the objection of the transferee. The transferee, however, has made no application to be substituted in place of the appellant and I am unable to see how the respondent can raise the preliminary objection to the maintainability of the

appeal at the instance of the original plaintiff. The preliminary objection is devoid of force and I overrule it.

On the merits, in my opinion, this appeal must succeed. The learned District Judge relied upon my judgment in A I R 1928 Lah 730,¹ where I held that a party to arbitration could object to the legality of the award on the ground that the Court which referred the dispute to arbitration on the application of the parties had no jurisdiction to entertain the suit. In that case, however, objections had been filed to the award, and objection had been taken to the jurisdiction of the Court. In the present case no objections had been filed by either of the parties and consequently the trial Court had no option but to give a decree in accordance with the award and it was not consequently open to either party to object to the validity of the award on any ground by appeal or by revision. Moreover, I am not satisfied that the view of the learned trial Judge that he had jurisdiction to entertain the suit is erroneous. The rules framed by the Government relating to Co-operative Societies have been framed under S. 43 (1), Co-operative Societies Act, 1912, which authorizes the Local Government, inter alia, to frame rules to provide that any dispute touching the business of a Society between members or past members of the Society or persons claiming through a member or a past member or between a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar for decision or, if he so directs, to arbitration, and to prescribe the mode of appointing an arbitrator or arbitrators and the enforcement of the decisions of the Registrar or the awards of arbitrators. In pursuance of this, the Local Government has framed rules Ex. P 6. R. 18 is that any dispute of the description mentioned in S. 43 (1) shall be referred to the Registrar and power has been given to the Registrar either to decide the dispute himself or to appoint arbitrators. In Cl. (j), R. 18, it is provided that the decision of the arbitrator or of the Registrar shall not be questioned in any civil or revenue Court. R. 49 of the Co-operative Society in question merely provides that any dispute between the Society and its

members, etc., shall be referred to the Registrar as provided in the rules framed by the Local Government.

It would thus be observed that the jurisdiction of the civil Courts is barred if there is a decision of the arbitrator or the Registrar, otherwise neither the Act nor the rules framed thereunder debar the jurisdiction of civil Courts to entertain disputes which otherwise have to be referred to the Registrar or to arbitration. In my opinion, till a reference has been made to the arbitrator or to the Registrar the rule must be deemed to amount to an agreement between the Society and the members, etc., to refer all disputes of the nature mentioned in the rule to arbitration, and if a party chooses to institute a suit on such matter in a civil or revenue Court, the proper procedure for the other party is to move that Court to stay its proceedings under Cl. 18, Sch. 2, Civil P. C., which provides that where any party to an agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement apply to the Court, to stay the suit ; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration and that the applicant was ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

No action was taken under this rule by the Society, but reference has been made to a judgment of the Division Bench of this Court reported as A I R 1924 Lah 418.² In that case it has been held that the civil Court has no jurisdiction to entertain a suit between a Society and its members, etc., by virtue of R. 18 framed by the Punjab Government. It being a Division Bench judgment, I am bound to follow it, though with great respect I do not agree with the conclusion of the learned Judges. Therefore I base this judgment on the ground that no appeal lay to the District Judge against a decree

1. *Ladha Ram v. Ralla Ram*, A I R 1928 Lah 730=112 I C 262=10 L L J 242.

2. *Zamindara Bank, Sherpur Kalan v. Suba*, A I R 1924 Lah 418=71 I C 722.

passed in accordance with the award because no objection was raised within the prescribed time to the validity of the award on any ground whatsoever. I accept this appeal, set aside the decree of the learned District Judge and restore that of the trial Judge. In view of the existence of a Division Bench judgment in favour of the respondent, I make no order as to the costs of this appeal.

B.D./D.S.

Appeal allowed.

* A. I. R. 1937 Lahore 270

TEK CHAND AND SKEMP, JJ.

Mt. Hayat Khatun — Plaintiff — Appellant.

v.

Abdullah Khan — Defendant — Respondent.

First Appeal No. 2276 of 1935, Decided on 13th October 1936, from decree of Sub-Judge, 1st Class, Dera Gazi Khan, D/- 15th July 1935.

* Mahomedan Law—Dower—Limitation—First divorce by written document its contents being known to wife — Subsequent living together as husband and wife and again divorce by talak—Subsequent divorce is meaningless — Suit by wife for prompt dower brought more than three years after first divorce, is barred.

Under the Hanafi School of Muhammadan law a divorce by a husband, evidenced by a written document, the contents whereof have been duly communicated to the wife, is irrevocable.

[P 271 C 2]

A Mahomedan divorced his wife by a deed the contents of which were fully known to her. Afterwards the parties were reconciled and continued to live together as man and wife for some years and subsequently the wife was again divorced by talak. She brought a suit for recovery of prompt dower, more than three years after the original divorce in writing :

Held: that the subsequent divorce was meaningless and did not give a fresh cause of action and therefore the suit being more than three years after the original divorce, was time barred.

[P 271 C 2]

Khurshaid Zaman — for Appellant.

M. L. Puri — for Respondent.

Tek Chand, J.—This is an appeal in *forma pauperis* from the decree of the Sub-Judge, Dera Ghazi Khan, dated 15th July 1935, dismissing the plaintiff-appellant's suit for recovery of Rs. 10,000. The parties were married on 11th June 1922. At the time of the marriage, a kabinnama was executed in which it was stated that the sum of Rs. 10,000 had been fixed as prompt dower. On 5th January 1933 the plaintiff

instituted a suit for recovery of Rs. 10,000 from the defendant, alleging that he had divorced her on 30th October 1932, by pronouncing the talak three times. The defendant pleaded that he was a minor at the time of the marriage and was not bound by the terms of the kabinnama, in which it had been entered merely for show that Rs. 10,000 would be paid as dower. He admitted that he had divorced the plaintiff, but denied that he did so orally on 30th October 1932, as stated in the plaint. He alleged that the divorce was by deed executed on 25th September 1927, when the plaintiff was given clothes and ornaments worth Rs. 550, and her claim for dower was fully satisfied. Lastly, he pleaded that the suit was barred by time, having been instituted more than three years after 25th September 1927.

The learned Subordinate Judge held that Rs. 10,000 mentioned in the kabinnama was intended to be paid, but that the plaintiff had been divorced on 25th September 1927, and consequently the suit was time barred. He also found that the parties had been reconciled soon after and the plaintiff continued to live with the defendant till October 1932 when the defendant again divorced her, but he held that from 25th September 1927 to 30th October 1932 the relationship of husband and wife did not, and could not legally subsist between the parties. He accordingly dismissed the suit, leaving the parties to bear their own costs. The plaintiff appealed to this Court through her mukhtar Hafiz Gaman, and along with the memorandum of appeal presented a petition under O. 44, R. 1, for permission to appeal in *forma pauperis*. As the trial Judge, after due enquiry, had adjudged her to be a pauper, further enquiry into her pauperism was considered unnecessary by the learned Judge who admitted the appeal.

At the hearing before us, Mr. M. L. Puri for the respondent raised a preliminary objection that the application for leave to appeal in *forma pauperis* was not presented in accordance with the provisions of R. 1 of O. 44, inasmuch as the applicant was not present in person in this Court at the time of the presentation of the application, nor was the application accompanied by a schedule of her property. In my opinion, both these contentions are without force. The applicant is a pardana-shin lady and she had executed a special power-of-attorney in favour of Hafiz

Gaman authorizing him to present the application in this Court on her behalf. In the mukhtarnama it was specifically mentioned that she could not go to Lahore in person as she was a pardanashin lady. No counter-affidavit has been filed that this statement is incorrect. This being so, she was exempt from personal appearance under S. 132, Civil P. C., and the presentation of the petition and the memorandum of appeal by her special mukhtar was in accordance with law. The petition was no doubt not accompanied by a schedule of the property of the plaintiff, but on the matter being brought to the notice of counsel by the office, a copy of the schedule which had been filed in the lower Court was actually presented in this Court. As already stated a full enquiry had been made in the Court below and the applicant had been adjudged a pauper for purposes of the suit. It is not contended on behalf of the respondent that the financial position of the applicant improved after the decision of the suit by the trial Court. In these circumstances it was not essential for the plaintiff to file another schedule of the same property with the application under O. 44, R. 1. The preliminary objections are, therefore, without force and are overruled.

It is common ground between the parties that the marriage took place on 11th June 1922 and the parties lived together until some time in 1927. The defendant's case is that on 25th September 1927 he divorced the plaintiff and executed a formal deed which was attested by two witnesses and was duly handed over to the plaintiff. In the lower Court the plaintiff denied the execution of this deed. The defendant accordingly led secondary evidence consisting of the statement of the scribe Udho Das (D. W. 1) who produced his register which contains a verbatim copy of the contents of the deed, and is signed by the defendant and the two attesting witnesses Dost Muhammad and Habibullah Khan. Of these Dost Muhammad is dead, but Habibullah Khan appeared as D. W. 5. This evidence fully establishes the execution of the deed. Indeed the learned counsel for the appellant did not seriously challenge the finding of the lower Court on this point. His real contention, was that the contents of the deed were not known to the plaintiff, that the parties soon became reconciled and continued to live as man and wife until 30th October 1932 and consequently the divorce of 1927

had become ineffectual. There is, however, reliable evidence on the record which establishes beyond doubt that soon after its execution, the deed was made over to the plaintiff and that she and her maternal uncle, Allah Dad, asked several respectable members of the brotherhood to intervene and bring about a reconciliation between the parties. The most important of these witnesses are Rahim Dad Khan (D. W. 4) who is a Sub-Registrar and an Honorary Magistrate and is a leading member of the tribe, and Habibullah Khan (D. W. 5) who had attested the deed and who has deposed that he handed it over to the plaintiff and explained its contents to her.

The learned Subordinate Judge has not accepted this evidence as reliable, but after reading it and hearing counsel for both sides I find myself unable to agree with his conclusion. It may be stated that the learned Subordinate Judge who actually decided the case took it over after the whole of the evidence had been recorded. He, therefore, had not the advantage of having the witnesses before him, and the same weight cannot be attached to his appreciation of the evidence as might have been the case if he had had the opportunity of observing the demeanour of the witnesses.

It must, therefore, be held that the plaintiff was divorced by the defendant on 25th September 1927 and that she was aware of this fact. It is conceded that under the Hanafi School of Muhammadan law a divorce by a husband, evidenced by a written document, the contents whereof have been duly communicated to the wife, is irrevocable. This being so, the fact that the parties were reconciled soon after the divorce and continued to live together for some years could not in law restore their relationship of husband and wife, and consequently the oral pronouncement of the talak in 1932 was a meaningless formality which did not give a fresh cause of action to the plaintiff to sue for recovery of dower. The relationship of husband and wife having come to an end in September 1927 the present suit instituted in 1933 is clearly barred by limitation and was rightly dismissed. In view of this finding it is not necessary to decide the other questions raised in the appeal. The appeal fails and is dismissed with costs. A copy of the decree of this Court shall be sent to the Collector.

Skemp, J.—I agree.

S.C./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 272

ADDISON AND DIN MOHAMMAD, JJ.

Mt. Lachhmi Devi — Plaintiff — Appellant.

v.

Firm Lala Uttam Chand Kapur & Sons — Defendants — Respondents.

First Appeal No. 140 of 1936, Decided on 14th October 1936, from decree of Sub-Judge, First Class, Lahore, D/- 29th February 1936.

Estoppel—Mortgage property standing in name of mortgagor—Mortgagor considered and did all acts as owner—Extracts from Municipal registers and survey plan given by mortgagor to mortgagee, showing mortgagor full owner—Mother present at time of negotiations finally inducing mortgagee to advance money on mortgage—Mother held estopped from denying title of son to property—Mortgagee held took reasonable care to ascertain that transferor had power to transfer.

A mortgaged certain property to B. The suit property stood all along in the name of A, who was considered to be its owner, did all the acts as an owner would do, and gave to B the extracts from the Municipal registers and a copy of the survey plan before the mortgage showing that he was the owner. His mother was present at the negotiations, when the mortgage in question was executed, and it was she who finally induced B to advance money on the mortgage, at the same time giving her brother as surety. Subsequently she brought a suit to avoid the transfer :

Held : that she was estopped from denying the fact that the property belonged to her son A ;

[P 272 C 2]

Held also : the mortgagee took reasonable care to ascertain that the transferor had power to make the transfer. It was with the express consent of the mother that her son A was held out as the ostensible owner and in that capacity he transferred an interest in the suit property to B for valuable consideration and hence the proviso to S. 41, T. P. Act, had been complied with and the transfer could not be avoided.

[P 272 C 2;
P 273 C 1]*M. C. Mahajan*—for Appellant.*Badri Das and Achhru Ram*—for Respondents.

Addison, J.—The plaintiff, *Mt. Lachhmi Devi*, widow of *Duni Chand*, brought the present suit against the firm *Uttam Chand Kapur and Sons*, represented by *Bihari Lal* and *Ishar Das*, its partners, and her son *Himaiti Ram*, defendant 2, for a declaration that the house in suit belonged to her husband *Duni Chand* and was purchased by her from him by means of a registered sale deed, dated 15th December 1890, the original of which had been lost, and that her son had no power to mortgage it to defendant 1 who had obtained a decree for its sale on the mortgage. The mortgagee pleaded that the house did not

belong to her, that the sale deed in her favour was fictitious and without consideration, that the plaintiff had throughout knowledge of the mortgage created by her son and took part in the negotiations therefor and had lost any rights she had by her acts and admissions. The trial Judge held that the transaction in her favour, evidenced by a copy of the deed dated 15th December 1890 was a fictitious transaction to which effect was never given, that she was estopped by her acts and admissions from disputing the mortgage and that S. 41, T. P. Act, also inured for the benefit of the mortgagee. He, therefore, dismissed the suit with costs and the plaintiff has appealed. As we have come to the conclusion that the plaintiff is estopped from contesting the mortgagee's claim by virtue of the provisions of S. 115, Evidence Act, as well as of S. 41, T. P. Act, it will not be necessary for us to come to any conclusion on issue 1. (His Lordship after discussing the evidence proceeded.) Sufficient has been said to show that the house has all along stood in the name of *Himaiti Ram* who was considered to be its owner, did all the acts as owner would do and gave the extracts from the Municipal registers and a copy of the survey plan, showing that he was the owner. His mother was present at the negotiations when this house was mortgaged and it was she who finally induced *Bihari Lal* to advance the money on the mortgage of the house, at the same time giving her brother *Lalji Das* as surety. The evidence with respect to this matter must be accepted. In these circumstances, S. 115, Evidence Act, estops her from denying the fact that the house belonged to her son. It runs as follows :

When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Similarly, the provisions of S. 41, T. P. Act, inure for the benefit of the mortgagee. He found the mother living with her son, who was believed by everybody to be the owner, and this was the natural state of affairs. The transferee not only had the registration registers searched for 14 or 15 years but was assured that the house belonged to *Himaiti Ram* by the production of the copies from the Municipal registers and survey plan. The proviso to S. 41

has thus been complied with, and it must be held that he took reasonable care to ascertain that the transferor had power to make the transfer. In fact, it was the plaintiff herself who finally induced him to grant the advance on the mortgage of this house. It was, therefore, with her express consent that her son was held out as the ostensible owner and in that capacity transferred an interest in the house to Bihari Lal for valuable consideration. Under this principle, therefore, also the transfer cannot be avoided. For the reasons given, we dismiss this appeal with costs.

V.B.B./K.S. *Appeal dismissed.*

A. I. R. 1937 Lahore 273

ADDISON AND DIN MOHAMMAD, JJ.

Brahm Das—Petitioner—Appellant.

v.

Tarlok Singh and others, Contesting objectors and *others*, Petitioners — Respondents.

First Appeal No. 60 of 1936, Decided on 20th October 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 11th November 1935.

Punjab Sikh Gurdwaras Act (8 of 1925), S. 16 (2) (iv)—Person worshipping Sikh Guru blessed by such Guru — Person also mentioned as Sikh in several Sikh historical works — Person held Sikh saint and also historical person — Institution in memory of such person is Sikh Gurdwara although subsequent Mahants were Udasis.

Where a person who was the worshipper of a Sikh Guru was blessed by such Guru, was mentioned as a Sikh and his career was also described in most of the important Sikh historical works :

Held : that these facts established that he was both a Sikh saint and also an historical person within the meaning of S. 16 (2) (iv). The institution founded in his memory was therefore a Sikh Gurdwara even though the Mahants subsequent to him were Udasis. [P 274 C2; P 275 C2]

Bhagat Singh—for Appellant.

Achhru Ram, Gurcharan Singh and Ram Lal Anand II—for Respondents.

Addison, J. — Certain worshippers of the institution or Gurdwara Baba Mihan Sahib forwarded a petition to the Local Government under S. 7, Sikh Gurdwaras Act, claiming that the Gurdwara in question was a Sikh Gurdwara and should be so declared. Two petitions under S. 8 of the Act were put in by Brahm Das and Attar Das to the effect that they were

hereditary office-holders. They disputed the contention that the institution was a Sikh Gurdwara and said that it was an Udasi institution. Three issues were framed :

(1) Is Brahm Das an hereditary office holder and entitled to present the petition; (2) Is Attar Das an hereditary office holder and entitled to present the petition? and (3) Should the institution be declared to be a Sikh Gurdwara? The two petitions were consolidated and evidence was led. The three members of the tribunal held that both Brahm Das and Attar Das were chelas but that possession had been obtained by Attar Das and accordingly they decided to treat him as the hereditary office-holder. It was mentioned, however that this question was pending trial in the civil Courts. An appeal from the decision of the Subordinate Judge, First Class, F. A. No. 50 of 1936, was heard at the same time and has been decided by us. It has been held in it that the proper successor to the deceased Atma Ram is Brahm Das and we have upheld the decree, giving him possession, as Mahant, both of the institution and of the lands attached thereto. It is therefore necessary to correct the finding of the tribunal in this respect and to hold that the hereditary office-holder is Brahm Das, who is entitled to possession under the decree of the civil Courts as Mahant of the institution. For this purpose we consolidated the appeals and made Brahm Das and Attar Das respondents in the appeals of each other. As regards issue 3, two of the members held that it had been established to be a Sikh Gurdwara under S. 16 (2) (iv), Sikh Gurdwaras Act. The finding was that the institution was established in memory of Mian Sahib, a Sikh historical person, and was used for public worship by Sikhs. If this finding is correct the institution was properly declared a Sikh institution.

Against this finding both Attar Das and Brahm Das have preferred separate appeals which we have consolidated. On our finding in Civil Regular First Appeal No. 50 of 1936, Attar Das has no further interest. It is the case of both parties that the institution was founded in memory of Mihan Sahib and not by Mihan Sahib. It is true that for a long time the Mahants have been Udasis. A pedigree table has been copied from the revenue papers and is at pp. 47 to 52 of the paper book. This shows that some time after 1869 the

mahants in charge were Udasis and gave their line of descent up to Guru Baba Singh Sahib alias Mihan Sahib. It is of course of no importance that the present mahants are Udasis. The question is, was Guru Baba Singh Sahib alias Mihan Sahib a Sikh historical person as it was in his memory after his death that the institution was founded. The dissenting member of the tribunal admitted that in the historical works he was called a Sikh, but he held that he must have become an Udasi as his followers were Udasis. This seems to us to be a *non sequitur* as it is not clear when they became Udasis. The person succeeding Mihan Sahib, as given in the pedigree table referred to, being Baba Lakhmir Sahib, it may be assumed that he started the institution but there is no evidence as to whether he was a Sikh or an Udasi.

There was some discussion before us as to the difference between an Udasi and a Sikh but this is not important in the present case. If Mihan Sahib was a Sikh, it is of no importance that for some considerable time the mahants have been Udasis because admittedly the institution was established in his memory. It was also used for public worship by Sikhs; in fact there was no dispute before us about the finding that the institution was used for public worship by Sikhs. The Udasis separated from the Sikhs when Siri Chand, the son of the first Guru Nanak, was not chosen to be Nanak's successor. At that time there probably was little or no distinction between Sikhs and Udasis except that the one followed Siri Chand and the other the proper line of Gurus. It was not till the time of the 10th Guru, Gobind Singh, that an attempt was made to prevent the followers of the Gurus following Hindu practices. Up to that time it may be said that Sikhs and Udasis both followed to a large extent Hindu practices but superadded to these a belief in the Gurus whose principal teaching was the oneness of God. Then Guru Gobind Singh, the last Guru, attempted to make Sikhs stop all idolatrous practices. Whether he was able to do so or not is a matter which is much disputed. After his death matters drifted back to the original state of affairs and it was not till the present century that the practices desired by Guru Gobind Singh again came into prominence. It is for this reason that, in more than 50 per cent of Sikh Gurdwaras, Udasis are or

were till a short time ago the priests in charge. There were of course purely Udasi institutions as well, but it was a common state of affairs to find an Udasi priest in charge of a Sikh institution and even erecting Smadhs of his predecessors in the Sikh Gurdwara.

Now Guru Baba Singh Sahib alias Mihan Sahib lived in the time of the 9th Guru, Tegh Bahadur, when as I have already said, Sikhism had made no determined attempt to break loose from Hinduism. An account of the career of Mihan Sahib is given at p. 342, Vol. 4 of Macauliffe's Sikh Religion, which is undoubtedly a historical work. It runs as follows:

The Guru was accompanied by a Sikh called Mihan who was totally devoted to his service. He drew water, brought firewood from the forest, and performed the most menial offices for him. He always kept a cushion on his head for lifting burdens. It was continually wet from water dripping on it and his head in consequence soon festered. One day as he was on the point of depositing a pitcher of water which he had brought, the cushion and turban fell when maggots were seen to issue from a sore in his head. The Guru's mother and wife observed this, and brought it to the Guru's notice. The Guru sent for Mihan, gave him a robe of honour, and promised him that he should be a Mahant, or superior of a religious order. The Guru then put his hand on his head and its pain and sores disappeared. Upon this, Mihan obtained a knowledge of God and the past, present and future. The Guru presented him with a bullock of the famed Nagori breed and a drum and banner to grace his new position.

This shows that the Mihan who is described as a Sikh was blessed by Guru Tegh Bahadur and given a robe of honour while it was promised him that he should be a Mahant or superior of a religious order. The Guru put his hand on his head and blessed him and presented him with a bullock, a drum and a banner to grace his new position. Can it be said that this was done to make him an Udasi? Obviously the blessing was given by the Sikh Guru to a Hindu servant, who had served him faithfully, and by reason of that blessing he became a Sikh. There is also a long account of this Mihan Sahib in the Sri Guru Panth Parkash of Giani Gian Singh, at p. 1055. This shows that he was called Ram Deva and was a waterman or bahishti. He was a good servant and pleased the Guru by his zeal. He gave him the name of Nihan because he sprinkled water as if it were rain (*minh*). It further recites that the Guru gave him a woollen rosary, a cap, his own shirt, a big plate for cooking bread and a drum.

and told him to go out into the world to serve humanity. This he did and began to preach. Further, it is recited that he went to visit the 10th Guru Gobind Singh at Anandpur. He came beating his drum and the 10th Guru was displeased and had it snatched away. He told the 10th Guru that the Guru's house had given him the drum and had taken it away, so that he had nothing to complain of. This was in allusion to the fact that the drum was presented to him by Guru Tegh Bahadur, the 9th Guru. Thereupon the Guru was very much pleased, gave him half of his own turban and restored the drum. He was thus blessed not only by the 9th but by the 10th Guru of the Sikhs.

There is another account in another historical work, namely, *Sri Gur Partab Suraj Granth*, at pp. 228 to 231, Vol. 4, Ch. 2. This work is written by Bhai Santokh Singh. Here he is called the son of Nand Lal and it is narrated that he used to serve the 9th Guru by bringing water, a task which he performed zealously. In his heart he remembered God and he had full belief in the Guru, so much so that he took no interest in eating and drinking. He was so zealous that the pitcher caused a wound in his head, which continued to expand, but he paid no regard to it. Finally worms appeared in the wound. This was observed by the Guru's mother Nanki who told the 9th Guru, Sri Tegh Bahadur, about it. The Guru was much touched and made him sit by himself and said to him :

Now you have become Mahant of Sants or saints. The worms in your head will disappear. Service is always good. By it a person acquires the knowledge of God.

The Mihan replied to the Guru "Maharaj, give me strength so that I may always sing your praises." The Guru thereupon bestowed upon him a bullock, a shirt, a drum and a banner and all the troubles of Mihan vanished from that moment. He commenced to worship the true Guru, considering him to be God. He went about with those things and Lakhmir became his first follower. He caused the wooden shoes of the Guru to be worshipped and preached the Guru's good qualities. Thus by serving the Guru, Mihan became Mahant. People came from far places to see him, bringing wealth and offerings. The Guru, however, did not accumulate wealth but spent it as the gifts were received. All these accounts show that he

was a devoted follower of Guru Tegh Bahadur and even received a turban from Guru Gobind Singh, the last Guru. So important a person was he that in the most important of the Sikh historical works considerable space is given to an account of his career. These accounts show that it was the Sikh Guru whom he worshipped and who blessed him and he finds a place as a Sikh historical person in the histories which have been written. In fact from these accounts it might be held that he was a Sikh saint as well as a historical person and for both reasons he would come within S. 16 (2) (iv) of the Act. In Rose's Glossary of Tribes and Castes, Vol. 3, p. 102 there is a description of the Mihan Sahibs, described as a Sikh sect founded by Ramdeva, who used to draw water for the Guru Tegh Bahadur's followers and horses. In part. 1 of Rose's Census Report, 1901 on p. 134, there is an account of the Udasis. The first paragraph deals with the usual sub-divisions of Phul Sahib, Balu Hasna, Almast Sahib and Govind Sahib. The second paragraph goes on to say :

There are various other Udasis such as the Ramdas-ke, founded by one Guruditta, the Mihan Sahib-ke, founded by a follower of the 9th Guru and the Diwana Udasi as to which sect or sub-sects the author had no information.

This shows that the Mihan Sahib Udasis with whom we are concerned did not belong to the regular Udasi sub-orders and that little is known about them. It may be that Lakhmir Das commenced to worship the Smadh or tomb of his master Mihan Sahib and, this being forbidden by strict followers of the 10th Guru, in whose lifetime Mihan Sahib died, Lakhmir Das or some of his successors became Udasis as one of their practices was the veneration of the Smadhs or tombs of their predecessors. This is, however, a conjecture. There is nothing to show that Mihan Sahib was ever himself an Udasi while it has been conclusively established that he was a Sikh who made converts to Sikhism, and was blessed by the 9th Guru as well as by the 10th Guru. In these circumstances there can be no question that the decision of the majority of the Tribunal is correct that the Mihan Sahib was a Sikh historical person and we are inclined to go further and say that he was a Sikh saint, although his followers are now Udasis. It is impossible to hold that a person blessed by two of the regular Gurus was an Udasi; in fact it is clear

that he was an ordinary Hindu servant until he was blessed by the 9th Guru, whereupon he became a Sikh and preached the Sikh religion as then known. He was again blessed by the 10th Guru. There is nothing to show that he later became an Udasi, though it is undoubted that the persons who later came to venerate his memory and to worship his Smadh were Udasis. It may also be noted that in S. 2 (9), Sikh Gurdwaras Act, 'Sikh' is defined to mean a person who professes the Sikh religion or, in the case of a deceased person, who professed the Sikh religion or was known to be a Sikh during his lifetime. It must certainly be held that Mihan Sahib was known as a Sikh during his lifetime and professed to be a Sikh. For the reasons given above and subject to the finding that Brahm Das is the hereditary office-holder and not Attar Das, we dismiss the appeals with costs to the respondents. There will be only one set of costs in the two appeals as we have consolidated them. Costs of the consolidated appeals should be paid by Brahm Das who has been held to be the hereditary office-holder and not by Attar Das.

V.B.B./D.S. *Appeals dismissed.*

A. I. R. 1937 Lahore 276

TEK CHAND, J.

Piare Lal and another — Plaintiffs —
Petitioners.

v.

Gopi Ram and another—Defendants —
Opposite Parties.

Civil Revn. No. 721 of 1935, Decided on 11th November 1936, from order of Sub-Judge, 1st Class, Ferozepore, D/- 11th June 1935.

Civil P. C. (1908), S. 149, Sch. 2, Para. 17 — Court-fee on objections to award not paid through inadvertence, owing to bona fide mistake of party's counsel—Requisite court-fee paid at earliest opportunity — Court should accept it under S. 149.

Where the court-fee payable on a memorandum of objections to an award has not been paid through inadvertence, owing to a bona fide mistake of the objector's counsel but the requisite court-fee is paid at the earliest opportunity, the Court should, under S. 149, Civil P. O., accept the court-fee and should not dismiss the objections as not properly stamped : *A I R 1929 Nag 117, Rel. on.* [P 276 O 2]

Qabul Chand—for Petitioners.

Order.—The parties to this litigation had appointed an arbitrator out of Court

to settle certain disputes between them. On 23rd November 1934 the plaintiff made an application under Sch. 2, Para. 17, Civil P. C., for filing the agreement of reference and directions to the arbitrator to proceed with the arbitration and file the award in Court. This application was granted and the arbitrator directed to proceed with the arbitration. On 25th March 1935 the arbitrator filed the award in Court. The hearing was adjourned to 15th April 1935, the parties being directed to file objections, if any, within the prescribed period. On 4th April 1935 the plaintiff filed a memorandum of objections in the Court but did not affix a court-fee of Re. 1 on it as he should have done. At the next hearing it was urged on behalf of the opposite party that the objections were unstamped and therefore should be rejected. Thereupon the plaintiff filed an application, supported by an affidavit, that the court-fee on the memorandum of objections was not paid inadvertently, owing to a bona fide mistake on the part of the plaintiff's counsel, and that the deficiency was being made good, and a court-fee stamp of Re. 1 filed. The Subordinate Judge rejected this application and holding that the objections were not properly stamped, dismissed them and passed a decree in terms of the award.

There is little doubt that the mistake in not affixing court-fee stamp on the memorandum of objections was due to inadvertence and in the circumstances the learned Subordinate Judge should have acted under S. 149 and accepted the requisite court-fee, which was paid at the earliest opportunity. In this connexion reference may be made to 117 I C 223,¹ where under somewhat similar circumstances the necessary court-fee was allowed to be supplied after the expiry of the period prescribed in Art. 158, Lim. Act. I accept the petition for revision, set aside the order of the Court below and holding that the objections were properly stamped remand the case for disposal in accordance with law. As the respondent has not appeared to oppose this petition, there will be no order as to costs.

R.M./R.K.

Petition accepted.

1. Hari v. Ghisu, A I R 1929 Nag 117 = 117 I C 223.

A. I. R. 1937 Lahore 277

JAI LAL, J.

Rahem Ghani—Decree-holder—Appellant.

v.

Court of Wards Property Pir Jahanian Shah—Judgment-debtor—Respondent.

Second Appeal No. 539 of 1936, Decided on 26th October 1936, from order of Dist. Judge, Sargodha, D/- 28th February 1936.

(a) Punjab Court of Wards Act (2 of 1903), S. 32—Interpretation of—Word 'suit' in S. 32 does not include 'execution proceedings'.

Section 32 nowhere uses the words 'execution proceedings'. It merely prohibits the bringing or maintenance of certain suits. By reading Ss. 31 and 32 together it is clear that the Legislature intended to make a distinction between 'suits' and 'execution proceedings,' and the expression 'suits' is used in the ordinary restricted sense and does not include 'execution proceedings'.

[P 278 C 2 ; P 279 C 1]

(b) Punjab Court of Wards Act (2 of 1903), S. 31 (3)—Application for execution of decree against Court of Wards—Absence of certificate that claim was notified under S. 26 is not fatal to maintenance of application.

A decree against the Court of Wards was obtained and an application for execution of the decree was filed. But a certificate that the claim was notified under S. 26 was not taken and filed in the executing Court:

Held: that the absence of a certificate that the claim was not notified under S. 26 was not fatal to the maintenance of the application for execution.

[P 278 C 2]

(c) Punjab Court of Wards Act (2 of 1903), S. 31 (3)—S. 31 (3) does not apply to application for execution of decree against Court of Wards (*Obiter*).

Obiter.—A decree against the Court of Wards was obtained and an application for execution of the decree was filed. A certificate that the claim was notified under S. 26 was not filed in the executing Court:

Held: S. 31 (3) applies only when the decree was against the ward and not when it is against the Court of Wards.

[P 277 C 2 ; P 279 C 2 ; P 280 C 1]

Tasadduque Husain—for Appellant.*Qazi Ataullah*—for Respondent.

Judgment.—The appellant, Rehm Ghani, claimed to be a creditor of Pirs Jahanian Shah and preferred his claim to the Court of Wards which had assumed superintendence of the estate of the debtor. This claim apparently was not recognised by the Court of Wards. Consequently a suit was instituted by the appellant against the Court of Wards for recovery of his debt and was decreed. The appellant then attempted to execute the decree but was met with objections on behalf of the

Court of Wards: (1) that the application for execution did not lie unless the decree-holder produced a certificate to the effect that his claim had been notified in accordance with S. 26, Punjab Court of Wards Act; and (2) that the Deputy Commissioner in charge of the Court of Wards had made an order for the payment of the decretal amount and therefore the execution proceedings could not proceed. Consequently three issues were framed: (1) Whether the application for execution is competent in the absence of a certificate that the claim has been notified to the Deputy Commissioner in accordance with S. 26, Punjab Court of Wards Act; (2) whether the Deputy Commissioner has made any order of payment under S. 32; and (3) if he has, what is its effect? The executing Court gave its decision against the decree-holder on the first issue and without deciding the next two issues dismissed the application for execution. Consequently an appeal was preferred to the District Judge by the decree-holder and the learned Judge held that the decree having been passed against the Court of Wards, S. 31 (3), which makes the filing of a certificate that the claim has been notified to the Deputy Commissioner in accordance with S. 26 a condition precedent to a fresh application for execution of the decree against the ward, did not apply. That section, according to the learned District Judge applies to cases where a decree has been passed against a ward and is sought to be executed against his estate in the hands of the Court of Wards. The order of the executing Court was consequently set aside and the case remitted to it with direction to proceed with the decision of the remaining two issues. This order was passed on 21st January 1935. No appeal was preferred against this order, nor was any attempt made to have it set aside by a superior Court. Consequently the order stands and is binding on both the parties.

When the case went back to the executing Court it again dismissed the application for execution holding that the Deputy Commissioner had already passed an order under S. 28, Punjab Court of Wards Act, laying down the order in which the liabilities of the ward had to be paid including the liability under the decree in question and that any order executing the decree would make that order ineffectual. This, in the opinion of the executing Court, was

not permissible by virtue of S. 32, Punjab Court of Wards Act. An appeal to the District Judge also was dismissed on the same grounds and the decree-holder has preferred this second appeal to this Court. Before proceeding with discussion of the case it is desirable to mention certain statutory provisions of the Punjab Court of Wards Act which bear on the question. S. 26 of the Act provides that on the publication of a notification under S. 9, which relates to the assumption of superintendence by the Court of Wards over the estate of a ward, the Deputy Commissioner shall publish a notice calling upon all persons having claims against the ward or against the property under the superintendence of the Court of Wards to notify the same in writing to such Deputy Commissioner within six months from the date of the publication of the notice. After the claimant concerned has made his claim with the formalities mentioned in S. 27, the Deputy Commissioner shall, under S. 28, hold an enquiry and shall admit or reject the claim in whole or in part so made to him and shall intimate his decision to the claimant and if the liabilities cannot be paid at once, the decision shall fix the interest (if any) to be paid thereon from the date of such decision to the date of the payment and discharge of such claim.

The next relevant section is S. 31 which provides: (1) That the Deputy Commissioner shall not be empowered to reject a claim which is based upon a decree passed by any competent Court and provides for the manners in which such decrees may be proved. Sub-s. (2) provides that on the publication of a notice under S. 26, all suits and all proceedings in execution of any decree against a ward or as affecting any property under the superintendence of the Court of Wards then pending in any civil Court shall be stayed until the plaintiff or the decree-holder files a certificate that the claim has been notified in accordance with S. 26. Sub-s. (3) of S. 31 is that no fresh proceedings in execution of any decree against the ward or as affecting such property, other than a decree in respect of a transaction subsequent to the date of the notification under S. 9 shall be instituted in, nor shall any attachment or other process in execution of such decree be issued by any civil Court until the decree-holder files a certificate to the effect specified in Cl. (2).

Section 32 provides that subject to the provisions of Ss. 19 and 31 nothing 'in this Chapter' shall be construed as preventing any claimant from bringing or prosecuting any suit, in any competent Court, in respect of any claim which has been duly notified, within the time and in the manner hereinbefore prescribed, to the Deputy Commissioner, and which has, whether in whole or in part, been disallowed by him, but no suit shall at any time be brought or be maintainable in respect of any claim which has not been so notified or to set aside or modify the order of a Deputy Commissioner (if any) fixing a date for the payment of such claim or regulating the order in which claims against the ward or properties under the superintendence of the Court of Wards shall be paid. S. 19 merely deals with notices previous to the institution of suits and is not relevant to the present inquiry.

In this appeal it is not open to me to decide whether the decision of the District Judge dated 21st January 1935 that S. 31 (3) has no application to the present case because the decree is against the Court of Wards and not against the ward is or is not correct, though as at present advised I am of opinion that it is correct. I must therefore proceed on the assumption that the absence of a certificate that the claim has been notified under S. 26, Punjab Court of Wards Act, is not fatal to the maintenance of the present application for execution. During the arguments the appellant's counsel stated that such a certificate had been filed but this statement was made under a misapprehension and the fact is that no certificate had been filed.

The only ground therefore which I have to consider is whether the decision of the Courts below that the execution of the decree in this case is prohibited by S. 32, Punjab Court of Wards Act, is or is not correct. It would be observed that S. 32 nowhere uses the words 'execution proceedings'. It merely prohibits the bringing or maintenance of a suit in respect of any claim which has not been notified or to set aside or modify the order of a Deputy Commissioner fixing a date for the payment of such claim or regulating the manner in which the claim has to be satisfied. The learned District Judge has held that the expression 'suit' used in this section is wide enough to include 'execution proceedings.' It is true that there is

authority that in some Acts the word 'suit' has been used in a wider sense and includes 'execution proceedings,' but the question is whether it is used in S. 32, Punjab Court of Wards Act, in the same sense. Now a reference to sub-s. (2), S. 31 shows that on the publication of a notice under S. 26 all 'suits' and "all proceedings in execution of any decree" shall be stayed till the contingency mentioned therein occurs. It is clear that the expression 'suits' as used in this sub-section does not include "proceedings in execution" because the latter are expressly mentioned in this sub-section in addition to 'suits'. It is also clear that in sub-s. (3) no fresh proceedings in execution of any decree are to be instituted until the decree-holder has filed a certificate to the effect specified in sub-s. (2). Sub-s. (2) therefore deals with pending suits and pending execution proceedings. Sub-s. (3) applies only to fresh proceedings in execution. S. 32 deals with fresh suits and probably also with pending suits. If the execution proceedings were held to be included in the word 'suit' as used in S. 32, then sub-s. (3) of S. 31 becomes redundant.

Moreover on a reading of the two sections together it is clear that the Legislature intended to make a distinction between 'suits' and 'execution proceedings,' and therefore the expression 'suits' has been used in the ordinary restricted sense and does not include 'execution proceedings'. The prohibition contained in S. 32 relates to suits, the object of which is to set aside or modify the order of the Deputy Commissioner fixing a date for the payment of a claim or regulating the order in which such claims against the ward or properties under the superintendence of the Court of Wards shall be paid. It does not, in my opinion, prohibit the institution of execution proceedings or continuance thereof which may have the effect of nullifying the order of the Deputy Commissioner fixing a date on which and the order in which the claims have to be satisfied. It may be that this was not contemplated by the Legislature but I have to interpret the sections as they exist. That an order executing the decree may sometimes have the effect of frustrating the order of the Deputy Commissioner fixing a date or regulating the order of payment of the claim is also obvious from sub-s. (3), S. 31 which provides that on a certificate being produced that the claim has been notified

under S. 26 to the Deputy Commissioner the decree-holder can proceed with the execution of his decree. No discretion is given to the Deputy Commissioner to refuse to grant a certificate which is merely a certificate of the fact that a claim has been notified. The decree-holder is then entitled to execute the decree irrespective of the order of the Deputy Commissioner fixing a date or order of the payment of the decree.

It was held by Shah Din, J. in 2 P R 1919¹ that where the decree-holder has filed with his application for execution a certificate to the effect specified in sub-s. (2), S. 32, Punjab Court of Wards Act, the executing Court has power to issue an attachment or other process in execution of the decree, and the property under the control of the Court of Wards, which has been duly attached, can be sold in execution without the consent or concurrence of the Court of Wards. The object of the Legislature, as expressed in these sections, appears to be that the Court of Wards should have intimation of a claim and an opportunity to satisfy it; but if a claim is denied by it or if a decree passed against the ward or against the Court of Wards has not been satisfied, then the creditor or the decree-holder is entitled to enforce payment of the same forthwith irrespective of any order that the Deputy Commissioner may have passed fixing a date for, or regulating the order of, the payment of the claim.

In my opinion therefore the decision of the learned District Judge that in S. 32, Punjab Court of Wards Act, the expression 'suit' is used in a wider sense and includes 'execution proceedings' is erroneous, and therefore the decree-holder is entitled to proceed with the execution of his decree. If S. 31 (3) does not govern the present case, then there is no provision in the Punjab Court of Wards Act, which prevents the decree-holder from executing his decree under the provisions of the Civil Procedure Code. It was for the judgment-debtor to show some express provision of law under which the decree-holder was debarred from executing his decree and as I have held that S. 32 does not apply, and as the learned District Judge has held that S. 31 (3) does not apply, and that decision still stands, there is no other law

1. Deputy Commissioner, Amritsar v. Mahindar Singh, A I R 1920 Lah 306=58 I C 631=2 P R 1919.

which has been cited before me which creates a bar to the decree-holder from executing the decree. I accordingly accept the appeal, set aside the orders of the Courts below and send the case back to the executing Court with direction to proceed with the execution of the decree in accordance with law. The costs of the appellant shall be paid by the judgment-debtor throughout. The parties have been directed to appear before the executing Court on 30th November 1936.

W.D./D.S.

Appeal allowed.

A. I. R. 1937 Lahore 280

ADDISON AND DIN MOHAMMAD, JJ.

Arjan Singh and another—Objectors—Appellants.

v.

Harbhajan Das, Petitioner and others, Objectors and pro forma—Respondents.

First Appeal No. 78 of 1936, Decided on 26th October 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 28th November 1935.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), S. 2 — Succession to institution in dispute from Guru to Chela—Nominations invariably made by mahant in office — Office is hereditary office.

Where there is ample evidence to show that the succession to the institution in dispute has always been from Guru to Chela and the appointments of the successors have invariably been made by nominations by mahants in office, the office is a "hereditary office" within the meaning of S. 2 (4) (iv) of the Act. [P 281 C 1]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), S. 8—Devolution to office must have been according to hereditary right or by nomination by office-holder before 15th January 1920 — It is not necessary that applicant under S. 8 should have been holding office before that date.

In order to qualify a person to present a petition under S. 8, it is not necessary that he should have been appointed before 1st January 1920. The only requirement laid down in the Act is that the petitioner should be the holder of an office the succession to which before 1st January 1920 devolved according to hereditary right or by nomination by the office-holder for the time being. [P 281 C 2]

(c) Evidence — Admissibility — Secondary evidence — Granth Sahib and hukumnamas (*Quaere*).

Whether secondary evidence of the Granth Sahib or hukumnamas is admissible on the ground of their sanctity and their immoveability on that account (*Quaere*). [P 282 C 2]

(d) Punjab Sikh Gurdwaras Act (8 of 1925), S. 16—Originator of institution being Udasi Fakir and not Sikh saint—Institution charitable and not religious from its inception—Institution cosmopolitan and place of shelter for all—Rites inconsistent with Sikh religion performed in institution — Mere reading of Granth Sahib or gifts to it by Sikhs under such circumstances held would not make institution Sikh institution.

Where the originator of the shrine was generally known to be an Udasi Fakir and not a Sikh saint and the institution from its inception was found more to be a charitable institution rather than a religious one, and where people of all castes and creeds assembled and took shelter and where there was a platform raised for a mosque and an open platform for worship, and where Guru Granth Sahib was read but other rites inconsistent with the Sikh religion were performed and when the institution was founded there was no Sikh residing in the locality but that Sikhs came and settled in its vicinity on account of the water supply there and they made grants to the institution out of reverence for the Granth Sahib :

Held : that the mere reading of the Granth Sahib and grants from Sikhs under the circumstances would not convert an institution which was purely Udasi from its inception into a Sikh institution. The institution therefore was not a Sikh institution within the meaning of S. 16 of the Act. [P 283 C 2 ; P 284 C 1, 2]

Lala Badri Das and Sardar Harnam Singh—for Appellants.

Achhru Ram, Indar Dev and Mohan Sundar Das — for Respondent (Petitioner).

Din Mohammad, J.—A petition under S. 8, Sikh Gurdwaras Act, was presented by Harbhajan Das, praying that the institution notified as Gurdwara Bhai Batha Ji at Pakpattan should not be declared to be a Sikh Gurdwara. The Shiromani Gurdwara Parbandhak Committee and two other persons resisted this petition, on the grounds (a) that the petitioner had no *locus standi* to make the petition inasmuch as he was not a hereditary office-holder within the meaning of S. 8 read with S. 2, sub-s. (4), Cl. (iv) and (b) that the institution came under several of the clauses mentioned in sub-s. (2), S. 16, Sikh Gurdwaras Act. The majority of the tribunal found against the objectors on both the points. The objectors have appealed. We may remark in passing that just before the arguments commenced, Rai Bahadur Badri Das informed the Court that, though he had no clear recollection of it himself, he had been informed that very morning by the respondent that he had given some sort of advice to the respondent in the drafting of his petition.

which is the subject of this appeal and that he was prepared to withdraw from the case if the respondent so desired. The respondent however on enquiry did not object to his appearance on behalf of the appellant and we consequently allowed Rai Bahadur Badri Das to proceed with the case.

Lengthy arguments have been addressed to us on both sides and we have been taken through both the oral and the documentary evidence brought on the record. We are not however prepared to differ from the conclusions arrived at by the majority of the tribunal. As regards the competency of the petitioner to present this petition under S. 8, Sikh Gurdwaras Act, he has only to show that he is the holder of a hereditary office. "Hereditary office" means

an office the succession to which before the first day of January 1920, devolved according to hereditary right or by nomination by the office-holder for the time being.

There is ample evidence on the record to show that the succession to the institution in dispute has always been from Guru to Chela. Counsel for the appellant concedes this but contends that inasmuch as in the appointment of the Mahant of this institution the approval of the descendants of the founder of the institution was a *sine qua non*, the office of the Mahant of this institution could not be termed a hereditary office as the condition precedent displaced the idea both of a hereditary right to succeed to the office and of nomination by the office-holder for the time being. We are not however prepared to agree to this contention raised by the appellant's counsel. It is true that some vague statements have been made to the effect that at the time of the appointment of some Mahants of this institution the descendants of Bawa Sarup Das were present but that does not establish either that no appointment could be made without their consent or that no appointment could be valid unless that consent was forthcoming. On 6th December 1919, Mahant Manohar Das applied to the revenue officers that he had installed Mahant Gulab Das on the Gaddi of Dera Bawa Sarup Das five years before, that all the buildings and lands attached to the Dera had been shown in his name and that a proper mutation order be made in his favour. It is significant that the mutation was in accordance with this

application attested in favour of Mahant Gulab Das (Vol. 3, p. 49).

Again we find that Mahant Manohar Das himself had been appointed by Mahant Hira Das by a will dated 30th Katik Sambat 1930 (14th November 1873 A. D.), (Vol. 3, p. 115). On 7th April 1920, Mahant Gulab Das made a will in favour of his Chela Bawa Ganga Das appointing him as Mahant to the Dera (Vol. 3, p. 164). Not being satisfied with the conduct of Mahant Ganga Das, the will was revoked on 4th November 1921 and Bawa Ganga Das was declared ineligible for the appointment. There could not be clearer evidence than this to prove that like all other institutions of this type the office of Mahant descended from Guru to Chela and that invariably nominations were made by the Mahants in office. Even counsel for the objectors before the tribunal did not challenge the status of the petitioner on the ground now urged by their counsel before us. The only exception that he took to the petitioner's competency to present the petition was that he had been appointed after 1st January 1920. That objection was obviously meaningless. In order to qualify a person to present a petition under S. 8, it is not necessary that he should have been appointed before 1st January 1920. The only requirement laid down in the Act is that the petitioner should be the holder of an office the succession to which before 1st January 1920 devolved according to hereditary right or by nomination by the office-holder for the time being, and this requirement is completely fulfilled in the petitioner's case.

Counsel for the appellant has drawn our attention to a note (Vol. 3, p. 170) made by the Deputy Commissioner, Montgomery, stating that the petitioner was on the death of Mahant Gulab Das elected by Pandit Atma Sarup of Hardwar, Akhara Bara, and Mahant Harbhajan Das of Bhuman Shah and contended that this neither disclosed a hereditary right nor a nomination by the office holder. The interpretation put upon the note referred to above is, however, not correct. In the first place, all the circumstances leading to the appointment of the petitioner as Mahant have not been mentioned in the note, and secondly it does not negative the idea of the petitioner's having come into the office in either of the ways mentioned in the definition of "hereditary"

office". We take now the second question on which the parties have joined issue. The position of the objectors is not definite as to the grounds on which they claim the institution to be a Sikh Gurdwara. They have made an attempt to bring the institution under various clauses of sub-s. (2), S. 16. They contend in the first instance that this institution was founded by Bhai Batha who had been styled "a son of the tenth Guru" and was established for use by Sikhs for the purpose of public worship. They also urge that there was some traditional connexion between the institution and the tenth Guru and further that the institution was established in memory of a Sikh saint or historical person. They have, however, completely failed to prove any of the allegations mentioned above.

In this connexion, we may first dispose of the extravagant claim made by the objectors that a copy of a Granth Sahib gifted by the tenth Guru himself as well as some of the hukamnamas issued by the said Guru were installed in the institution and that those were the only objects of worship there. The objectors mainly rely on the statement of Mahant Ganga Das in this matter. He is the same Ganga Das who was in 1920 appointed a successor to the Gaddi by Gulab Das and was subsequently removed in 1921. He has stated that a manuscript Guru Granth Sahib and the hukamnamas of Guru Gobind Singh and Mai Sundri attached to the said Granth Sahib were lying in the building in dispute and that it was the same Granth Sahib which had been gifted by Guru Gobind Singh to Bhai Batha. He has further alleged that when he left the Smadh 10 or 11 years before he appeared in the witness-box, he removed both these sacred objects and that he made them over to one Narain Singh about four months before his appearance in Court. This, to say the least, is a bare-faced lie. It is inconceivable that the Sikhs of the locality would have slept over the matter for such a long time, had there been in existence a manuscript Granth Sahib connected with the tenth Guru or the hukamnamas issued by him over his own signatures as stated by this witness. For the Sikh community which has got a great regard for its religious preceptors, both these articles would have been invaluable treasures and the Sikhs would never have tolerated their removal, espe-

cially, as it is well known that they had started a religious agitation on a large scale about the time when this witness asks us to believe that he had slipped away with those objects. A gentleman of the position of a retired Extra Assistant Commissioner has made a statement to the effect that he was informed in 1927 by the then Mahant that some Chelas had run away with the Guru Granth Sahib, but we are constrained to remark that that statement also is of the same nature as that of Mahant Ganga Das. Neither the Granth Sahib nor the hukamnamas have been produced in original before the Tribunal on the ground of their sanctity and on the basis of their immovability; on that account the objectors have contended that they were entitled to lead secondary evidence to prove them. We have, however, no hesitation in remarking that the decision of the Tribunal in this respect is quite in conformity with law. In the first place even if these documents were genuine, we doubt whether the secondary evidence would have been admissible for the reasons stated by the objectors and, secondly as remarked above we are not convinced of their genuineness. On these grounds, we exclude these documents from consideration in the determination of the matter at issue.

The objectors have made much capital of the existence of a well, known as Bhai Bathewala well and practically reared their whole fabric on those foundations. We have examined that matter very carefully and have come to the conclusion that the objectors' foundations were not firm and that they had been building on sand in this respect. Even if there existed a gentleman by the name of Batha in the time of the tenth Guru and he was a *persona grata* with the Guru it will not be enough to prove the sacred origin of the well, known as Bathewala well or even establish its having been built by the same Batha. It is significant that prior to this well coming into possession of the institution in question it was owned by the Muslim shrine of the place known as Bawa Farid and that it was gifted to "the wife of Faqir Sarup Das" by the Sajjada Nashin of that shrine somewhere in Sambat 1872 (1815 A. D.) (Vol. 3, p. 172). It is further stated in Ex. P.43 (Vol. 2, p. 23) which is an extract relating to this well, attached to the settlement record of the same year, that the well was named

Bathewala as one Batha used to cultivate the land on this well. This clearly negatives the theory advanced by the objectors. It also appears from the later jamabandis that this well was in 1896-1897 known as Baghwala and 1913-1914 it was described as Smadhwala (see the entry relating to khasra Nos. 4235 to 4321 min in Ex. P-56, pp. 55 to 90, Vol. 2, and entry relating to khasra No 2064 in Ex. P-52 at pp. 115 to 151, Vol. 2). In order to establish that these two entries relate to the same well, reference may be made to an application submitted by the petitioner for a copy of the relevant portions of the settlement record relating to Bathewala well and to the reply made thereon on 30th August 1935 that the settlement record for 1896-1897 did not mention any well of the name of Bathewala.

It is further clear that Bawa Sarup Das who is admittedly the originator of this shrine was generally known as an Udasi Faqir and not a Sikh saint. In Ex. P-16, which is a pedigree of the proprietors of Mauza Pakpattan attached to the settlement record of 1872, Bawa Sarup Das is shown as "Faquir" by caste and "Udasi" by got (Vol. 2, p. 18). In Ex. P-13 which again is a pedigree of the proprietors of Mauza Pakpattan prepared in 1932-33, the various Mahants who have admittedly held office in this institution have been described as 'Sadh Udasi' (Vol. 3, p. 105). In Ex. P. 20, which is an extract from the Muafi file prepared in 1849, Sarup Das, grantee, is shown as 'Sadh Udasi' (Vol. 3, p. 118). In Ex. P-30 which is also an extract from the Muafi file prepared at the time when Sarup Das had died and Santokh Das had succeeded to the office, the grantee Sarup Das is shown as 'Sadh Udasi' (Vol. 3, p. 120). It is further noteworthy that in both these documents the name of the predecessor (Guru) of Sarup Das is given as Pritam Das, which would evidently show that Sarup Das too had succeeded to his Guru Pritam Das. This by itself would conclusively establish that Sarup Das was not a Sikh, but a Sadh Udasi, as among the Sikhs the institution of succession from Guru to Chela is unknown. The objectors' own witness, Sundar Singh, who claims descent from Sarup Das has stated that on the death of Sarup Das his widow Mata Sohago enjoined her sons to take charge of Sarup Das's secular pro-

perty and install Prem Das in charge of the institution in dispute. This lady no doubt gifted some property to the institution but the gift alone would not be enough to prove the contention raised by the appellants that the institution was a Sikh institution.

Further, there is abundant material on the record to show that from its very inception this institution was a charitable institution rather than a religious institution. In Ex. O-2 which was prepared at the time of the Settlement of 1872, in the proprietary column relating to the lands attached to the Baghwala well, the name of Mahant Hira Das, Chela of Bawa Santokh Das, caste 'Faquir' got 'Udasi' is given as owner. Against serial No 183, Khasra No. 4223 there is shown one marla of land under a raised platform of a kacha mosque. In the same document against serial No. 180, Khasra No. 4287 min, two pieces of land measuring 8 marlas, 8 sarsahis and one sarsahi each are shown as dhuan (fire place) and against Khasra No. 4302, a plot of land measuring two sarsahis is shown as a place of worship. At serial No. 182, against Khasra No. 4274, a plot of land measuring 4 marlas 6 sarsahis is shown under the Smadh of Chajju. From these entries it will clearly appear that this institution was a sort of cosmopolitan institution where people of all creeds and castes could assemble and take shelter; otherwise, if the institution had been a Sikh Gurdwara, there could not have been in existence there a raised platform for a mosque or an open platform for a place of worship or the dhuan, as mentioned above. The plan Ex. O-3 which is on the record throws a good deal of light on this aspect of the case. We are fortified in our conclusion by an application, Ex. P-41 at p. 99, Vol. 2. This was made by one Sewa Das, Chela of Mahant Manohar Das, on 19th January 1898 and forms part of the record of inquiry into the Muafi relating to the lands attached to this institution. It is stated therein that the Dera is a holy place visited by the Hindus on account of the existence of the Smadh of Bawa Sarup Das as well as some other Smadhs of notable persons. It further states that from the very beginning a drinking tank and a shivala have existed there as well as several houses which provide comfort to the Faqirs living there permanently and to the travellers visiting

the place occasionally. Persons of all castes and creeds without any distinction visit the place and live there and that on the occasion of the four fairs including the two big fairs, one of Hazrat Baba Farid and the other of Hazrat Baba Diwan Sahib, visitors are accommodated in those buildings. We may say in passing that this probably explains the gift made by the Sajjada Nashin of Hazrat Farid to Mata Sohago referred to above. We need not repeat that a purely Sikh institution would not have been used in the manner in which it was depicted to be used long before the Akali agitation started or the Sikh Gurdwaras Act came into existence.

It is also clear from the record that during the proceedings in 1849 and the following years relating to the Muafi of this institution although several statements were recorded of persons connected with the institution, not once was a reference made to Batha or his connection with the institution. Reference in this connexion may be made to the statements of Brahm Das (Vol. 2, pp. 1, 2 and 3), Santokh Das (pp. 4 to 8, 11 and 15), Matka (p. 9) and Charn Das (pp. 12 to 14, Vol. 2). Reference may also be made to Ex. P.29 (Vol. 3, p. 119).

Counsel for the appellant has laid great stress on the fact that when Mahant Manohar Das wanted to convert the kacha buildings of this institution into pakka buildings, he went round collecting subscriptions taking the Granth Sahib along with him and that several Sikhs made a generous response to his appeal. Even if this be so, it would in no wise establish that the institution was primarily established as a Sikh institution. It is practically admitted by the objectors that at the time when the institution came into existence there was hardly any Sikh residing in the locality and as even the Udasis read Guru Granth Sahib and hold it in great esteem it is no wonder that the Sikhs who happened to settle in the colony after the canal system was introduced there supported this institution on that account. It is a matter of common knowledge, however, that the mere reading of Guru Granth Sahib in an Udasi institution where other rites are performed which are inconsistent with the Sikh religion does not convert a purely Udasi institution into a Sikh institution. The Udasis worship Gola Sahib and the Murti of Baba Sri Chand and pay a very

great reverence to the Smadhs of their own Guru erected in their Asthans and all this militates against the tenets of the Sikh religion. We have no doubt, therefore, that the institution in dispute was not a Sikh institution within the meaning of sub-s. (2) of S. 16, Sikh Gurdwaras Act. We accordingly affirm the decree of the Sikh Gurdwaras Tribunal and dismiss the appeal with costs.

W.D./A.L.

Appeal dismissed.

A. I. R. 1937 Lahore 284

JAI LAL, J.

L. Ram Rup—Plaintiff—Appellant.

v.

Dalip Singh and others—Defendants—Respondents.

Second Appeal No. 627 of 1936, Decided on 5th November 1936, from order of District Judge, Delhi, D/. 18th January 1936.

Punjab Pre-emption Act (1 of 1913), S. 3—Question whether property forms part of village or urban immoveable property is question of law—But its determination wholly depends on finding of fact—Second appeal does not lie.

The question whether a particular property comes within the definition of village immoveable property or urban immoveable property as contained in S. 3, is a question of law, but its determination wholly depends on a finding of fact and the legal definition necessarily follows from this finding of fact. So a second appeal does not lie.

[P 284 C 2 ; P 285 C 1]

Mehr Chand Mahajan and *Bishen Narain*—for Appellant.

Manohar Lal and *I. K. Kaul*—for Respondents.

Judgment.—This is a plaintiff's appeal in a suit for pre-emption. He sought to pre-empt the sale on the ground of vicinage. Such a right exists in the case of urban immoveable property but not in the case of agricultural land or village immoveable property. The learned District Judge has held that the property in suit is not urban immoveable property but that it is either agricultural land or more probably village immoveable property, and therefore the right of pre-emption by vicinage does not exist. A preliminary objection is raised on behalf of the respondent that no second appeal lies because the conclusion of the District Judge is one of fact. On behalf of the appellant it is urged that the conclusion is not one of fact but one of law because the question is whether the property in suit comes with-

in the definition, as contained in S. 3, Punjab Pre-emption Act, of village immoveable property or urban immoveable property. It is true that to that extent the question might be one of law but the determination of this question wholly depends upon whether the property forms part of the town of Delhi or whether it is village immoveable property and has not yet become part of the town of Delhi. The learned District Judge has held that the property has not become part of the town of Delhi. That, in my opinion, is a finding of fact and the legal definition necessarily follows from this finding of fact.

I accordingly hold that this appeal, under the circumstances disclosed in the case, is not competent and I dismiss it with costs.

V.B.B./D.S. *Appeal dismissed.*

A. I. R. 1937 Lahore 285

ADDISON AND DIN MOHAMMAD, JJ.

Baga Singh—Objector—Appellant.

v.

Imam Din and others, Petitioners and others, pro forma—Respondents.

First Appeal No. 40 of 1936, Decided on 29th October 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 30th October 1935.

(a) Civil P. C. (1908), O. 41, R. 27—Additional evidence—*Lacuna*—Additional evidence can be allowed by appellate Court only when lacuna or inherent defect becomes apparent—Provisions are not meant to patch up weak parts of case and fill up omissions in appeal.

Legitimate occasion for the exercise of the discretion to allow additional evidence is not whenever, before the appeal is heard, a party applies to adduce fresh evidence, but when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. [P 285 C 2]

The provisions of S. 107, Civil P. C., as elucidated by O. 41, R. 27 are clearly not intended to allow a litigant who has been successful in the lower Court, to patch up the weak parts of his case and fill up omissions in the Court of appeal : *A I R 1931 P C 143, Rel. on; A I R 1929 P C 99, Expl.* [P 286 C 1]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 7 and 10 (3)—Notification under S. 10 (3)—It is not conclusive proof of right, title or interest in property in dispute of party named therein—It only proves that no claim was made under S. 7.

Notification of the Local Government under S. 10 (3) is not conclusive proof of the right, title or interest of the party named therein in the pro-

perty concerned but it only proves the simple fact that no claim was made in respect of any right, title or interest, specified in the notification, under S. 7 of the Act and nothing more.

[P 286 C 1, 2]

Sardar Harnam Singh—for Appellant.

J. L. Kapur—for Respondents (Petitioners).

Din Mohammad, J.—The petitioners respondents in this case claimed certain lands situate at Muza Qila Jhanda Singh to be their property. The Shiromani Gurdwara Parbandhak Committee as well as certain other Sikhs resisted the petition. The Sikh Gurdwaras Tribunal found in favour of the petitioners. Hence this appeal by one of the signatories of the petition under S. 7, Sikh Gurdwaras Act. The sole question to be determined in this case is whether the petitioners have succeeded in proving their right, title or interest in the lands claimed by them. It is not denied by the objectors that the lands in dispute belong to the petitioners. The only plea that has been raised by them is that the institution on whose behalf they are resisting the application is an occupancy tenant under Cl. (d), sub-s. (1) of S. 5, Punjab Tenancy Act. The petitioners' ownership being admitted, the onus of proving that ownership is encumbered by this right will evidently lie on the objectors and we have no hesitation in saying that they have failed to discharge it. The objectors contend that one Ram Narain was a Muafidar of these lands and that the Parbandhak Committee had succeeded to his interest about 13 years ago. There is, however, nothing on the present record to show that this was so. Counsel for the appellant produced some documents during the pendency of the appeal to prove the objectors' claim, but finding that even those documents did not help him, he has further made a request to be allowed to produce additional evidence under R. 27, O. 41, Civil P. C. We are not, however, prepared to grant this request in face of the clear pronouncement of their Lordships of the Privy Council contained in 10 Pat 654.¹ At p. 668 their Lordships have observed :

The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applied to adduce fresh evidence but when on examining the evidence as it stands some inherent lacuna or defect becomes apparent.

1. Parsotim Thakur v. Lal Mohar Thakur, A I R 1931 P C 143=132 I C 721=58 I A 254=10 Pat 654 (P C).

On the same page, their Lordships have remarked as follows:

The provisions of S. 107, Civil P. C., as elucidated by O. 41, R. 27 are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal.

Counsel for the appellant relied on A I R 1929 P C 99,² but that judgment was delivered under O. 13, R. 2, Civil P. C., and has nothing to do with O. 41, R. 27, Civil P. C. In order to establish a claim under Cl. (d), sub-s. (1) of S. 5, Punjab Tenancy Act, it is incumbent upon the claimant to prove that he is a Jagirdar of the estate or any part of the estate in which the land occupied by him is situate and that he has continuously occupied the land for not less than 20 years. As already remarked, there is not a tittle of evidence to prove any of the material ingredients of this clause. Even if it be assumed for the sake of argument that Ram Narain was a Muafidar of the land in suit, there is no documentary evidence on the record to show that he had been in occupation of the land for 20 years or that the objectors had succeeded to the Muafi in question under the orders of the Government. Counsel for the appellant referred us to a copy of the mutation relating to the land situate at a village of the name of Kot Dharam Chand and asked us to hold that what happened in that case had happened in the present case also and that the objectors had lawfully succeeded to whatever right, title or interest Ram Narain had in the land. We, however, cannot follow this course as to us it appears to be illegal. Counsel further contended that no claim having been made under S. 10, the Local Government has issued a notification under sub-s. 3 of that section specifying the right, title or interest of the objectors in the property in dispute and as the right claimed by them pertained to the Muafi in question, this Court should take the said notification as conclusive proof of the fact that the objectors were the Muafidars or in other words, the successors-in-interest of Ram Narain. This argument, however, proceeds on a wrong conception of sub-s. (3), S. 10. The only thing that the notification under that sub-section can prove is the simple fact that no claim was made in respect of any right, title or interest

specified in the notification under S. 7, Sikh Gurdwaras Act, and no more. On these grounds, we affirm the decision of the Sikh Gurdwaras Tribunal and dismiss this appeal with costs.

K.B./A.L.

Appeal dismissed.

A. I. R. 1937 Lahore 286

JAI LAL, J.

Ghulam Mohammad Shah and others
—Plaintiffs—Appellants.

v.

Sadhu Ram and others—Defendants—Respondents.

Second Appeal No. 1757 of 1935, Decided on 3rd November 1936, from decree of Dist. Judge, Mianwali, D/- 27th May 1935.

Custom (Punjab) — Shamilat — Cultivation of — Adna malik in Panj Girain, Tahsil Bhakkar, Mianwali District, is entitled to cultivate shamilat land without permission of ala malik—Only right of ala malik is priority to cultivate land before it is actually cultivated by adna malik.

An adna malik in the village Panj Girain in the Tahsil of Bhakkar in the Mianwali District is entitled to cultivate shamilat land without the permission of the ala malik. The only right of the ala malik is priority to cultivate the land before it is actually cultivated by the adna malik.
[P 286 C 2]

Mohammad Monir—for Applicants.

Achhru Ram, Shambu Lal Puri and Indar Dev—for Respondent 1.

Judgment.—The only question in this second appeal is whether an adna malik in the village Panj Girain in the Tahsil of Bhakkar in the Mianwali District is entitled to cultivate shamilat land without the permission of the ala malik. The learned District Judge has held that on a proper interpretation of the two clauses of the wajibularz, i. e., Cls. 11 and 12, it is clear that no permission of the ala malik is necessary to enable the adna malik to cultivate shamilat land and that the only right of the ala malik is priority to cultivate the land before it is actually cultivated by an adna malik. That this interpretation is correct is clear from the phraseology of the two clauses of the Wajibularz already referred to. Cl. 11 is that:

The ala maliks have the first right to cultivate the shamilat and after them that right devolves upon the adna maliks. If the latter have no intention or means to occupy the shamilat land, the ala maliks can give the land to

2. *Gopika Raman Roy v. Atal Singh*, A I R 1929 P C 99=114 I C 561=56 I A 119=56 Cal 1003 (P C).

other people, whether they be residents or non-residents and on such terms as they like.

It will be observed that no mention is made of any permission by the ala maliks to be obtained by the adna maliks before they can cultivate the shamilat land. Cl. 12 deals with jhuri and it is provided that it is open to the ala malik to refuse to accept jhuri from the adna malik in which case the latter becomes an occupancy tenant. This clearly establishes the right of the adna maliks to cultivate the shamilat land without reference or without the permission of the ala maliks. The matter is so clear that it is not necessary for me to discuss it in detail. In my opinion the learned District Judge has come to a correct conclusion as to the interpretation to be placed on these two clauses of the Wajibularz. It is next contended on behalf of the appellants that the learned District Judge has found that Ganhwara, a tenant of the appellants, ala maliks, had actually cultivated about 40 kanals of land and the prayer for injunction which has been refused also related to the land so cultivated by Ganhwara. On the other hand it is urged on behalf of the respondents that they never claimed any right to cultivate the land which had already been cultivated by Ganhwara or to prevent the ala maliks or Ganhwara from cultivating this land and that there was no dispute in this litigation about that land. It is therefore conceded that any decision given by the District Judge in this case does not affect the land which it had been found has been cultivated by Ganhwara. This admission by the respondents ought to remove any apprehension that the appellant may have with regard to the land cultivated by Ganhwara. It is not necessary to modify the decree of the learned District Judge because it is admitted that it does not affect such land specially as there can be no possible objection to the ala maliks cultivating land which is not already cultivated by the adna maliks or by occupancy tenants. I therefore dismiss this appeal. The appellants shall pay the costs of the respondents in this appeal.

R.M./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 287

JAI LAL, J.

Thakar Dass—Decree-holder — Appellant.

Ram Rakha Mal—Judgment-debtor—Respondent.

First Appeal No. 229 of 1936, Decided on 23rd November 1936, from order of Senior Sub-Judge, Gujrat, D/- 31st January 1936.

Punjab Relief of Indebtedness Act (7 of 1934), S. 35—Person belonging to agricultural tribe but not cultivating land himself is not agriculturist.

A person belonging to an agricultural tribe and owning some land but not cultivating the land himself is not an agriculturist within the meaning of S. 60, Civil P. C. and therefore cannot claim the benefit of S. 35, Punjab Relief of Indebtedness Act. [P 287 C 2]

Arjan Das—for Appellant.

S. C. Manchanda—for Respondent.

Judgment.—The only question in this appeal is whether the judgment-debtor Ramrakha Mal, who has been found to belong to an agricultural tribe, being Mohyal Brahman, is entitled to claim exemption from sale in respect of two houses owned by him in Kharian, which is the headquarters of a Tahsil. The judgment-debtor is before me and admits that he does not cultivate any land in the village or anywhere else. He owns 13 bighas of land which he let out to tenants. Under the circumstances he cannot be held to be an agriculturist within the meaning of S. 60. He is a retired school-master and is a lambardar. He does not get any pension but received Rs. 1,500 as his provident fund. He alleged that he himself is living in one of the houses and that in the other house he keeps his cattle. I believe, however, the evidence of the decree-holder that he had previously rented one of the houses to another person but recently has shifted to that house for his personal residence, and the other house, which was occupied by him before, is now vacant. Apparently this was done in order to try to secure exemption under S. 35, Punjab Relief of Indebtedness Act.

In my opinion, the judgment-debtor is not entitled to the benefit of S. 35, Punjab Relief of Indebtedness Act, because he is not an agriculturist within the meaning of S. 60, Civil P. C., and it would be a question whether, under the circumstances, the house, which is now occupied by him

and which was occupied by him shortly before attachment, should not be held to have been rented by him, as it had been rented for some years before he came to occupy it. I have, however, given him a choice, in view of my admitting note, to claim exemption in respect of only one of the houses and he has claimed exemption before me in respect of the house which is not now occupied by him and which is bounded as follows: *North*, by a gali; *East*, by a gali; *South*, by the house of Mehta Jagan Nath; and *West*, by the house of Mehta Amar Nath according to the plan which is on the record. The other house which is described in the plan as bounded on the *East*, by the house of Master Sundar Das; *South*, by a gali; *West*, by the house of Darshan Singh and *North*, by the house of Mahtab Ali Pathan shall be held saleable in execution of the decree.

I accept this appeal and direct that the house mentioned above last shall be sold in execution of the decree of the decree-holder. The respondent shall pay the costs of this appeal.

S.C./D.S.

Appeal allowed.

A. I. R. 1937 Lahore 288

TEK CHAND, J.

Kishori Lal and others—Plaintiffs—
Petitioners.

v.

Khair Din and others — Defendants—
Opposite Parties.

Civil Revn. No. 492 of 1936, Decided on 10th November 1936, from order of Senior Sub-Judge, Gurdaspur, D/. 29th June 1936.

Co-sharer — Co-sharer granted temporary injunction restraining other co-sharers from building on joint land pending suit — In appeal Court finding no necessity for temporary injunction and allowing other co-sharers to build at their own risk—Court held exceeded its jurisdiction in deciding suit on merits—Status quo ante must be maintained —No obligation on plaintiff co-sharer to sue for partition.

In cases of disputes between co-sharers, it is of the utmost importance that the *status quo ante* should be maintained pending decision of the suit, and that none of the co-sharers should be allowed to deal with joint property in a manner which is likely to render the suit infructuous or create other complications. [P 289 C 1]

One of the co-sharers sued for a perpetual injunction, restraining his other co-sharers from building on a portion of joint land, which area

was larger than their share. Pending the suit he was granted a temporary injunction against the other co-sharers not to build on joint property till the decision of the suit. The other co-sharers continued building in defiance of the injunction. The lower Court characterizing the conduct of other co-sharers as reprehensible, found that there was no need for a temporary injunction and allowed them to build at their own risk:

Held: that the statutory rule of maintaining the *status quo ante* was departed from without any adequate reason and the Judge had really exceeded his jurisdiction in virtually deciding the suit on the merits. [P 289 C 1]

Held further: that there was no obligation on the plaintiff co-sharer, who was granted temporary injunction to sue for partition. It was for the defendants co-sharers to have the land divided before starting the construction either by consent or through Court. [P 289 C 1]

Vishnu Datt for Raj Kishna Tandon and Raj Kishna Tandon—for Petitioners.

Chiragh Din and Muhammad Din Jan for *Chiragh Din*—for Opposite Parties.

Order.—This case was heard on 2nd October 1936. At the conclusion of the arguments the parties asked for an adjournment to enable them to enter into a compromise. The case was accordingly adjourned to the 12th October, and again at the request of counsel to the 27th October. It appears however that no compromise has been arrived at. I therefore proceed to decide the case.

The property in dispute is a vacant piece of land in Batala which belonged originally to firm 'Shadi Khair Din'. Shadi's share was 13/48, which on his death, his son Din Mohammad sold to the plaintiffs. The defendants having lately enclosed a portion of the joint land with a view to erect machinery thereon, the plaintiffs brought a suit for a perpetual injunction restraining the defendants from constructing any building on the joint land. This suit is being tried in the Court of the Sub-Judge, Batala. Along with the plaint the plaintiffs presented an application for issue of a temporary injunction directing the defendants not to construct any building till further orders of the Court. On 4th May 1936, the Sub-Judge issued the temporary injunction asked for. Shortly afterwards the defendants applied to have the injunction discharged. The Sub-Judge by his order dated 12th June 1936, rejected this application and made the interim order absolute. In this order he observed that the defendants had disobeyed the temporary injunction and had continued the building operations in defiance of the injunction. On appeal the Senior Sub-

Judge, while characterising the conduct of the defendants as reprehensible, held that the temporary injunction should not have been issued. He accordingly accepted the appeal and cancelled the temporary injunction, laying down at the same time that the defendants will be held to have enclosed the land and fixed the machinery in the premises at their own risk.

After hearing counsel and examining the record I am unable to sustain the appellate order of the learned Senior Sub-Judge. In cases of this kind it is of the utmost importance that the *status quo ante* should be maintained pending the decision of the suit, and that none of the co-sharers should be allowed to deal with joint property in a manner which is likely to render the suit infructuous or create other complications. It seems to me that this salutary rule has been departed from in this case without any adequate reason and the learned Judge has really exceeded his jurisdiction in virtually deciding the suit on the merits before the trial had begun. After rightly stating the law, that ordinarily one of the co-sharers of joint property is not entitled to build on it without the permission of the others, since such conduct on his part is likely to prejudice eventually a proper partition of the property, he has remarked that the plaintiffs in this case should, instead of filing a suit for perpetual injunction, have instituted a suit for partition. I am unable to see that there was any obligation on the plaintiffs to sue for partition. It was the defendants who were anxious to build on a portion of the joint land, which comprises an area larger than their proper share and it obviously lay on them to have the land divided before starting the construction, either by consent or through Court. The learned Senior Sub-Judge appears to have overlooked the fact that the area enclosed is admittedly $\frac{3}{4}$ th of the joint plot, while the defendants' share is $\frac{35}{48}$. This shows that the defendants have not only effected a partition of the property by their unilateral act, selecting at their choice the portion which they considered to be suitable for their purposes, without reference to the other co-owners, but that they propose to bring within an enclosure surrounded by a pucca wall land in excess of their shares, which they will have to surrender in any case. This area may be small, but it is admittedly valuable. Further, it is difficult to

see how the construction of a pucca compound wall and fixing machinery in it can be regarded as structures of a temporary nature. Obviously these structures will materially alter the nature of the property which in the very nature of things, it is necessary, should not be done until the relative rights of the parties have been determined in the suit.

I can see no justification for departing from the ordinary rule in this case, more especially when the respondents appear to have disobeyed the injunction issued by the trial Judge. I accept the petition for revision, set aside the order of the lower appellate Court and restore that of the trial Judge confirming the temporary injunction issued by him. The respondents shall pay the costs of the petitioners in the lower appellate Court and this Court.

V.B.B./K.S.

Petition accepted.

A. I. R. 1937 Lahore 289

BHIDE, J.

Mehtab Singh—Plaintiff—Appellant.

v.

Small Town Committee, Phalia, Defendant and *others*, Plaintiffs—Respondents.

Second Appeal No. 662 of 1936, Decided on 20th November 1936, from decree of Senior Sub-Judge, Gujrat, D/- 20th February 1936.

Punjab Small Towns Act (2 of 1922), Ss. 34 (q) and 41—Fixing fees for occupation of portion of public street by motor lorries falls under S. 41 and not under S. 34 (q).

A resolution passed by the Small Towns Committee fixing fees for the occupation of a portion of a public street, where lorries are allowed to stand, falls under S. 41 and not under S. 34 (q), as the latter section deals with licensing of motor vehicles and setting apart of places for public vehicles, while S. 41 deals with levying of fees.

[P 290 C 1]

Harbhajan Dass — for Appellant.

R. L. Anand I — for Respondent (Defendant).

Judgment. — This was a suit for a declaration that a resolution passed by the Small Town Committee of Phalia fixing fees for the occupation of a portion of a public street, where motor lorries were allowed to stand, was ultra vires. The suit has been dismissed by the Courts below and the plaintiff appeals. The only contention raised by the learned counsel

for the appellant was that the resolution of the Committee falls within the scope of S. 34, Cl. (q), Small Towns Act, and was ultra vires as the procedure prescribed by S. 36 was not followed. This contention does not appear to me to be sound as Cl. (q) of S. 34 deals with licensing of motor vehicles and setting apart of places for public vehicles, while the levying of fees comes under Cls. (c) and (e) of S. 41. The learned Senior Subordinate Judge has rightly held that the resolution was in order as the case falls under S. 41.

I dismiss the appeal with costs.

V.B.B./D.S. *Appeal dismissed.*

A. I. R. 1937 Lahore 290

COLDSTREAM AND BHIDE, JJ.

Ram Kishen Das—Appellant.

v.

Shiromani Gurdwara Parbandhak Committee, Amritsar and another, Objectors and others, Petitioners — Respondents.

First Appeal No. 2329 of 1935, Decided on 26th November 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/. 23rd September 1935.

Punjab Sikh Gurdwaras Act (8 of 1925), S. 8—Sikh Gurdwara—Dharamsala Sree Granth Sahib of Shahabad — It is Sikh Dharamsala and not Udasi dera.

Although Udasis read the Granth Sahib and the scripture is kept in most Udasi deras, yet the institution Dharamsala Sree Granth Sahib of Shahabad, though its servitors were Udasi Sadhs, is not an Udasi dera or college but the ordinary Sikh village dharamsala where the travellers are accommodated and the Granth recited by the Udasi sadh in charge. [P 291 C 2; P 292 C 1]

N. C. Pandit and Din Dayal Khanna—for Appellant.

Charan Singh and Narindar Singh — for Respondents.

Coldstream, J.—This is an appeal by Nanak Saran the hereditary manager of an institution known as Dharamsala Sri Granth Sahib in Shahabad a revenue estate in Thanesar Tahsil of the Karnal District against the decision of the Sikh Gurdwaras Tribunal, that the institution is a Sikh Gurdwara and not, as claimed by him in a petition submitted under S. 8, Sikh Gurdwaras Act, an Udasi Dera belonging to him. The decision was in accordance with the judgment of two members of the Tribunal, Rai Sahib Lala

Dwarka Parshad and Sardar Man Singh. With this judgment the learned President, Hilton, J. did not concur, holding it not proved that the institution was a Sikh Gurdwara. Nanak Saran's petition besides alleging that the institution was his own property asserted that it was known as the dharamsala of Bawa Maya Ram, that the smadhs of his ancestors were attached to it, that these smadhs, a Gola Sahib, an idol of Bawa Sri Chand (the founder of the Udasi Order) and a Granth Sahib peculiar to the Diwana sect of Udasis were the only objects of worship in it and that the Sikhs had no concern with the dharamsala. Nanak Saran died before the trial began and his chela Ram Kishen Das was substituted for him as his legal representative.

The petition was resisted by the Shiromani Gurdwaras Parbandhak Committee (hereinafter referred to as the objectors) who denied the truth of the allegations made by the mahant, asserting that the institution was established for use by Sikhs for public worship, the only object of such worship in the institution being the Guru Granth Sahib. The judgments of the majority of the tribunal held it established by the evidence that public worship in the institution had always been Sikh worship for which purpose the institution had been founded. It is contended before us by appellant's counsel that there is no evidence proving that the shrine was established for Sikh public worship and that the appellant's evidence shows that it was an Udasi Dera in which the only Granth Sahib worshipped was a book produced in Court which was not the Guru Granth Sahib but the Granth of the Diwanas.

From the documentary evidence in the case it appears that at the time of the first settlement in 1851, the shrine and its property were in possession of two Udasi Fakirs of Sadhs, Sarab Dial and Brahm Dhyani. The earliest record of that time (Ex. O. 2), describes the muafi attached to the shrine as having been given originally by Sikhs to an Udasi called Maya Ram. The register of muafis prepared after enquiry (Ex. O. 4) sets forth the history of the muafi in detail as given by Sarab Dial. The land had been part of a jagir enjoyed by the local Sikh sardars and the endowment had been made some sixty years previously for the house of the Granth Sahib, a dharamsala and

smadhs, the servitor khidmatuguzar of the institution being Gurmukh Das, the brother-in-law of Sarab Dial's grand Guru. Gurmukh Das was succeeded as khidmatguzar by his chela Gur Dial, Sarab Dial's Guru. The income was spent upon lighting the buildings and feeding hungry fakirs who visited the shrine. This statement was corroborated by the lambardars of the revenue estate, all Mohamedans, and the representatives of the Sikh jagirdars who were the successors of the original donors agreed to the continuance of the assignment. It was accordingly recommended that the muafi should be continued so long as the house of the Granth Sahib, the smadhs and the dharamsala existed. The recommendation was accepted by the Commissioner on 1st September 1852 (O. 6).

From a statement made by the Mahant Nanak Saran (O. 6) and a report by the Settlement Superintendent (O. 10) during the enquiry into the muafi at the settlement of 1886-87 (O. 8) it appears that Sarab Dial absconded and Prabhu Dial was imprisoned on a charge of murder whereupon the Sikh jagirdars put one Kirpa Ram, an Udasi Sadh of Thanesar, in charge of the institution but transferred part of the assignment to an Udasi Sadh of Pahuda called Narain Das. Then one Ranjit Singh, claiming to be heir of Brahm Dial and Sarab Dial, appeared and was placed in charge by the jagirdars. Ranjit Singh died and Kirpa Ram and Gobind Das were put in possession. On Gobind Das's death he was succeeded by his chelas Nanak Saran and Atma Ram. The latter disappeared and the muafi land was recorded as in possession of Gobind Ram instead of Nanak Saran.

Nanak Saran declared that many fakirs rested in the dharamsala and that he read the Granth. He declared his occupation to be reading or reciting the Granth (Granth Khani). The jagirdars asked for the muafi to be continued in the name of the dharamsala to which it belonged. The Settlement Superintendent reported that the Granth was being read and recommended continuance of the muafi. The result of the enquiry was recorded in the muafi register (O. 7) where it was noted that the land concerned had been released from revenue in favour of the Granth Sahib and the dharamsala, Sarab Dial being the khidmatguzar at the previous settlement. The Settlement Officer's

order of 11th January 1888 noted that the muafi was attached to a dharamsala in which the Granth Sahib was read (O. 11). Coming to the settlement of 1908, the report of the enquiring officer then was that the institution existed, the Granth Sahib was kept in it, food distributed to fakirs and the 'relevant services' duly rendered. The lambardars and jagirdars wished the land to be released from revenue as before and this was done (O. 12). The oral evidence produced by the objectors was of six Sikhs of Shahabad, one a jagirdar (O. W. 2) who testified that they had worshipped regularly at the institution, where the jagirdars also worshipped, that the smadhs were of the ancestors of the Sikh Sardars and that the Granth Sahib was worshipped. The jagirdar witness had never heard of the Granth Sahib of the Diwanas. When part of the building was burnt some thirty years ago the jagirdars subscribed money for its repair, that Puranmashi and Sankrant were regularly celebrated and Karah Parshad was regularly distributed, and that no Gola Sahib or idol of Sri Chand was worshipped. The petitioner gave evidence himself and called two witnesses, one a Mohamedan of Shahabad and the other a Hindu of Latala. This evidence was that the Granth Sahib read in the dharamsala is the Diwanas' sacred book and not the Guru Granth Sahib, that there is a smadh of Nanak Saran attached to the shrine and that Sikhs do not worship there.

A consideration of all this evidence leaves me satisfied of the correctness of the order of the tribunal. There is no contemporary documentary evidence of the manner in which the institution came into being or for what object it was first established, but there is no doubt that when it was first endowed with its muafi by the Sikh sardars towards the end of the eighteenth century, it was not only a dharamsala to which the smadh of a Sikh sardar was attached but also a "Makan Granth Sahib". At every enquiry made before 1908, emphasis was placed upon the reciting of the Granth Sahib. That Udisis read the Granth Sahib is true and it is well known that the scripture is kept in most Udasi deras, but the evidence indicates that this institution though its servitors were Udasi sadhs, was not an Udasi dera or college but the ordinary Sikh village dharamsala where the travel-

lers were accommodated and the Granth recited by the Udasi sadh in charge. Udasīs were commonly managers of Sikh shrines and it is proved that in this dharamsala it was the Sikh jagirdars who controlled the appointment of the managers. Much has been made by appellants' counsel of the evidence that the first endowment was in favour of one Maya Ram who was presumably not a Sikh, but that there existed a Makan Granth Sahib when the endowment was made there is no doubt, and the conclusion is justified that this makan was an important, if not the principal feature of the institution from the time of its foundation and that the institution was established for public worship by Sikhs.

The petitioner's evidence is of the poorest kind. No regular Hindu worshipper at the dharamsala has been produced. The evidence of the Mahomedan witness is obviously unreliable and I need say no more about it. The only Hindu witness other than the petitioner himself belongs, as already noted, to Latala and it is admitted that he was himself engaged in litigation with the Sikhs over his own institution at Latala under the Sikh Gurdwaras Act. He professed that he was a 'Diwana', but there is no evidence that he ever described himself as such before he gave evidence in this case or after it. His evidence about the Diwanas' Granth Sahib is most unconvincing and he admitted that this book was not kept in his dera at Latala. The book produced in Court by the petitioner was not the Guru Granth Sahib. It is possible that he kept this book and read it, but that the Sikh jagirdars endowed a Makan Granth Sahib in which the Granth Sahib was not their own Holy Book I am unable to believe. It was certainly the Guru Granth Sahib of the Sikhs that was worshipped in this dera before the first enquiry was made in 1851, into the circumstances of the shrine, and I see no reason to disbelieve the objectors' witnesses that worship during their lifetime has been of the Guru Granth Sahib. For all these reasons I would dismiss this appeal with costs.

Bhide, J.—I agree.

B.D./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 292

JAI LAL, J.

Mrs. I. E. Moore — Caveator — Appellant.

v.

E. M. Turner and another—Petitioners—Respondents.

Civil Misc. Appeal No. 209 of 1936, Decided on 2nd November 1936, from order of the Addl. Dist. Judge, Lahore, D/- 18th July 1936.

(a) Will — Validity of — Undue influence — Disposing mind — Deceased dying 18 months after execution of will — After execution of will but before her death, deceased going to Europe for few months — Deceased not taking any steps to revoke will while in India and also while in Europe— Though some legatees not allowing deceased to meet others except in their presence, the brother's daughter of the deceased who was not legatee used to be taken out by the deceased in her motor car — Held existence of disposing mind was established and allegation of undue influence was not proved.

The deceased died more than 18 months after the execution of the will but did not in the meantime take any steps to revoke the same. After the execution of the will and before her death, the deceased went to Europe for a few months. Though some of the legatees did not allow the deceased to meet others except in their presence, the brother's daughter of the deceased used to be taken out by the deceased in her motor car :

Held : that as the deceased did not revoke the will even while in Europe, where she was not under the influence of the legatees, the allegation of undue influence was not proved. [P 293 C 2]

Held also : that as the deceased did not take steps to revoke the will during the 18 months after the execution of the will and before her death, the existence of a disposing mind was established. [P 294 C 1]

(b) Will—Proof of—Unnatural will—Letter sent by deceased to husband of her brother's daughter — Annoying reply sent by husband to deceased — Testatrix deprived her niece of share in property — Held testatrix naturally deprived her brother's daughter of a share in her property.

A letter written with the authority of the testatrix, was sent by her to the husband of her brother's daughter, who sent a reply to the testatrix. The testatrix was annoyed by this reply. These two documents showed that relations between testatrix and the husband of her brother's daughter were not good :

Held : the testatrix naturally deprived her brother's daughter of a share in her property.

[P 294 C 1]

(c) Will — Validity of — Bequest to son of attesting witness made independently is not void.

A bequest to a son of an attesting witness made independently and not as a person claiming under the attesting witness is not void and S. 67, Succession Act, does not apply.

[P 294 C 2]

H. S. Khorana—for Appellant.

Ishwar Das Khanna and Mehr Chand Mahajan—for Respondents.

Judgment. — This appeal is against an order of the Additional District Judge of Lahore, dated 18th July 1936, granting probate of the will of the late Mrs. E. A. Thomson of Lahore to the respondents, Messrs. Turner and Chapman two of the executors mentioned in the will, the third Ch. Ram Ditta Mal having resigned. The learned Additional District Judge has confined the grant of probate to two-thirds of the estate of the deceased, having held that there was intestacy with regard to the remaining one-third; in fact if the order of the learned Additional District Judge has to be upheld the grant must be, even on the facts found by him, with regard to the entire estate of the deceased with the exception of one-third of the the residue thereof as mentioned in para. 5 of the will. The grant was opposed by the appellant Mrs. Moore, who is a brother's daughter of the deceased. The grounds of opposition were that the will was not executed by the deceased, that in any case she had not a disposing mind and had acted under the undue influence of two of the legatees, Mr. and Mrs. Bardsley. In the course of the hearing some legal objections also were raised, which have been repeated before me, and which would be dealt with in due course.

The first question, which is the really important question in this case, is whether it has been established that the will was duly executed by the deceased. It may be mentioned that no date of the execution of the will is mentioned in the document but the month and year is mentioned as February 1934. The space intended for the date has been left blank. The deceased died in November 1935, that is to say, about 18 months after the alleged execution of the will. The will is attested by Mr. F. N. Forrest, House Surgeon of the Albert Victor Hospital, Lahore, and by Mrs. A. M. Turner. Both these have appeared as witnesses and have deposed to the due execution of the will by the deceased in their joint presence. The will was drafted by Mr. Ram Ditta Mal, an Advocate of this Court. He did not witness

the document but has deposed that he wrote it out and had it typed under the instructions of Mrs. E. A. Thomson, whom he knew before. Two witnesses have also appeared to depose to the identity of the signatures of Mrs. Thomson. The question of the genuineness of the will must however depend mainly on the testimony of three witnesses: Mr. Forrest, Mrs. Turner and Mr. Ram Ditta Mal. They were cross-examined at length but stood the test well. With regard to Mr. Forrest, an affidavit has been filed in this Court in which it is alleged that when the witness stated that he was a House Surgeon he in fact was under suspension and was subsequently transferred to another post which was inferior to that of the House Surgeon. The witness, however, was not cross-examined when he gave his evidence and I am unable to accept the affidavit filed by the appellant in this Court as sufficient proof of the facts alleged by her. In any case I am of opinion that the facts mentioned in the affidavit do not detract from the credibility of the testimony of Mr. Forrest. The evidence of the witnesses is consistent and has not been shaken in cross-examination. It is therefore sufficient to say that I agree with the conclusion of the Additional District Judge that the execution of the will by the deceased has been established by the evidence on the record.

The next question of undue influence and existence of disposing mind can shortly be disposed of in view of what I have stated about the due execution of the will by the deceased. She died more than eighteen months after the execution of the will but did not, in the meantime, take any steps to revoke the same. If the will had been the result of undue influence or had been executed when the deceased was not in possession of a disposing mind she would have taken the earliest steps to revoke it. It is conceded that after the execution of the will and before her death the deceased had gone to Europe for a few months. Even if it be assumed that while residing in Lahore she was under the undue influence of some of the persons who have benefited by the will the same cannot be said about her when she was abroad. In this connection it is to be borne in mind that the appellant herself admitted that though Mr. and Mrs. Bardsley did not allow the deceased to meet others except in their

presence, she (the appellant) used to be taken out by the deceased in her motor car. I am clearly of opinion that under the circumstances the existence of disposing mind has been established and the allegation of undue influence has not been proved. It was urged on behalf of the appellant that the will is unnatural because the testatrix has deprived her niece of a share in her property. I have considered this question and I am of opinion that in all probability the deceased had some reasons for acting in the manner she did. Two letters have been proved at the trial. One is a letter Ex. p. 2 which is supposed to be written by Mrs. Thomson to the husband of the appellant. The other is a reply to this letter from Mr. Moore. The two documents are dated the 15th June 1933 and 20th June 1933, respectively. With regard to the first document some suggestion was made at the trial, and also here, that it was not signed by Mrs. Thomson, but it is to be noted that the reply was sent by Mr. Moore to Mrs. Thomson. It may be that the document was not actually written by Mrs. Thomson, but it was assumed to have come from her and therefore a reply was sent by Mr. Moore to Mrs. Thomson. I must, therefore, assume that the document is a genuine document and is not a forgery and that in any case it was written with the authority of Mrs. Thomson. The examination of these two documents clearly shows that the relations between the deceased and the husband of the appellant at any rate were not good, and that might be a reason why the deceased was annoyed with her niece and deprived her of a share in her estate.

The will is a badly drafted document and appears to have been negligently executed; its meaning, however, is quite clear. But it appears that when the will was executed some alterations were made to it either at that time or after its execution. Some of these alterations are signed by Mrs. Thomson but not by the attesting witnesses. Two paragraphs containing two different bequests in paras. (4) (A) and (B) have been crossed over, but the cancellation is not signed by Mrs. Thomson at all. The learned Additional District Judge under the circumstances has held that all these alterations must be deemed to have been made to the will after it was duly executed by Mrs. Thomson and therefore not to affect the original will as

executed by her, that is to say, the will shall be deemed to be the document as if these alterations did not exist. No objection is taken to this conclusion of the learned Additional District Judge, but it is contended that the will is void for uncertainty. In my opinion, however, neither the will nor any of the bequests mentioned in it are void for uncertainty. The learned counsel was unable to point out any uncertainty which would make the will void. It was then contended that one of the bequests in para. 4 (A) of the will is in favour of Desmond Webster, who is a son of Mrs. Turner, the witness, and, therefore, as Mrs. Turner is one of the attesting witnesses to the will, the document becomes void. Reliance is placed on S. 67, Succession Act, which provides that a will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband; but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them. The section makes it quite clear that under the circumstances, even if I were to assume that the will has been attested by a person of the description mentioned in this section it does not become void but it is the bequest which becomes void. But the bequest becomes void only if the attesting witness is the wife or husband of the person in whose favour the bequest has been made or the latter is a person claiming under either of them. The bequest in this case was to Desmond Webster independently. He was not to take it under the attesting witness, Mrs. Turner. S. 67, Succession Act, therefore, does not affect the bequest.

I stated at the commencement of this order that the learned Additional District Judge has granted probate in respect of the 2/3rd of the estate of the deceased. On his own finding, the grant should have been for the estate of the deceased with the exception of the bequest made to the charities in para. 5 of the will. Counsel on both sides agree that this is the correct position having regard to the conclusion of the learned Additional District Judge. I, therefore, direct that the order of the learned Additional District Judge shall be construed to be that the grant of probate to the respondents has

been made in respect of the entire estate of the deceased with the exception of 1/3rd of the residue which has been given by the deceased for charity. I dismiss this appeal with costs.

W.D./D.S.

Appeal dismissed.

*** A. I. R. 1937 Lahore 295**

TEK CHAND AND SKEMP, JJ.

Popat Ram and another—Plaintiffs—Appellants.

v.

Khushi Ram and others—Defendants—Respondents.

First Appeal No. 2303 of 1935, Decided on 14th October 1936, from decree of Sub-Judge, 1st Class, Dera Ghazi Khan, D/- 16th October 1935.

*** Declaratory Suit** — Plaintiff being in actual or constructive possession or no further relief could be asked for—Suit for mere declaration in respect of such properties is maintainable—Further relief in respect of small item included in suit not asked for though could be asked for—Amendment of plaint by adding such relief in respect thereof can be allowed.

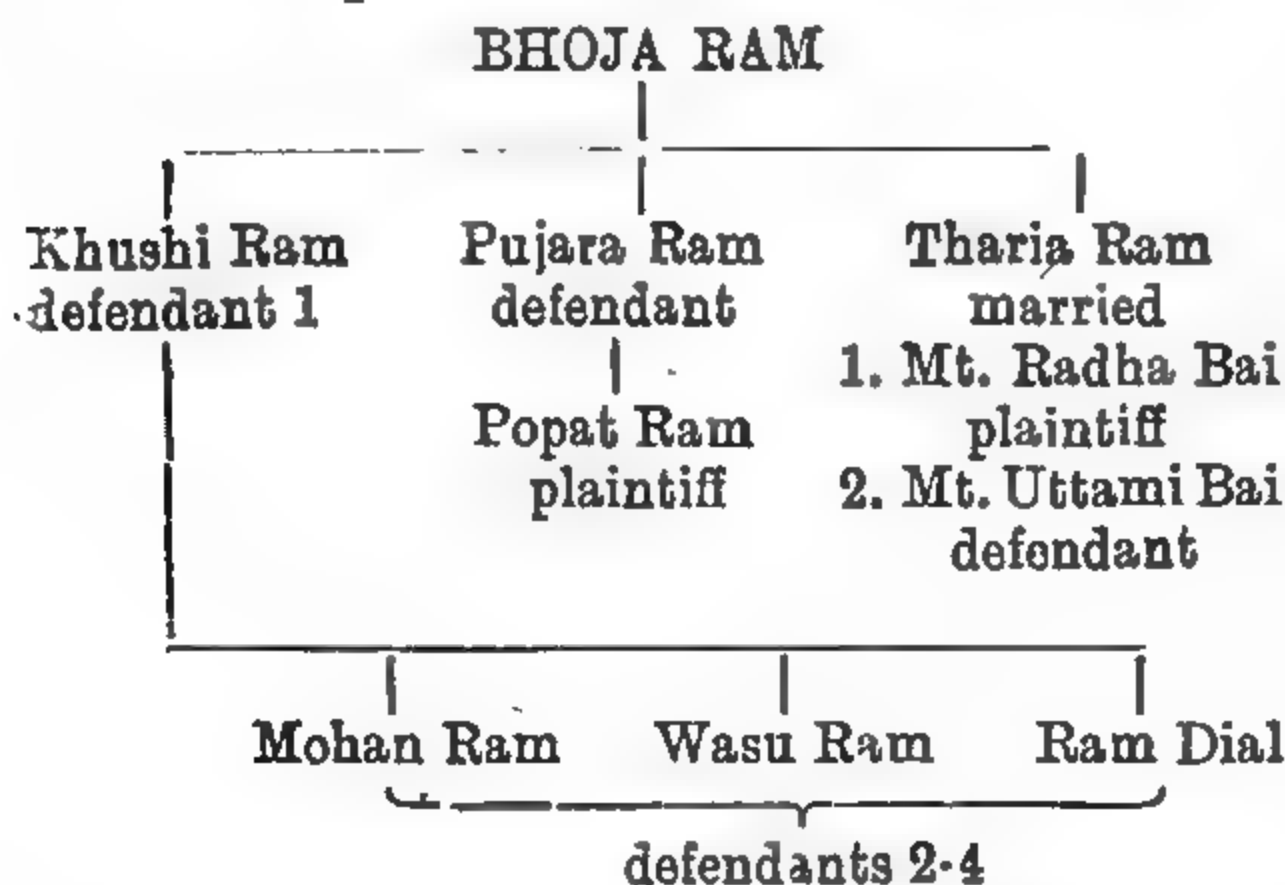
Where the plaintiff is either in actual or constructive possession of most of the suit properties or when no further relief in respect of them can be asked at the time of filing the suit, a suit for mere declaration in respect of suit properties is maintainable. If however the suit includes a small item of property with respect to which further relief of possession is not asked for though such relief could have been prayed for by the plaintiff, the Court may allow amendment of the plaint by allowing plaintiff to add such prayer in respect of the small item : 55 I C 32, *Rel. on.*

[P 296 C 2 ; P 297 C 1]

M. L. Puri and Bishen Narain—for Appellants.

S. L. Puri and Roop Chand—for Respondents.

Skemp, J—The following pedigree table will be helpful in this case :



The plaintiffs Popat Ram and Mt. Radha Bai lodged a suit stating that Tharia Ram,

who had no son, had adopted Popat Ram, his nephew. They thereupon sued for a declaration that they were entitled to rights of ownership in seven properties specified in the list attached to the plaint and in a number of debts. The contesting defendants were Khushi Ram and his sons, Mt. Uttami Bai and Pujara Ram were pro forma defendants. The contesting defendants pleaded inter alia that they were holding possession by virtue of a will left by Tharia Ram and that the suit for a declaration did not lie. The Subordinate Judge framed preliminary issues and after taking a good deal of evidence held that the suit did not lie. Of the seven properties given in the list attached to the plaint the Subordinate Judge held that house No. 1 was occupied by Mt. Radha Bai, house No. 2 by Mt. Uttami Bai, that site No. 3 was a vacant site not in physical possession of anybody, that the defendant was in possession of site No. 4, that shop No. 5 was in the possession of a co-sharer Dial Chand who had rights jointly with either the plaintiffs or the defendants, that the shop No. 6 was in the possession of the defendants and that the plaintiffs were not in possession of property No. 7, agricultural land. On these findings he held, in respect of some property that a mere declaration of legal character would suffice, while in respect of the other further relief could be sought by the plaintiff.

He held on the evidence, that the suit did not lie, and without giving any reasons that no amendment could be allowed, dismissed the suit. The plaintiffs have appealed. Their appeal is that the plaintiffs are shown to have been in possession, physical or constructive of all the seven properties specified in the list; and that even if the Subordinate Judge's findings as to possession are correct, amendment of the plaint ought in the circumstances to have been allowed. In particular it is pointed out that a suit for a declaration that Popat Ram was the adopted son certainly lies and that no reason has been given why a declaration should not have been made in reference to the debts. The points for determination in appeal are (1) who is in possession of the several immovable properties and (2) whether amendment ought to be allowed. The appellants accept the findings as regards the properties 1, 2, 3 and 5. The respondents also accepted the finding about property 5, but urged that the defendant Khushi Ram exercised possession over the

two houses occupied by the widows. This depends on flimsy and most unreliable evidence and there is no doubt that the Subordinate Judge was right as to these two houses.

The respondents contested the finding as to property No. 3. This is described in the plaint and found by the Subordinate Judge to be a vacant site. The plaintiffs admitted that there was a wall on this site but stated that they did not know who built it. They also stated that the panchayat had built a thatched shed thereon at their own expense and this was corroborated by a witness named Jamna Ram. It appears that the place is now used by the panchayat for a piyao. The servant who served at the piyao gave evidence that he had taken it from Khushi Ram on behalf of the panchayat and that Khushi Ram built the wall. Khushi Ram also stated he built the shop. On the other hand, there is an application made on 26th October 1933, i.e., little more than two months after the suit was lodged, asking for an injunction to restrain the defendants from building on this property; and an injunction was issued accordingly. On 15th June 1935, there is a further application by the plaintiffs under O. 39, R. 2, Civil P. C., asking that the defendants be criminally prosecuted for building on the site in defiance of the injunction. This application appears to have been put in when the Subordinate Judge was on leave and it was not followed up, but in my opinion the two applications tip the balance in favour of the plaintiffs, proving that at the time the suit was lodged in August 1933, Popat Ram was in possession of this site.

The next property, No. 6, is situated in the grain market. The Subordinate Judge's finding was that at the time of his judgment it was in occupation of a tenant under the defendants; the plaintiffs admitted that they had never paid ground rent. There was nothing to show that the plaintiffs had been dispossessed since the institution of the suit. No application to the Court for an injunction regarding this property was made, whereas the defendants stated that before the present tenant Hotu Ram there had been another tenant under them, Aya Ram. For these reasons the Subordinate Judge held that the property was in the possession of the defendants. It is pointed out by the appellants that the only witness besides the defen-

dant himself, namely the tenant Hotu Ram, had come into possession long after the suit, but, in my opinion, this consideration is not sufficient to displace the reasoning of the Subordinate Judge. Further, the site under the shop admittedly belongs to the Municipal Committee of Dera Ghazi Khan and there are two receipts on the record which show that ground rent was paid by Khushi Ram. This ground rent was indeed paid after suit on 30th November 1933 but for the period from 1st January to 30th September 1933.

As to the land, the jamabandi for the year 1933 shows the two widows of Tharia Ram as owners in succession to Tharia Ram by virtue of an order of mutation dated 13th March 1933 (some five months before suit). Of the land in question, which is attached to Pathanwala well, 133 kanals 10 marlas are shown as banjar and 29 kanals 17 marlas as cultivated. The tenant, one Jalal, has executed a number of leases, the first dated 17th November 1932, in favour of Tharia Ram deceased through Khushi Ram. Tharia Ram had died on 10th July 1932. The next is the cancellation of this deed dated 16th June 1933. This document provided that Jalal should give over the entire produce of the land to Rai Devki Nandan, lambardar and that the surplus after payment of the land revenue should be paid to Khushi Ram. On the same date, 16th June 1933, Jalal executed a lease in favour of Mt. Radha Bai, the plaintiff-widow, and a few days later, on 23rd June 1933, he executed a further lease in favour of Khushi Ram's sons. From this I think we are justified in drawing the inference, which is urged upon us by the plaintiffs' counsel, that possession of the land in dispute was not settled, that the actual possession of the cultivated area about one-fifth of the whole was that of a tenant who was prepared to attorn to either party, while four-fifths of the area, was waste land possession of which would follow the title. In a similar case, 55 I C 32,¹ a Division Bench of this Court held that a suit for declaration could lie. In that case possession had for some time been in a state of flux, and each party was in possession of part of the land in dispute. Summing up, we find that the plaintiffs were either in possession or could bring a declaratory suit because they could not at-

1. Labhu Ram v. Nathu, (1920) 55 I C 32.

the present stage ask for further relief in respect of the properties except No. 6. This is only a small portion of the whole and we think that the proper course is in the circumstances to allow amendment of the plaint so that they might ask for possession of property No. 6.

In conclusion we cannot understand why the Subordinate Judge on his own findings did not allow the plaintiffs to sue for a declaration of the properties of which they were in physical or constructive possession and amend their plaint with regard to the other properties which were only three in number. There is no reason why the suit could not lie for a declaration that Popat Ram is the adopted son of Tharia Ram or that he has a right in the debts. Probably if this course had been adopted the plaintiff would have accepted the finding, which would have been much more economical both of time and money than an appeal in this Court. We accept the appeal and direct that the suit for declaration shall proceed as framed with regard to the properties, except No. 6 with regard to which the plaintiffs are permitted to amend the plaint paying additional court-fee. The appellants having practically succeeded in this Court, the respondents are to pay the costs of this appeal. The parties have been instructed to appear in the Court of the Subordinate Judge first Class, Dera Ghazi Khan, on 9th November 1936 for further proceedings in the suit.

Tek Chand, J.—I agree.

B.D./A.L. *Appeal accepted.*

A. I. R. 1937 Lahore 297

JAI LAL, J.

Mul Raj—Appellant.

v.

Official Receiver, Jhelum and others—Respondents.

Second Appeal No. 19 of 1936, Decided on 6th November 1936, from order of Dist. Judge, Jhelum, D/. 8th February 1936.

(a) Provincial Insolvency Act (1920), Ss. 4, 68 and 75—Appeal—Insolvent's property brought to sale by Receiver—Objection to sale by purchaser of insolvent's property prior to insolvency—Objection though under S. 68 must be deemed to be one under S. 4—No sanction of Court is necessary for appeal.

The property of insolvent was sold by the Official Receiver, but the same property was purchased by a person prior to the insolvent's appli-

cation for insolvency, in execution of his decree and the purchaser objected to the sale under S. 68 of the Act, and on dismissal of the objection, appealed to the District Judge, who dismissed his appeal. The purchaser then filed a second appeal. On objection being raised by the respondent Receiver that an appeal was not competent without the sanction of the Court :

Held : that even though the Court was moved by the appellant under S. 68 of the Act the investigation into the objection of the appellant by the Insolvency Court must be deemed to be under S. 4 of the Act and hence no sanction for an appeal was necessary [P 298 C 1]

(d) Execution Sale—Attachment of property before judgment—Compromise decree passed with order that attachment should continue till full payment—Person contesting validity of attachment—Onus lies on him to prove that there was no subsisting attachment at time of sale—Attachment must be assumed to be proper and subsisting in presence of report of attachment and subsequent order of attachment to continue.

Where certain property was purchased by the decree-holder in execution of his money decree against a certain person but the same property was attached by him before judgment in his suit and the suit was compromised and an order was passed by the Court that attachment should continue till full payment :

Held : that the attachment having been ordered and a report having been submitted that the order had been complied with, it must be assumed that there was a proper and subsisting attachment when the property was sold, specially in view of the subsequent order that the attachment should be continued. The burden of proving that there was no subsisting attachment at the time of sale would be on those who allege that a valid attachment had not taken place. [P 298 C 1]

(c) Execution Sale—Sale in execution of money decree without attachment is not nullity.

A sale of property in execution of money decree even without attachment is not a nullity. [P 298 C 1]

Jhanda Singh—for Appellant.

Amolak Ram Kapur—for Respondents.

Judgment.—*Mul Raj*, appellant, instituted a suit against *Nidhan Singh* who appears to be related to him. The suit was for recovery of money. On the institution of the suit he applied for the attachment of a house of *Nidhan Singh* before judgment. This application was granted and the house was attached. Subsequently a decree was passed against *Nidhan Singh* on compromise. It was provided in the decree that till the payment of the decretal amount the house should remain under attachment. This was in 1926, the suit having been brought in 1925. In 1927 *Nidhan Singh* mortgaged the house to *Budh Singh*. In 1933 *Mul Raj* had the

house sold in execution of his decree and purchased it himself. Soon after Nidhan Singh made an application to be adjudicated an insolvent, which was granted, and the Official Receiver took possession of the house and sold it to Budh Singh; but Mul Raj raised an objection to this sale and moved the Insolvency Judge under S. 68, Provincial Insolvency Act, by way of appeal against the action of the Official Receiver, in selling the house which Mul Raj claimed was his by virtue of the purchase in the Court auction. His objection after investigation was rejected by the Insolvency Judge and an appeal by him to the District Judge was dismissed. On this second appeal a preliminary objection is taken that an appeal is not competent without the sanction of the Court, but the investigation of the objection of Mul Raj by the Insolvency Court must be deemed to be under S. 4, Provincial Insolvency Act, though the Court was moved under S. 68 of that Act. An appeal is consequently competent.

On the merits, in my opinion, the appeal must succeed. Mul Raj is a purchaser of the property in dispute in an auction sale held in execution of a money decree obtained by him. The learned District Judge is of opinion that in the present case it must be assumed that the record of the proceedings relating to the attachment before judgment is in existence; the burden of proving a subsisting attachment at the time of the sale is on Mul Raj, and also the validity of the attachment with proper procedure. In my opinion, the attachment having been ordered and a report having been submitted that the order had been complied with, it must be assumed that there was a proper and subsisting attachment when the property was sold specially in view of the subsequent order that the attachment should be continued. The burden would be on those who allege that a valid attachment had not taken place. But even assuming that no attachment took place, the sale of the property to Mul Raj in execution of a money decree even without attachment is not a nullity. We are not concerned with the status of Budh Singh as a mortgagee. The Insolvency Judge and consequently the learned District Judge were not competent to decide in these proceedings the validity or otherwise and the priority or otherwise, respectively, of the sale to Mul Raj and the mortgage to Budh Singh. That is a

matter which, under the circumstances of this case, was outside the purview of the insolvency proceedings. The only question to be decided was whether the Official Receiver was competent to sell the property in the face of purchase in an auction sale by Mul Raj.

I consider that Mul Raj on production of his certificate of sale was entitled to succeed as against the Official Receiver and consequently the latter was not competent to confer a title by sale on Budh Singh. So far as these proceedings, therefore, are concerned, Mul Raj was entitled to a finding that the house in dispute did not vest in the Official Receiver. Any dispute that there may be between Budh Singh as mortgagee from Nidhan Singh and Mul Raj as purchaser in a Court auction must be settled between them in separate proceedings. The present appeal must be accepted and the orders of the Courts below set aside and Mul Raj declared to be the owner of the property in dispute as against the Official Receiver. I may mention that Mul Raj claims only a two-thirds share in the house in dispute and when I have used the words "property in dispute" or "house in dispute", I have always intended to mean two-third share in the house in dispute. The remaining one-third, according to the order of the learned District Judge, vests in the Official Receiver and is saleable by him. The respondent Official Receiver shall pay the costs of the appellant throughout.

K.B./A.L.

*Appeal allowed.***A. I. R. 1937 Lahore 298**

JAI LAL, J.

Warris Khan and others—Plaintiffs—Appellants.

v.

Atma Ram and others, Defendants and others, Plaintiffs—Respondents.

Second Appeal No. 8 of 1935, Decided on 11th November 1936, from decree of Dist. Judge, Rawalpindi, D/- 13th August 1934.

Custom (Punjab) — Alienation — Non-proprietors of village Usman Khattar in Rawalpindi District are entitled to alienate sites of their houses.

The non-proprietors of the village Usman Khattar in the Rawalpindi District are by custom entitled to alienate the sites of their houses and a

sale of a house owned by a non-proprietor in execution of a decree against him is not invalid.

[P 300 C 1]

Abdul Haye—for Appellants.

Mehr Chand Mahajan — for Respondent 1.

Judgment.—The appellants are proprietors of the village Usman Khattar in the District of Rawalpindi. They instituted a suit for a declaratory decree that the sale of a haveli owned by Fazal Ilahi, a non-proprietor resident of the village, in execution of a decree against him was invalid on the ground that the non-proprietors of the village in question are not entitled to dispose of sites of their houses. The sale had taken place in execution of a decree granted by the Court. The trial Court decreed the suit but the learned District Judge of Rawalpindi reversed the decree of the trial Court and dismissed the suit, and he granted a certificate under S. 41, Punjab Courts Act. Consequently this second appeal has been heard by me at some length.

The sole question for decision is whether the non-proprietors of village Usman Khattar in the Rawalpindi District are entitled to alienate the sites of their houses. The burden of proof was placed on the defendants, that is, the non-proprietors. 11 witnesses were produced on behalf of the defendants, three of whom gave evidence merely as to the existence of a custom whereby the non-proprietors are entitled to dispose of the sites of their houses. They did not however support their evidence by any instance. Eight witnesses however have given evidence which is supported by documents in most cases and most of them have mentioned not only one instance of an alienation but a number of instances. Against this oral evidence the plaintiffs relied upon three documents. Two are judgments in which alienations of sites by non-proprietors in an adjoining village have been set aside. The third relates to a suit for damages and does not appear to have any direct bearing on the question of custom. Among the instances given by the defendants' witnesses there are instances of sales of vacant sites. The instances mentioned by the witnesses relate to the period between 1895 and recent years. The most important evidence however which supports the defendants' case is a judgment of the District Judge of Rawalpindi dated 24th August 1923 in Civil Appeal No. 102 of

1923, Waris Khan v. Fakir Chand. That case related to this village and after a thorough inquiry the learned Judge in an exhaustive judgment held that in the village of Usman Khatter the non-proprietors had established a custom whereby they were entitled to alienate the sites of their houses.

In the settlement of 1864 a dispute arose between the proprietors and the non-proprietors because the names of the non-proprietors were entered as proprietors of the abadi under the orders of the Financial Commissioners. Proceedings were instituted to have the entry corrected and then the case of the proprietors was that the non-proprietors used to pay them one-quarter of the sale price of the sites. It was not their contention at that time that the non-proprietors were not entitled to sell the sites of their houses. It is not clear from the record what the result of these proceedings finally was, but their importance lies in the fact that the proprietors did not deny the right of the non-proprietors to sell the sites of their houses. They merely claimed that the non-proprietors were bound to pay them one-quarter of the sale price. At that time a list of more than 100 sales was produced before the revenue authorities and apparently the existence of these sales was not denied by the proprietors but the dispute between the parties was about the payment of the one-quarter of the sale price and inquiry was directed to that matter. Thus on the side of the non-proprietors there is a larger number of sales which have been proved by documentary evidence supported as it is by the eight witnesses mentioned above. In addition to this there are more than 100 alienations which took place before 1864. On the side of the proprietors there is not a single instance of an alienation which has been set aside at the instance of the proprietors in this village.

The learned counsel for the appellants however relied upon certain observations made in some of the judgments of this Court that the mere fact that previous alienations have not been challenged by the proprietors is no proof of the existence of a custom that the non-proprietors have a right to sell the sites of their houses. I do not think that the proposition so broadly stated can be supported by any reason. The matter must depend upon the circumstances of each case, the number

of instances of alienations and the circumstances under which they have taken place. In the present case there have been a large number of alienations before the first settlement of the village and not a single alienation has been challenged by the proprietors successfully. Only one instance in which an alienation was challenged is against the proprietors, and the previous history of the dispute in 1864 negatives the claim of the proprietors.

With regard to the judgment of the District Judge in the case of 1923 counsel for the appellants urged that the vendor in that case, Chanda, was found to be a proprietor. That may be so, but the learned Judge deliberately proceeded to decide the question of the capacity of a non-proprietor to alienate the site of his house in view of the alternative plea that even if the vendor be held to be a non-proprietor, he was entitled to sell the site of his house by custom. In my opinion therefore the learned District Judge has rightly held in this case that the non-proprietors of the village Usman Khattar are by custom entitled to dispose of the sites of their houses.

An application was made by the appellants for permission to produce additional documentary evidence. The document relied upon has been placed on the record and I have examined it. I do not think it has any important bearing on the question at issue. In spite of that document I am definitely of opinion that the conclusion of the learned District Judge is correct. I dismiss this appeal with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 300

JAI LAL AND ABDUL RASHID, JJ.

Emperor

v.

M., Bar-at-law, Lyallpur.

Civil Misc. No. 378 of 1936, Decided on 19th November 1936.

Legal Practitioner—Duties of — He must assist administration of justice — Personal motives or desire of revenge should not come in his way—He should not insult or impute motives to Presiding Officer — By asking scandalous and irrelevant questions he incurs grave responsibility.

The duty of an advocate is to assist in the administration of justice and not to obstruct or to impede it. In the performance of his professional

duties an advocate is expected not to be influenced by personal motives, desire of revenge or by resentment. It is improper for him to adopt an insulting attitude towards the presiding officer of the Court or to impute motives to him. It is illegal for him to ask irrelevant and scandalous questions and he incurs grave personal responsibility if he does so. [P 303 C 1, 2].

Dewan Ram Lal—for the Crown.

Khalifa Shuja-ud-Din—for Opposite Party.

Jai Lal, J.—Mr. M., Advocate, who was called to the Bar on 4th June 1913, and enrolled as an advocate of the Chief Court of the Punjab on 19th August 1913, has appeared before us to answer the following charges:

(1) That being engaged as counsel by one Ghulam Mohammad, Shaida, in a case under S. 384, I. P. C., you interviewed the District Magistrate of Lyallpur on or about 23rd October 1935, and there used threats and other improper methods in an attempt to induce the said District Magistrate to withdraw the said criminal case then pending against your client in the Court of the Additional District Magistrate, Lyallpur. (2) That during the cross-examination of Hans Raj on 26th, 27th and 28th November 1935, when he appeared as a prosecution witness, you, in pursuance of your threats aforesaid, put improper and scandalous questions making grave insinuations and allegations against respectable persons with a view to influencing the District Magistrate to agree to withdraw the said case against your client. (3) That during the cross-examination of Rai Sahib Lala Nathu Ram, prosecution witness in the aforesaid case, you on 5th December 1935, attempted to browbeat the Magistrate trying the case and otherwise behaved in a discourteous and improper manner in Court. (4) That the facts stated in paras. 1, 2 and 3 constitute improper conduct on your part and a reasonable cause to remove or suspend you from practice under Cl. 8, Letters Patent, and S. 13, Legal Practitioners' Act, 18 of 1879.

These charges were framed in pursuance of an application made by the learned Government Advocate on 10th June 1936. This application was supported by affidavits sworn by Messrs. Macdonald, Sant Ram, Sardari Lal and Shankar Dass. On the first date of hearing the advocate appeared before us and filed a written reply denying the allegations contained in the application of the Government Advocate.

cate; consequently we directed that evidence in support of the allegations made in the application and in rebuttal thereof be produced before us. Five witnesses have been produced by the learned Government Advocate and two by Mr. M., but beyond denying the allegations made in the application filed by the Government Advocate in his written reply, Mr. M. has not made any statement before us to explain the evidence given against him.

It is necessary to describe the incidents on which the charges are based. It appears that a newspaper called *The Toofan* is published at Lyallpur and it is apparently owned by one Ghulam Mohammad Shaida. It was brought to the notice of Mr. Macdonald, the then Deputy Commissioner of Lyallpur, that Ghulam Mohammad Shaida had attempted to blackmail one Hans Raj, a stenotypist in the office of the Superintending Engineer of Lyallpur, by demanding money from him on a threat that unpleasant matter concerning him would otherwise be published in the paper. It was thereupon arranged that Hans Raj should hand over marked currency notes to Ghulam Mohammad Shaida, who would then be caught by a Magistrate concealed in the room in which the money was to be paid. This scheme was carried into effect and Ghulam Mohammad Shaida was arrested with marked currency notes in his pocket. At the time of arrest Mr. Nathu Ram, Magistrate, who had been deputed by Mr. Macdonald and Mr. Phillip, Deputy Superintendent of Police, were present. As a result of this arrest there was considerable excitement among the friends and supporters of Ghulam Mohammad Shaida. Mr. M., who admittedly is a friend of Ghulam Mohammad, interviewed Mr. Macdonald by previous arrangement on 23rd October 1935, and suggested to him to withdraw the case against Ghulam Mohammad Shaida. He represented that improper means had been adopted by the police in arresting the accused and that he was innocent of the charge. He further pointed out to Mr. Macdonald that the Mahomedan community as a whole had always stood by him and so had Ghulam Mohammad Shaida and as Mr. Macdonald was about to be transferred from Lyallpur it was not nice for him to leave behind unpleasant memories. When this appeal to the sentiments of Mr. Macdonald did not have any effect Mr. M. resorted to threats. He told

Mr. Macdonald that unless he interfered in the matter things would be made uncomfortable for him and scandal would be made for other European officers at Lyallpur who were his friends. Mr. Macdonald naturally took offence at this attitude of Mr. M. and threatened to have him thrown out, whereupon the latter adopted an apologetic tone and stated that his object has been misunderstood by Mr. Macdonald.

The case against Ghulam Mohammad Shaida was duly sent up for trial before Lala Sant Ram, Additional District Magistrate, in a couple of days after this interview and Hans Raj was produced as the second witness for the Crown. In his cross-examination a question was put to him whether Mr. Jesson, the Superintending Engineer, was accompanied by Mrs. Jesson when he went to Dalhousie for the recess. On this question being answered in the negative by Hans Raj, the second question was asked whether his (Hans Raj's) wife had gone to Dalhousie at the time. This question was disallowed and a further question was asked whether Mrs. Gainsford, wife of the Superintendent of Police, Lyallpur, had stayed in the house of Mr. Jesson. This question also was disallowed. Then another question was asked whether Mr. Jesson and Mr. Gainsford were related to each other. The scandalous suggestion conveyed by these questions was obvious and so was their irrelevancy, but Mr. M. insisted that the questions should be recorded by the Magistrate. The Magistrate however quite properly refused to do so whereupon an application was made by the accused requiring that the proceedings be stayed because he wanted to move the higher Courts for transfer of the case from his Court.

Mr. Nathu Ram, Magistrate who had arrested the accused, was also produced as a witness for the prosecution, and in the cross-examination he was asked by Mr. M. whether he had been prosecuted for contempt of Court in the Court of Mr. Nasir-ud-Din, Magistrate. He protested against this question on the ground that it was irrelevant and scandalous. Mr. M. was warned by the Magistrate, but he persisted in putting the question. It was however disallowed. Thereupon he adopted a defiant and disrespectful attitude towards the trying Magistrate and when told about his responsibility in the matter stated

that he was fully prepared for all this because he knew that a brother Magistrate was being produced as a witness before the Additional District Magistrate and expected what was happening. He styled the behaviour of the Additional District Magistrate to be unjust. This unseemly scene continued for some minutes and subsequently an application was made by Mr. M. protesting against the note that the Additional District Magistrate had at the time made on the record describing this incident. When this matter was brought to the notice of Mr. Macdonald he took steps to have proceedings for disciplinary action started against Mr. M.

The most important charge relates to what happened in the meeting between Mr. Macdonald and Mr. M. on 23rd October 1935. The only direct evidence on this matter could be of the two gentlemen concerned. Mr. Macdonald has filed an affidavit swearing to the correctness of his version of the affair but Mr. M. beyond denying in his written reply the correctness of this version, has not given his own version of the matter. Mr. Macdonald has further made a statement on oath in this Court describing the incident. He was cross-examined at length and a witness Rana Feroze Din, a Pleader of Lyallpur, was produced in defence. Mr. Macdonald has stated that Mr. M. held out a threat to him that unless Ghulam Mohammad Shaida be released and proceedings against him withdrawn things would be made uncomfortable for him and scandal would be made for his friends, the European officials of Lyallpur. The suggestion on behalf of the advocate, as appears from the cross examination of this witness, is that a wrong impression has been created in the mind of Mr. Macdonald of what Mr. M. told him. Mr. Macdonald, however, is quite definite that the respondent had used the expression "we" or "I and other Mohammedans" in connection with threats. There was, therefore, no scope for any misunderstanding in the matter and there is no substance in the suggestion that Mr. M. had merely conveyed a friendly warning to Mr. Macdonald of what others were likely to do if he did not withdraw the case. The affidavit and the statement made by Mr. Macdonald in Court leave no doubt that an actual threat was held out by Mr. M. that he and other Mohammedans would make things uncomfortable for him and would create scandal for his European

friends stationed in Lyallpur. The learned Government Advocate has rightly contended that the later conduct of Mr. M. in putting scandalous and irrelevant questions to witnesses is a strong corroboration of the statement of Mr. Macdonald.

Apart from this corroboration, in our opinion, the clear and definite statement of Mr. Macdonald leaves no doubt that it is not a case of mere inference drawn by the witness from the conversation generally but of what he was actually told. The statement of Rana Feroze Din does not, in our opinion, shake this part of the learned Government Advocate's case. He states that, in October 1936, after Mr. M. had received notice of these proceedings, he went to Mr. Macdonald with Mr. M. by appointment and explained that the latter had been misunderstood and that Mr. Macdonald told him that he was satisfied with this explanation. The suggestion is that Mr. Macdonald admitted that he was under a wrong impression as to the conversation of Mr. M. in the interview on 23rd October 1935. Mr. Macdonald, however, flatly denies that he expressed any satisfaction with the explanation of Mr. M. He says that he expressed satisfaction only with regard to the conduct of Mr. M. after the events which are the subject matter of this charge. In our opinion the evidence of Rana Feroza Din does not establish that Mr. Macdonald had merely drawn an inference from statements made by Mr. M. on 23rd October 1935. Another witness called by the respondent, Hakim Nur Din, gave no relevant evidence in the case and need not be referred to.

With regard to the questions put to Hans Raj the evidence of Lala Sant Ram, Additional District Magistrate, Rai Bahadur Shanker Dass, Public Prosecutor, who was in charge of the prosecution of Ghulam Mohammad Shaida, and Rai Sahib Lala Sardari Lala, Prosecuting Deputy Superintendent of Police, who assisted the Public Prosecutor, leaves no doubt that these questions were asked. The suggestion made on behalf of the respondent is that all these questions were not put to the witness but only one question was asked whether Mr. Jesson and Mr. Gainsford were related to each other. We are unable to believe that the three gentlemen mentioned above have deliberately perjured themselves in the matter. The questions, in our opinion, were obviously irrelevant and scandalous and the Magis-

trate could have himself taken action against the advocate for asking them, but as they are intimately connected with the incident of the interview with Mr. Macdonald on 23rd October 1935, they have been made the subject of one of the charges in this case.

It is contended and with force by the Government Advocate that by asking these questions Mr. M. carried into effect his threat to Mr. Macdonald as otherwise they had absolutely no relevancy to the case and were obviously scandalous. With regard to the third incident relating to the question put to Mr. Nathu Ram, Magistrate, the statements of Lala Sant Ram, Additional District Magistrate, Lala Nathu Ram, Rai Bahadur Shankar Das and Rai Sahib Lala Sardari Lal clearly establish that the question was asked, was objected to and was pressed by the advocate by adopting an insulting attitude towards the Additional District Magistrate. He styled his action to be unjust and attributed motives to him which amounts to contempt of Court. This question was also irrelevant and scandalous.

In our opinion, therefore, it has been established that Mr. M. attempted to impede the course of justice by holding out illegal and improper threats to Mr. Macdonald, District Magistrate of Lyallpur, and on failing to induce Mr. Macdonald to withdraw the case against Ghulam Mohammad Shaida, he appeared as counsel for the accused before Lala Sant Ram, Additional District Magistrate, and put scandalous and irrelevant questions to the witness Hans Raj. This was done to carry out the threat held out by him to Mr. Macdonald. We also find that Mr. M. put an irrelevant and scandalous question to Rai Sahib Lala Nathu Ram, Magistrate, and on that question being disallowed adopted an improper attitude towards the trial Magistrate and styled his action as unjust. These, in our opinion, are sufficient grounds for taking disciplinary action against the Advocate as they fall within the definition of professional misconduct. It is hardly necessary for us to point out that the duty of an Advocate is to assist in the administration of justice and not to obstruct or to impede it, and that in the performance of his professional duties an Advocate is expected not to be influenced by personal motives, desire of revenge or by resentment. It is improper for him to adopt an insulting attitude towards the

presiding officer of the Court or to impute motives to him. It is illegal for him to ask irrelevant and scandalous questions and he incurs grave personal responsibility if he does so.

Mr. M. has been guilty of great dereliction of duty and of professional etiquette in the matters mentioned above. We have not heard a single expression of regret or repentance from him, therefore, we cannot but mark our condemnation of his conduct by suspending him from practice. We direct that Mr. M. be suspended from practice for a period of three months from today and that he be not permitted to resume practice as an Advocate on the expiry of three months unless he tenders an unqualified apology to this Court for his conduct in respect of which this action has been taken against him and gives an undertaking that he shall not repeat such conduct in the future. He must further, as a condition precedent to the resumption of practice, deposit in this Court Rs. 300 as to the costs of these proceedings. This order has been communicated personally to Mr. M.

B.D./A.L.

Order accordingly...

A. I. R. 1937 Lahore 303

TEK CHAND, J.

Babu Ram—Decree-holder—Petitioner.
v.

Mohammad Ali and others—Judgment-debtors—Opposite Parties.

Civil Revn. No. 295 of 1936, Decided on 19th November 1936.

Punjab Debtors' Protection Act (2 of 1936), S. 9 — Decree on unsecured debt incurred before Public Debtors' Protection Act—Judgment-debtor dying before attachment — Liability of ancestral property in hands of judgment-debtor's sons is to be determined according to Punjab Debtors' Protection Act.

A decree for an unsecured debt incurred before the commencement of the Punjab Debtors' Protection Act, was obtained against A. A died before attachment, leaving his ancestral property in the hands of his sons. The decree-holder tried to attach this property in the hands of the sons:

Held: that as the land was not under attachment, when the Punjab Debtors' Protection Act commenced, its liability for the unsecured debts of A, must be determined according to the Punjab Debtors' Protection Act. [P 304 C 1]

Ram Narain—for Petitioner.

Bodh Raj Sahani — for Respondents 1 and 2.

Order.—The petitioner obtained a money decree against Mehr Din Gujjar.

Some time later Mehr Din died. The decree-holder attached certain land in the hands of the sons of the deceased. This land has been found to be ancestral. The sons, two of whom are adults, and the third a minor, objected that the land was not liable to attachment in execution of the decree obtained against Mehr Din for a debt which had not been secured on the land. In reply the decree-holder contended that there was a special custom in the Gurdaspur district under which ancestral land in the hands of sons could be sold in execution of a money-decree against the father. The executing Court found for the decree-holder and dismissed the objection. On appeal by the objectors the Senior Subordinate Judge came to the contrary conclusion and accepting the objection released the land.

Before me, counsel for the decree-holder has assailed the judgment of the learned Senior Subordinate Judge on various grounds which, he urges, justify this Court's interference on revision. It is however unnecessary to discuss them, as during the pendency of the case in this Court, the Punjab Debtors' Protection Act 2 of 1936 has come into force. S. 9 of this Act lays down that in respect of debts incurred before its commencement, ancestral property in the hands of a subsequent holder is liable for the unsecured debts of his predecessor-in-interest, only if certain conditions specified in the proviso are fulfilled. As the land is not under attachment now, its liability for the unsecured debts of Mehr Din must be determined according to the Debtors' Protection Act. In this view of the case, the petitioner must be given an opportunity to show that he can satisfy the conditions laid down in the proviso to S. 9. His counsel therefore prays that the case be remanded to the executing Court for this purpose. Counsel for the respondents has no valid objection to raise against this course and this prayer must be granted. I accept this petition, set aside the orders of the Courts below and send the case back to the executing Court for decision in accordance with the provisions of S. 9 of the (Punjab) Act 2 of 1936. Both parties will be given opportunity to lead such evidence as they desire. In the peculiar circumstances of the case I leave the parties to bear their own costs in all Courts.

V.B.B./D.S. Case remanded.

A. I. R. 1937 Lahore 304

JAI LAL, J.

Ganga Ram—Insolvent—Appellant.

v.

Amar Nath — Creditor and others — Respondents.

First Appeal No. 176 of 1936, Decided on 26th November 1936, from order of Dist. Judge, Gujranwalla, D/- 6th April, 1936.

Provincial Insolvency Act (1920), S. 41—Application for discharge—Insolvent incurring debts recklessly and dishonestly after adjudication—Conditional order of discharge ordering payment of fixed proportion of debt is illegal—But conditional order paying certain proportion of monthly income for a period is proper.

A person, after being adjudicated insolvent, incurred further debts dishonestly and recklessly, without keeping any account books and applied for a discharge. The lower Court granted a conditional discharge, the condition being that he should pay 8 annas in the rupee to the scheduled creditors :

Held : that the condition directing payment of a fixed proportion of the debts without regard to his income or property could not be imposed, but that a conditional order should be passed asking him to pay certain proportion of his monthly income for a fixed period and that the income acquired by the insolvent during the period should also vest in the Official Receiver. [P 305 C 1]

Bodh Raj Sahani—for Appellant.

Manohar Lal Sachdeva—for Respondents.

Judgment—The appellant Ganga Ram having been adjudicated an insolvent has applied for his discharge. The learned District Judge of Gujranwala has declined to grant him an absolute discharge but granted him a conditional discharge, the condition being that he should pay eight annas in the rupee to his scheduled creditors. He has held that he is not entitled to an absolute discharge on two grounds, i. e., that he has not kept proper books of account and on a previous occasion he had made a composition with his creditors. Both these are good grounds for refusing an absolute discharge under S. 42, Provincial Insolvency Act. It appears that the insolvent made an application for being adjudicated an insolvent in 1917 and alleged that he was indebted to the extent of Rs. 40,000 in round figures. He however placed the whole of his property at the disposal of the creditors who were paid three annas in the rupee by way of composition of their debts. Subsequently he has incurred debts to the extent of Rs. 15,000 but has kept no account books.

At the same time it has been found that it has not been proved that he has concealed any property. It is in view of his conduct in connexion with his previous insolvency proceedings and subsequent recklessness in raising loans that the District Judge has imposed the condition that he should pay eight annas in the rupee.

It is contended that such a condition is illegal and cannot be imposed under S. 41, Provincial Insolvency Act. The correctness of this contention is conceded by the respondents' counsel, the respondents being the creditors who opposed the absolute discharge of the appellant. Under S. 41 the Court may grant or refuse an absolute discharge or may suspend the operation of the order for a specific time or may grant an order of discharge subject to conditions with respect to any earning or income which may afterwards become due to the insolvent or with respect to his after-acquired property but a condition that the insolvent should pay a fixed proportion of the debts without regard to his income or his property cannot be imposed. The condition, therefore, that the insolvent should pay eight annas in the rupee cannot be sustained. The question then is, what is the proper order to pass in this case. From what has been stated at the bar and in the judgment of the District Judge there is no doubt that the conduct of the appellant does not entitle him to any leniency. He has acted throughout in a reckless and dishonest manner. At the same time it is no use to refuse to grant him a discharge indefinitely. I consider that a conditional discharge should be granted to him. He stated that his monthly income as a broker is Rs. 20 to 25, probably an under-estimate. I direct that the order of absolute discharge be suspended for a period of three years and in the meantime the appellant should pay Rs. 15 a month to the Official Receiver for payment to his scheduled creditors out of his monthly earnings and any property acquired by him during this period shall also vest in the Official Receiver. On his duly performing the above conditions he shall be granted an absolute discharge on the expiry of three years from to-day. To this extent this appeal is accepted and the order of the learned District Judge modified as indicated above. There will be no order as to costs of this appeal.

V.B.B./D.S. *Appeal partly accepted.*

A. I. R. 1937 Lahore 305

ADDISON AND DIN MOHAMMAD, JJ.

Sardar Kirpal Singh and others —
Assessee—Petitioners.

v.

Commissioner of Income-tax, Lahore—
Opposite Party.

Civil Misc. No. 336 of 1936, Decided on 25th November 1936.

Income-tax Act (1922), S. 66—Question of law—No material for conclusions drawn by Income-tax authorities — Question resolves itself into one of law.

Whatever conclusions are arrived at by the Income-tax authorities, they must have some material to support them, and in case it is contended that there is no material for those conclusions, the question does resolve itself into one of law. [P 306 C 1,2]

*Mehr Chand Mahajan—*for Petitioners.

*J. N. Aggarwal and S. M. Sikri—*for
Opposite Party.

Din Mohammad, J.—The assessee in this case required the Commissioner of Income-tax under sub-s. (2) of S. 66, Income-tax Act, to refer to the High Court several questions of law arising out of the appellate order of the Assistant Commissioner of Income-tax in the matter of their assessment for the year 1934-35. Thereupon, the Commissioner drew up a statement of the case and referred the following three questions to this Court: (1) Was there no material upon which the Assistant Commissioner could uphold the finding that Sardar Kirpal Singh, and his three brothers constituted a Hindu undivided family? (2) Was there no material upon which the Assistant Commissioner could uphold the finding that each of the sources of income comprised in the assessment belonged to the said family? (3) Was assessment upon the said family not validly based upon notices addressed to Sardar Kirpal Singh, without specification of status? Not being satisfied with the statement of the case made by the Commissioner and the questions referred to us, the assessee moved this Court under S. 66 (3), praying that the Commissioner be called upon to refer certain other questions of law also that arose in their assessment.

The facts bearing upon the questions of law involved in this case may shortly be stated. Jawanda Mal and his four sons were assessed as Hindu undivided family up to 1927. In the meantime, they had opened a branch of their business in

London. On 15th March 1927, they formed themselves into a company. Out of the four sons of Jawanda Mal, Balwant Singh was for the time being excluded; the other three sons had a share each, Jawanda Mal had four and the three ladies of the family had a share each. This company was duly registered on 10th June 1927. Later, Balwant Singh, too, applied for a share and one share was allotted to him on 24th June 1927. Soon after, Jawanda Mal died, leaving besides other property a sum of Rs. 1,77,000 odd. On 15th January 1928, the sons of Jawanda Mal divided this cash among themselves in the following manner: Each son was allotted 400 shares of Rs. 100 each, thus disposing of Rs. 1,60,000. The balance which amounted to Rs. 17,000 odd was deposited with the company in the name of Mt. Dhan Devi, the widow of Jawanda Mal, at a fixed rate of interest. After 1928, the Income-tax authorities treated the four brothers as individuals apart from their company. On 1st February 1930 the brothers opened a branch of their business at Colombo. No change in their status took place up to 1934. In the 1934-35 assessment, however, the question was taken up for the first time, whether they could claim to be assessed as individuals and not as members of a Hindu undivided family, and decided against them. The Income-tax authorities have not only assessed them as a Hindu undivided family but also treated the sum deposited in the name of their mother, Mt. Dhan Devi, as a part of the joint family property and to the profits made by the company within British India, they have added Rs. 10,000 as profits received from Colombo and London.

The additional questions proposed by the assesseees relate to the inclusion of their mother's deposit in the so-called joint family property and the addition of Rs. 10,000 to the income of the said family on account of their profits on Colombo and London business. The only other point raised by the assesseees is as to the form of question No. 3 referred to above. After hearing counsel on both sides, we are satisfied that the questions proposed by the assesseees do arise in this matter and that the question No. 3 formulated by the Commissioner also requires alteration on the lines proposed by them. Whatever conclusions are arrived at by the Income-tax authorities, they must

have some material to support them, and in case it is contended that there is no material for those conclusions, the question does resolve itself into one of law. We accordingly formulate the following two questions in addition to the three questions referred to us by the Commissioner: (4) Whether there is no material for the finding that the deposit held by Mt. Dhan Devi in the Pioneer Sports, Limited, was not her separate property. (5) Whether the Income-tax Officer was legally justified in raising a presumption that any income was received in India from Colombo or London. Besides we alter question No. 3 in the following manner: (3) Whether the notices which issued to the four brothers were sufficient notice to the Hindu undivided family, if any, having regard to Ss. 2 (9), 3 and 63 (2). This alteration has been necessitated on account of the argument advanced by the assesseees' counsel that a notice served on an individual is not a valid notice to a family. We accordingly require the Commissioner to refer to this Court the two additional questions of law also as formulated above and the third question in its altered form and to draw up a statement of the case in relation thereto and refer it with his own opinion thereon to this Court. There will be no order as to the costs of this petition.

W.D./A.L.

*Order accordingly.***A. I. R. 1937 Lahore 306**

COLDSTREAM AND BHIDE, JJ.

Mt. Hukmi and others—Plaintiffs—Appellants.

v.

Fauja Singh and others—Defendants—Respondents.

Second Appeal No. 2047 of 1935, Decided on 24th November 1936, from decree of Dist. Judge, Amritsar, D/- 7th August 1935.

Custom (Punjab)—Succession—Self-acquired property—Khaira Jats of Tarn Taran Tahsil in Amritsar District—Daughter succeeds in preference to collaterals.

Amongst the Khaira Jats of Tarn Taran Tahsil in Amritsar District in the Punjab the daughter succeeds in preference to collaterals in respect of the self-acquired property of the father: *A I R 1925 Lah 35* and *AIR 1935 Lah 408, Ref.*; *AIR 1936 Lah 804, Disting.* [P 307 C 1; P 308 C 2]

*Durga Das and Madan Gopal Soni—*for Appellants.*M. C. Mahajan and Jhanda Singh—*for Respondents.

Coldstream, J.—One Sagar Singh, a Khaira Jat of Tarn Taran Tahsil in Amritsar district, died in July 1918, leaving a widow Mt. Khemi and a daughter Mt. Maro who was the mother of two sons Fauja Singh and Bhag Singh. His land was recorded by mutation in the name of his widow. Fauja Singh and Bhag Singh sued Mt. Khemi for possession of the land and house property left by Sagar Singh alleging that they were Sagar Singh's heirs by virtue of a will by Sagar Singh in their favour. The widow confessed judgment and Fauja Singh and Bhag Singh obtained a consent decree on 11th November 1919. Thereupon, four of Sagar Singh's collaterals and the widow of a fifth brought a suit for a declaration that they were not bound by the consent decree. In this they were successful, their claim being decreed on 24th June 1921—a decision upheld on appeal by the District Judge on 1st April 1922. The widow died in December 1931 and Sagar Singh's land was entered in the records as having passed to his collaterals. The latter then proceeded to sue Bhag Singh and Fauja Singh for possession of the property.

Bhag Singh and Fauja Singh resisted the suit on the grounds that the property was not ancestral qua Sagar Singh and the plaintiffs, and that as heirs they took preference of the plaintiffs who were collaterals of Sagar Singh in the third degree. The trial Court found that the lands in suit were ancestral but that the house property was acquired by Sagar Singh. Deciding, however, that by custom collaterals excluded daughters in succession to all kinds of property he gave the plaintiffs the decree they sought. Against this decision, the defendants appealed to the District Judge who reversing the trial Court's findings both regarding the ancestral nature of the land and the preferential right of the collaterals dismissed the suit. The plaintiffs have come to this Court with the present appeal, having obtained from the District Judge a certificate under S. 41 (3), Punjab Courts Act, allowing them to re-agitate the question whether among Khaira Jats the daughters exclude collaterals in succession to self-acquired property. Before us, the appellants' counsel attacks both the decision that the land concerned is not proved to be ancestral and the decision that the daughters took preference of collaterals in

succession to the property. The first is a finding of fact but it is contended that the learned District Judge ought to have held the question whether the property is or is not ancestral to be *res judicata* by the decision in a suit brought by the collaterals in 1913 to have it declared that the will made by Sagar Singh would not affect their reversionary rights and by an admission of the respondents in the suit in which they obtained a declaration on 24th June 1921 that the consent decree in favour of Bhag Singh and Fauja Singh was not binding upon them.

But there is nothing to show that such a plea was taken at the trial. The suit of 1913 was dismissed as premature and the judgments in that suit and the suit decreed in the collaterals' favour in 1921 record no finding regarding the ancestral nature of the property in suit. It is argued that the learned District Judge ought to have examined the pleadings in these suits before deciding as he did that the matter was not *res judicata*. But those pleadings were not before the Court. Nor so far as the record shows was either of the Courts below asked to take notice of the documents which appellants' counsel now asks us to examine. No ground has been made out for admitting new evidence at this stage. As regards the custom governing the parties in the matter of succession the appellants rely on the entry in the Customary law of the Amritsar district, commonly referred to as the *Riwaj-i-am* compiled by the Settlement Officer in 1914. The *Riwaj-i-am* compiled at the previous settlement was silent on the subject but the answer to question 60 in the compilation of 1914 shows that at that time "nearly all" the tribes said that agnates however remote excluded daughters. In answer to the next question No. 61, it was stated that there was no distinction as to the right of a daughter to inherit ancestral property as distinguished from self-acquired property of her father. There has been some conflict in the judgments of this Court in applying the rule stated in these answers but recently it has been followed in many cases relating to succession among agriculturist tribes of the district. The preface to the book shows that for drawing up the answers to the various questions put to the people enquiries were made from members of 26 sub-divisions of the Jat tribe and that other sub-tribes with a strength of less

than one thousand, were not questioned. No representative of the Khaira sub-division was examined. To establish their case the appellants were bound to prove that the particular custom they alleged was followed by their particular clan.

This, in my opinion, they have not done, the only evidence produced other than the answers to questions 60 and 61 of the *Riwaj-i-am* which were not given by the Khaira Jats being of an inconclusive character which has not been relied upon before us. On the other hand the respondents put forward two judicial instances of succession by daughters in preference to collaterals. These are proved by two judgments of this Court, 5 Lah 364¹ and A I R 1935 Lah 408.² The first (Scott-Smith and Harrison, JJ.) related to Khaira Jats of the contiguous district of Gurdaspur, the land in suit being ancestral; the second (Hilton and Din Muhammad, JJ.) to Khaira Jats of Amritsar district. The first judgment was considered to be a relevant piece of evidence by the Judges who decided the second, although the collaterals in that case were of the tenth degree. In the second case, where the property concerned was self-acquired of the last male owner, the learned Judges found that the evidence was not sufficient to prove any custom among Khaira Jats of Amritsar district either of daughters succeeding in preference to collaterals or of collaterals succeeding in preference to daughters. The learned Judges, therefore, applied the "general custom of the Punjab" as described in para. 23 of Rattigan's Digest of Customary law, which is in favour of daughters. Reference was made to this judgment in 17 Lah 296³ where it was rejected as an instance of no value because the *Riwaj-i-am* was deliberately rejected and reliance had wrongly been placed upon "general custom," instead of on proof of any custom alleged by the parties. But the judgment in 17 Lah 296³ dealt with a case of succession among Aulak Jats, a sub-tribe who had been represented in the inquiry made by the Settlement Officer for the purpose of compiling his Customary law of the district. In the case before us as already noticed

the parties are of a sub-tribe who were excluded from the inquiry and the answer to question 60 shows that not all of those who were questioned stated the custom to be in favour of the collaterals. Assuming that in this case neither side succeeded in proving the custom it alleged, we have to fall back, not upon any "general custom," but upon the personal law of the parties and this law being in favour of the daughters I would decide that the lower appellate Court's judgment cannot be said to be wrong and I would accordingly dismiss this appeal. Having regard to all the circumstances I would make no order as to costs.

Bhide, J.—I agree.

B.D./A.L.

Appeal dismissed.

* A. I. R. 1937 Lahore 308

ADDISON AND DIN MOHAMMAD, JJ.

Messrs. Mela Ram-Shib Dayal —
Assessee—Petitioners.

v.

Commissioner of Income-tax, Punjab—
Opposite Party.

Civil Ref. No. 19 of 1936, Decided on 26th November 1936, from Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, D/- 1st June 1936.

* Income-tax—Previous years — Assessee can have two previous years, one for main office and another for branch office—But he cannot accumulate two years' results of branches and account for them in one year's results of the main office.

The assessee is entitled to have two 'previous years', one for the head office and one for the branches, but in his assessment he must add the results of the two, each year and make his return on this basis. He cannot accumulate the results of two years of the branches and account for them in one year's results of the main office.

[P 309 C 2]

Kirpa Ram Bajaj—for Petitioners.

J. N. Aggarwal, S. M. Sikri and M. M. Aslam Khan—for Opposite Party.

Addison, J.—A Division Bench of this Court required the Commissioner of Income-tax to state the case of the Hindu undivided family, Mela Ram-Shiv Dayal, and refer it to this Court and at the same time formulated the following question :

Whether in the circumstances mentioned in the order the losses of the branches ought to have been allowed in the assessment year 1932-33 of the head office.

1. Gurdit Singh v. Mt. Malan, A I R 1925 Lah 35=84 I C 171=5 Lah 364.

2. Thakar Singh v. Mt. Dhan Kaur, A I R 1935 Lah 408=157 I C 114=37 P L R 225.

3. Kartar Singh v. Mt. Banto, A I R 1936 Lah 804=17 Lah 296=38 P L R 300.

The facts are fully set out in the order of the Bench, dated 10th February 1936,* and are amplified in the reference of the Commissioner. In the Commissioner's opinion, the answer should be in the negative. The statement of facts shows that it has not been established that there was a regular method of bringing into the books of the main shop the results of the branches for every 12 months' period ending in the main previous year. "Previous year" is defined in S. 2 (11), Income-tax Act. The case for the assessee is that the main office uses the Sambat year, which ended on 19th March 1931 whereas the branches use the ordinary financial year, which ended on 31st March 1931. It was, therefore, argued that the assessee was not bound to include the profit or loss of the branches, as the 'previous year' of the branches expired a few days later than the 'previous year' of the head office. Reference was made to para. 6 (viii) of the Executive Notes and Instructions regarding the Income-tax Law and Rules at p. 148 of the Income-tax Manual. This executive instruction runs as follows :

If an assessee closes his accounts in different dates for different businesses or different sections of the same business, or different sources of income, his income should be calculated separately for each business, section of business or source, according to the accounting year adopted for it and the aggregate of the incomes thus computed should be treated as the income of the previous year. Each of the years of which the income is thus added together must, of course, satisfy the definition of 'previous year' in S. 2 (11) of the Act with reference to the same year of assessment.

Whether this instruction is in accordance with law or not, is not very important as the assessee would be entitled to take advantage of it if it is in his favour, seeing that it has been published for general information. The scheme of the Act and the definition of 'previous year' would, however, seem to show that there can be only one previous year in one assessment. The Income-tax Commissioner has remarked that he had no desire to go against the instruction embodied in para. 6 (viii), but he says that the concession allowed by it does not mean that the assessee can incorporate two years' results of the branches in one year's account on the ground that the two years' results of the branches happen to come within the previous year of the main office. This is actually what the assessee is contending

for. As we read this instruction it means that under it the assessee is entitled to have two 'previous years,' one for the head office and one for the branches, but in his assessment he must add the results of the two each year and make his return on this basis. He cannot accumulate the results of two years of the branches and account for them in one year's results of the main office. For the reasons given we answer the question in the negative and allow the Commissioner his costs.

B.D./D.S. *Answer accordingly.*

A. I. R. 1937 Lahore 309

SKEMP, J.

Alam Khan—Judgment-debtor—Appellant.

v.

Anjuman Imdad Bahmi Qarza, Decree-holder and *others*, Sureties and Auction-purchasers—Respondents.

Second Appeal No. 726 of 1936, Decided on 9th December 1936, from order of Senior Sub-Judge, Gurdaspur, D/. 28th May 1936.

Civil P. C. (1908), S. 60 (1) (c) and O. 21, R. 90 (as amended by Lahore High Court)—Objection under S. 60 (1) (c) after sale but before confirmation — Objection cannot be entertained.

Where objection to a sale of immovable property is taken under S. 60 (1) (c) after sale, but before sale is confirmed, objection falls under O. 21, R. 90, as amended by the Lahore High Court and is not entertainable. [P 310 C 1]

Ram Lal Anand I—for Appellant.

Mela Ram for *C. L. Aggarwal*—for Respondents.

Judgment.—The sole question before me in this second appeal is whether an objection made under S. 60 (1) (c), Civil P. C., may be entertained if it is first preferred at a date after the sale has taken place but before the sale is confirmed. In this case a house and vacant site were attached on 25th December 1934 and sold on 4th October 1935. An objection was made on 17th October 1935 before the sale had been confirmed. The executing Court accepted the objection but the lower appellate Court relying on a ruling reported as A I R 1930 Lah 106¹ held that objections under S. 60 must be made before the property is sold.

1. *Jita Singh v. Ganpat Rai*, A I R 1930 Lah 106=121 I C 303.

* [See A I R 1936 Lah 546].

The appeal was admitted by a learned Judge of this Court on Malak Ram Lal Anand's contention that the ruling just cited does not lay down correct law. Malak Ram Lal Anand's contention before me is that the authorities relied on in A I R 1930 Lah 106¹ do not lay down the proposition deduced from them. In three of the authorities cited the point was taken not in objection proceedings but in a suit brought necessarily after the confirmation of the sale. The fourth case however 7 All 641,² a Division Bench ruling, fully supports the proposition originally laid down. It is however unnecessary to go further because in my judgment the matter is concluded by an amendment made by the Lahore High Court to O. 21, R. 90, Civil P. C. That rule deals with applications to set aside a sale of immoveable property and the local Rule includes the following since 7th April 1932:

Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted.

Relying on this rule I dismiss the appeal with costs.

V.B.B./D.S.

Appeal dismissed.

2. Ramchhiabar Misr v. Bechu Bhagat, (1885) 7 All 641=1885 A W N 190.

A. I. R. 1937 Lahore 310

SKEMP, J.

Abdul Qadir and others — Plaintiffs — Appellants.

v.

Municipal Committee, Gujrat — Defendant — Respondent.

Second Appeal No. 786 of 1936, Decided on 8th December 1936, from decree of Senior Sub-Judge, Gujrat, D/- 8th April 1936.

Punjab Municipal Act (1911), S. 188 — Government Notification No. 19192 — Municipal Committee authorized to levy octroi on animals brought into town for slaughter but not on animals in town or not brought in for slaughter—Municipal Committee can realize octroi on animals already slaughtered — Aggrieved party can claim refund of tax illegally recovered.

A Municipal Committee, entitled by the Punjab Government Notification No. 19192 to charge octroi on animals brought into town for slaughter but not on animals already in the town either born there or not brought there for slaughter, can realise octroi on animals already slaughtered at the shops of the licensed butchers, where there is no Municipal slaughter house; otherwise there would be smuggling on a considerable scale, the

animals intended for slaughter being mixed up with herds that go out for grazing every day; the aggrieved party can claim refund of any tax illegally realized. [P 310 C 2; P 311 C 1]

Mohammad Husain (Malik) — for Appellants.

Dr. Tassaddaq Hussain — for Respondent.

Judgment. — The plaintiffs who are butchers of Gujrat sued the Municipal Committee of Gujrat for an injunction to restrain the Committee from realizing octroi from the plaintiffs on account of animals slaughtered at their shops. It appears that at Gujrat there is no Municipal slaughter house for bullocks and cows and that animals of this class have for very many years been slaughtered at licensed private slaughter houses at the plaintiffs' shops. The Committee pleaded that there was a contract enabling it to realize octroi on animals already slaughtered but this was found against it by the trial Court, and it is now admitted that this finding is correct. The other substantial issue was: "Is the defendant entitled to realize octroi on animals already slaughtered?" Both the lower Courts found on this point against the plaintiffs and dismissed the suit.

The plaintiffs have come here on further appeal. Their learned counsel Khan Bahadur Malik Muhammad Hussain has referred to S. 188 (g), Punjab Municipal Act, which he says presumes that octroi on animals can only be levied on entry into the Municipality. This is not so. This section is purely permissive. He also referred to S. 78 but this is merely a penal section. The tax is levied under the Punjab Government Notification No. 19192, dated 28th June 1934, which lays down that the Municipal Committee with the previous sanction of Government has imposed the rates of octroi shown in the schedule appended below. This includes class II, animals of a class for slaughter. This does not carry the discussion much further. The Courts below decided the suit on the assumption that the Committee was entitled to charge octroi on animals brought into the town for slaughter but not on animals already in the town either born there or not brought there for slaughter. They held that unless the present method levying octroi were continued, there would be smuggling on a considerable scale, the animals intended for slaughter being mixed up with the herds

that went out for grazing every day. The trial Judge said that the plaintiffs could sue the Committee for every item of octroi illegally realized; the learned appellate Judge, that the plaintiffs could claim a refund on such cattle. The appellants' counsel says that it would not be in accordance with law for the Committee to grant a refund on any article except that exported; but I cannot find warrant for this proposition.

In conclusion, it was suggested that I should grant the plaintiffs an injunction restraining the Committee from realizing octroi on animals not brought into octroi limits for purposes of slaughter: but this was not the relief which the plaintiffs sought and in practice it would give rise to grave difficulties. There are no sufficient reasons for interfering with the judgments of the Courts below and this second appeal is dismissed with costs.

V.B.B./K.S. *Appeal dismissed.*

A. I. R. 1937 Lahore 311

JAI LAL, J.

Jiwan Das — Defendant — Appellant.
v.

Hira Das — Plaintiff — Respondent.

Second Appeal No. 1943 of 1935, Decided on 1st December 1936, from decree of Dist. Judge, Hoshiarpur, D/- 26th July 1935.

Custom (Punjab) — Religious endowment — Mahant — Succession — Thakardwara — Mahant of Thakardwara of Bairagis nominating successor — Still confirmation by Bhek and Sewaks is essential — Such custom being generally recognized strong evidence is essential to prove contrary.

Where a Mahant of Thakardwara of Bairagis nominates his successor, still the appointment ultimately rests with the Bhek and Sewaks and their confirmation and election is essential. This being a generally recognized custom strong evidence is always required to establish a custom, which is contrary to it. [P 311 C 2; P 312 C 1]

Achhru Ram — for Appellant.

Mehr Chand Mahajan and *Yashpal Gandhi* — for Respondent.

Judgment.—The dispute in this case relates to the Thakardwara of Bairagis in village Sahri in the Hoshiarpur district. The previous Mahant Bansi Das having died a dispute arose between Hira Das, respondent, and Jiwan Das, appellant, as to the right to succeed him. The latter claimed by virtue of nomination by the

deceased Mahant; the former by appointment by the Bhek. The learned District Judge has held that the respondent was duly elected by the Bhek after the death of Mahant Bansi Das; he has also held that the appellant had been appointed by Bansi Das as his successor during his lifetime, but he has decreed the suit on the ground that even the appointment of a successor by a Mahant of this shrine must be followed by confirmation by the Bhek. In other words the ultimate appointment is in the hands of the Bhek though a Mahant can nominate his successor and as a rule of practice the Bhek respects his nomination and repudiates it only if there are good reasons for doing so.

The shrine in question belongs to "Ram Kabir" sect of the Bairagis, and the only question that has been agitated on this appeal and which could be agitated, in view of the certificate granted by the District Judge under S. 41, Punjab Courts Act, is, whether, according to the custom applicable to the shrine in question, it is open to the Mahant to nominate his successor, and if so, such nomination completes the title of the nominee without confirmation by the Bhek and the Sewaks. The learned District Judge has held that election and confirmation by the Bhek and the Sewaks is essential in order to establish title to the gaddi. The evidence led for the plaintiff on the question of custom involved is overwhelmingly strong. There is only one witness Prahlaad Das, produced by the plaintiff who has not fully supported his case; otherwise the statements of Mahant Lachhman Das, (P. W. 7), Mahant Raghbir Das of Hajipur, (P. W. 9), Mahant Raghbir Das of Ram Tutwali, (P. W. 12), Janki Das, (P. W. 12-A), Thakar Das, (P. W. 13), Prem Das, (P. W. 14) and Nandu Lal, (P. W. 15), are definite that confirmation by the Bhek and the Sewaks is essential. These witnesses have stated, and this statement has been relied upon by the appellant's counsel, that a successor nominated by the Mahant can be removed only for immorality or some other good cause. These statements, however, do not militate against their effect of this testimony that election and confirmation of a nomination by the Bhek and the Sewaks is essential.

Against this evidence, statements have been made by six witnesses on behalf of the defendant. They are (D. W. 3), Kishore Das, (D. W. 4), Sadhu Das, (D. W. 5), Raghbir Das, (D. W. 6), Balbhadar Das,

(D. W. 7), Bhagat Ram and (D. W. 20), Lala Ajudhia Prasad, an advocate of Hoshiarpur, who is a Sewak of the Thakardwara. The evidence of these witnesses is that a nomination once made by the Mahant confers a title on the nominee to succeed to the Mahant and such nominee cannot be removed from office by the Bhek afterwards. These statements, in my opinion, are opposed to the essential character of the status of a Mahant in relation to the shrine. The well recognized custom among all the shrines of this nature is that the appointment ultimately rests with the Bhek and the Sewaks, and strong evidence is required to establish a custom which is contrary to the generally recognized custom of this character. In my opinion the learned District Judge has reached the correct conclusion on the question of the custom and agreeing with his conclusion I dismiss the appeal, but make no order as to the costs of this appeal.

V.B.B./D.S.

*Appeal dismissed.***A. I. R. 1937 Lahore 312**

JAI LAL, J.

Rama Nand and another—Defendants
—Appellants.

v.

Nand Kishore—Plaintiff—Respondent.

Second Appeal No. 395 of 1936, Decided on 30th November 1936, from decree of Dist. Judge, Amritsar, D/- 7th January 1936.

(a) Practice—New plea—Plea of limitation depending on evidence cannot be allowed in second appeal.

A plea of limitation depending on evidence cannot be entertained for the first time in second appeal. [P 312 O 2]

(b) Partnership — Accounts of dissolved partnership — Possession of account books need not be determined before preliminary decree—Court when finally settling accounts may draw adverse inference against party withholding accounts.

In a suit for accounts of a dissolved partnership there is no law that an enquiry to determine in whose possession the account books are, must be held before the passing of a preliminary decree, though normally that should be the practice. In such a suit the person in whose possession the books are and who has kept the accounts and knows all about them is entitled to file a suit for accounts. Normally there is no accounting party in such a suit, though if a partner withholds the books the Court may draw an inference against him when finally settling the accounts. [P 312 O 2]

Prakash Chandra Jain—for Appellants.

Din Dayal Khanna—for Respondent.

Judgment.—Defendant appeals against a decree for rendition of accounts of a dissolved partnership passed by the trial Court and confirmed by the District Judge on appeal. An objection is raised by the appellant for the first time that the suit when instituted in the Court of the Subordinate Judge was barred by time. The suit was, however, instituted in the first instance in a civil Court at Ahmedabad. Then it was well within time. The plaint was returned for want of jurisdiction and was presented in the Court of the Subordinate Judge at Amritsar. It is alleged that the suit when instituted in the Court of the Subordinate Judge, was barred by time. It may be, but I do not decide that when the suit was filed at Amritsar, it was barred by limitation having regard to the normal time fixed for filing such suits. But the question arises whether the plaintiff is entitled to a deduction of the time spent in prosecuting the suit in the civil Court at Ahmedabad under S. 14, Lim. Act. The determination of this question depends upon evidence. Consequently I decline to entertain the plea of limitation for the first time on this second appeal.

On the merits there is no substance in the appeal. It is contended that the trial Court should have determined the question in whose possession the account books are before passing the preliminary decree. There is no law that such an enquiry must be held before the passing of the preliminary decree in a suit like this though normally that should be the practice. In a suit for accounts of a dissolved partnership the person in whose possession the books are and who has kept the accounts and knows all about them is entitled to file a suit for accounts. Normally there is no one accounting party in such a suit though if a partner withholds the books the Court may draw an inference against him when finally settling the accounts. I am informed that the trial Judge did frame an issue about the possession of the books after the passing of the preliminary decree and this issue has not yet been determined. I see no illegality in the manner in which the trial Court has determined this suit. I dismiss this appeal with costs.

V.B.B./K.S.

Appeal dismissed.

A. I. R. 1937 Lahore 313

JAI LAL, J.

Firm Mohan Lal-Lakhmi Dass —
Petitioner.

v.

People's Bank of Northern India, Ltd.
in liquidation, and others — Judgment-
debtors—Opposite Parties.

Civil Revn. No. 851 of 1936, Decided on
27th November 1936, from order of Senior
Sub-Judge, Gujrat, D/. 6th December
1935.

(a) Execution — Order of attachment —
Party, neither judgment-debtor nor legal
representative of judgment-debtor, has no
right to appeal from such order—He can
only formally object to attachment.

Where in execution proceedings an attachment
order is made, a party which is neither the
judgment-debtor nor a legal representative of the
judgment-debtor, is not entitled to appeal against
the attachment order. If it is aggrieved by it, it
should formally object to the attachment.

[P 313 C 2]

(b) Execution — Attachment — Judgment-
debtor having share in shop—Order attach-
ing specific goods in shop is illegal — Proper
order is to prohibit judgment-debtor from
transferring his share.

Where in execution a decree-holder seeks to
attach the share of the judgment-debtor in a
shop, attachment can be made only by prohibiting
the judgment-debtor from transferring his share
and subsequently such share can be sold in exe-
cution of the decree, but specific goods in the
shop can neither be attached nor sold.

[P 313 C 2; P 314 C 1]

(c) Civil P. C. (1908). S. 51 and O. 40, R. 1
—Judgment-debtor possessing share in firm
—It is doubtful, if receiver can be appointed
in execution—Approximate value of share
can be ascertained by appointing Commis-
sioner to find out assets and liabilities of
firm (*Quaere*).

Quaere.—In execution of a decree against a
person possessing a share in a firm it is
doubtful if a receiver under S. 51 can be
appointed because a receiver cannot be appointed
for the custody of the property which the judg-
ment-debtor himself cannot take possession of :

[P 314 C 1]

In order to ascertain the approximate value of
the shares of the judgment-debtor, it may be
open to the Judge to appoint a Commissioner to
make an inventory of the assets of the firm and
its liabilities.

[P 314 C 1]

Dewan Chaman Lal—for Petitioner.

Bhagwat Dayal—for Opposite Parties.

Order.—No appeal lies in this case.
But having regard to the circumstances of
this case I have decided to take action in
exercise of the revisional jurisdiction of
this Court. The facts are these : A money
decree exists in favour of the People's

Bank of Northern India in liquidation and
one of the judgment-debtors is Des Raj.
Alleging that Des Raj is a partner in the
firm Mohan Lal-Lakhmi Das, the Official
Liquidator of the Bank sought to attach
the share of Des Raj in the firm. But
instead of issuing a prohibitory order to
Des Raj not to alienate his share in the
firm a warrant was issued for the attach-
ment of the goods in the shop. Objection
was taken to this course by Mohan Lal
and Lakhmi Das, both of whom claimed to
be the sole proprietors of the firm, and
alleged that Des Raj had no share in it.
When this matter was reported to the
executing Court, a notice was issued to
Mohan Lal and Lakhmi Das to show
cause why they should not be prosecuted
for obstructing the attachment. On this
Lakhmi Das made an application in which
he stated that Des Raj was not a partner
in the firm as he had already separated.
Des Raj, it may be mentioned, is a brother
of Mohan Lal and Lakhmi Das. He also
denied that there had been any obstruc-
tion. At the hearing of the proceedings,
the Court remarked :

The contents of the application of Lakhmi Das
are correct. The counsel admit the same. No
steps should be taken further in respect of a notice
issued to the obstructors. No costs.

But on the same day the Judge passed
another order which is to the effect :

Notice to issue to Des Raj on receipt of process
fee to the effect that he should not effect any
transfer of 1/3rd share of firm Manohar (Mohan)
Lal-Lakhmi Das, situated at Railway Station
Gujrat. Moreover, the Official Receiver is
appointed as a receiver under S. 51, Civil P. C., so
that he might prepare a list of the property and
goods, etc., of this firm, produce the same in
Court and obtain a *sapurdnama*.

It is against this last order that this
appeal is preferred, the appellant being
the firm Mohan Lal-Lakhmi Das. It is
obvious that they are not entitled to
appeal against the order. The firm is
neither the judgment-debtor nor is it the
legal representative of the judgment-
debtor. The proper course apparently for
the appellant was formally to object to
the attachment of 1/3rd share alleged to
be owned by Des Raj in the partnership.
But on both sides there have been irregu-
larities. The original order attaching the
specific goods in the shop was illegal. In
a case like this, the attachment could be
made only by prohibiting the judgment-
debtor from transferring his share and
subsequently such share could be sold in
execution of the decree, but the specific

goods in the shop could neither be attached nor sold. The purchaser in execution would then be vested with all the rights of Des Raj and, therefore, with all the rights of a partner, but no partner is entitled without the consent of the other partners to take exclusive possession of any goods belonging to the partnership and to bring it to his own use. The order now passed by the Judge below, therefore, is correct to the extent that Des Raj has been restrained from transferring 1/3rd share in the firm Mohan Lal-Lakhmi Das. I am assuming that the Court below did not decide, when it recorded the note that 'the contents of the application of Lakhmi Das are correct and that counsel admit the same,' that Des Raj was not a partner. The application contained an allegation by Lakhmi Das that Des Raj had no share in the firm and the order as recorded would imply that all the allegations made by Lakhmi Das were admitted to be correct, but the further order passed on the same day by the Judge indicates that the admission was not considered to extend to the claim that Des Raj was not a partner in the firm. Otherwise, the Judge could not have passed an order restraining Des Raj from selling his 1/3rd share.

Now, in order to ascertain the approximate value of the share of Des Raj it may be open to the Judge to appoint a Commissioner to make an inventory of the assets of the firm and of its liabilities, and the appointment of the Official Receiver, it is now conceded before me on behalf of the respondent, should be deemed to be his appointment as a Commissioner and not as a receiver. In fact it is doubtful if a receiver could be appointed under S. 51 because a receiver cannot be appointed in this case for the custody of property which Des Raj himself could not take possession of. This appears from O. 40, R. 1, sub-r. (2) which is :

Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

The order that sapurdnama should be obtained is, therefore, illegal. A sapurdnama can only be obtained after possession has been taken of the property by the official concerned and then it is handed over to another person, the sapurddar. In order, however, to place the proceedings on a proper footing and to

safeguard the interests of all the parties concerned I direct that the following procedure be adopted in this case. I assume that the notice has already been served upon Des Raj in pursuance of the order passed by the Court on 6th December 1935. If not, it should immediately be served. The petitioners may then, if so advised, file an objection under O. 21, R. 58. This objection should immediately be summarily investigated by the executing Court. The question to be determined would be whether Des Raj is a partner in the firm Mohan Lal-Lakhmi Das. If the Court finds that he is, then the Court should ascertain whether usual and necessary books of account are regularly kept in the firm including a stock register. If they are, then the affairs of the firm can be ascertained from those books and it is not necessary to make an inventory of the goods of the firm. If, however, there be any suspicion that the books are not properly kept or are being falsified, then the Court would be justified to have an inventory of the goods in the shop made. Subject to the result of any suit that the parties may file under O. 21, R. 63, the share of Des Raj, if found to exist by the executing Court, shall be sold by auction and the sale proceeds dealt with in accordance with law. I consider that this is the proper procedure to be adopted in this case and I would not have ordinarily given these directions, but for the fact that at one time an attempt was made to seize the goods in the shop, and even now by the order relating to the sapurddar it seems to be assumed that possession of the specific goods can be taken by the receiver.

I accordingly accept this petition to this extent : that the order authorizing the receiver to take possession of the goods and books in the shop which is implied in the direction relating to the sapurdnama is set aside and the order relating to the preparation of an inventory of the goods in the shop is stayed till necessity for this course arises as indicated above. There will be no order as to the costs of this petition.

V.B.B./K.S. *Petition partly accepted*

A. I. R. 1937 Lahore 315

TEK CHAND AND SKEMP, JJ.

Ghulam Mohammad Shah and others—
Plaintiffs—Appellants.

v.

Said Hussain Shah and others—
Defendants—Respondents.

First Appeal No. 2279 of 1935, Decided on 27th October 1936, from decree of Senior Sub-Judge, Jhang, D/- 3rd September 1935.

(a) Practice—Procedure—Rules and Orders framed by High Court are executive directions for guidance of subordinate Courts—Rules if not in accordance with statute law have no authority and statute law must be followed.

The Rules and Orders framed by a High Court are only executive directions for the guidance of subordinate Courts prepared in the office of the High Court, and if occasionally by oversight it should happen that these rules are not in accordance with the statute law, then they have no authority, and the text of the statute law must be followed. [P 316 C 2]

(b) Jurisdiction—Civil and Revenue Courts—Partition proceedings—Question of title—Revenue Officer may himself decide it as civil Court or may refer it to civil Court—Revenue Officer deciding it without such formalities as plaint, written statement or issues and then ordering suit in civil Court—Such decision is not as civil Court—Civil Court has therefore jurisdiction to decide question of title—Suit to establish title may be instituted at any time within limitation even after partition is completed.

Where a question as to title of the land to be partitioned is raised during partition proceedings, the revenue officer may decide the question of title himself as a civil Court or refer the matter to a civil Court for a decision. In such a case if there is no plaint, no written statement, no issues are struck—in a word there are no formal proceedings and the Revenue Officer opines that the title of a party is ill-founded and orders that a suit to establish title may be instituted in a civil Court within 60 days of the order, the Revenue Officer is not proceeding as a civil Court. So his direction to lodge a civil suit still stands and therefore the civil Court has jurisdiction to decide the title. [P 316 C 1, 2]

Even if such a civil suit to establish title is not instituted within 60 days, it may be instituted at any time within limitation, even after the partition is completed: 61 P R 1897 and A I R 1931 Lah 664, Rel. on. [P 316 C 2]

Barkat Ali and S. M. Jamil — for Appellants.

*Mohammad Amin—*for Respondents.

Skemp, J.—This case came up a short time ago and was adjourned in order that the parties might file a written compromise. No written compromise however

has been put in and the parties are absent today. Both counsel state that although they have communicated with their clients they have received no answer. In these circumstances we have no alternative but to proceed with the appeal. This appeal is one incident in long drawn-out partition proceedings. In the year 1917 an application was made for the partition of the village shamilat of village Jahani Shah, Tahsil Chiniot, District Jhang. The father of the present plaintiffs, one Shah Jamal, raised an objection that the land which is now in dispute was not shamilat and was not liable to partition. The revenue officer directed Shah Jamal to bring a civil suit to establish his claim and he did so in March 1919. The suit was dismissed on the merits on 15th January 1920 and an appeal to the High Court was dismissed on 14th April 1924. After several previous applications had been made but dismissed in default, partition proceedings were resumed on an application dated 5th November 1930. In the course of the proceedings the present plaintiffs, the three sons of Shah Jamal, raised the objection that owing to the lapse of time they had acquired proprietary title by adverse possession over the land in dispute and that it was not open to partition. The Assistant Collector in his order dated 10th December 1932 expressed the opinion that this contention was ill founded, but finally gave the plaintiffs sixty days to lodge a suit in a civil Court to establish their claim.

The plaintiffs appealed to the Collector who dismissed the appeal. He expressed an opinion on the question of adverse possession, but not as to the final direction of the Assistant Collector. He said in conclusion that as the partition proceedings had been pending for a long time the Assistant Collector should take steps to bring them to an early conclusion. The plaintiffs then lodged a suit before a civil Court which was dismissed on 14th May 1934 by Mr. Mela Ram, Subordinate Judge, First Class, Jhang, on the ground that the Revenue Officer had himself determined the dispute as to title and that his permission to have the dispute determined in the civil Court was *ultra vires*. Mr. Mela Ram held that the suit was bad for want of cause of action and he rejected the plaint under O. 7, R. 11, Civil P. C. An appeal to this Court was dismissed. O. 7, R. 13, Civil P. C., lays down that the

rejection of the plaint on any of the grounds previously mentioned, i. e., including R. 11, shall not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. Accordingly after the rejection of the plaint the plaintiffs lodged the present suit on 18th May 1934. The defendants, other owners in the shamilat, took various pleas in particular that the suit was barred by the rule of res judicata. The learned Subordinate Judge held that the suit was not barred by the rule of res judicata and decided other issues in favour of the plaintiffs but he held a second time that a civil Court has no jurisdiction to try the suit. He relied in particular on directions in the rules and orders of this Court in para. 5, Chap. 2-C, Vol. 1, which lay down that :

A civil Court can only entertain a suit relating to a dispute as to title in revenue-assessed land arising in partition proceedings, when a Revenue Officer declines to determine the question himself and refuses to proceed to partition until the question is determined by a competent Court.

Like Mr. Mela Ram he held that the Revenue Officer had himself decided the question. The question for determination in appeal is whether a civil Court has jurisdiction to decide this suit. Mr. Barkat Ali who represented the appellants pointed out that as the second suit lay all that this Bench has to consider is whether the decision of the Second Subordinate Judge is correct. He also drew attention to the terms of S. 117 (1) and (2) (a) and (b), Land Revenue Act, which ran as follows :

117. (1) When there is a question as to title in any of the property of which partition is sought the Revenue Officer may decline to grant the application for partition until the question has been determined by a competent Court, or he may himself proceed to determine the question as though he were such a Court; (2) where the Revenue Officer himself proceeds to determine the question, the following rules shall apply, namely (a) if the question is one over which a Revenue Court has jurisdiction, the Revenue Officer shall proceed as a Revenue Court under the provisions of the Punjab Tenancy Act, 1887; (b) if the question is one over which a civil Court has jurisdiction, the procedure of the Revenue Officer shall be that applicable to the trial of an original suit by a civil Court, and he shall record a judgment and decree containing the particulars required by the Civil Procedure Code to be specified therein.

Now, from this it is clear that when a question as to title of the land to be partitioned is raised during partition proceedings the Revenue Officer may either decide the question of title himself as a civil Court or refer the matter to a civil Court for decision. The point about

deciding as a civil Court is missed in the passage from para. 5, Chap. 2-C, Vol. 1 of the Rules and Orders quoted above. The Rules and Orders are only executive directions for the guidance of subordinate Courts prepared in the office of the High Court, and if occasionally by oversight it should happen that these rules are not in accordance with the statute law then they have no authority and the text of the statute must be followed. Steps will be taken to have the passage in question re-drafted. In the present case the Revenue Officer indeed expressed an opinion at some length, but he did not act as a civil Court. There was no plaint, there was no written statement, no issues were struck—in a word, there were no formal proceedings. Therefore, the Revenue Officer did not proceed as a civil Court and hence his direction to lodge a civil suit still stands. No doubt the plaintiffs have not lodged their suit within sixty days of the order but there is abundant authority that a civil suit to establish title may be lodged at any time within limitation, even after the partition is completed, the leading case being 61 P R 1897¹: see also 12 Lah 688.² In these circumstances we have no alternative but to accept the appeal and to remand the case to the Court of the Senior Subordinate Judge, Jhang, for procedure in accordance with law. Court-fee on the appeal will be refunded; other costs of this appeal will be costs in the cause.

V.B.B./D.S.

Appeal accepted.

1. Bachan Singh v. Madhan Singh, (1897) 61 P R 1897 (F B).
2. Tirath Ram v. Mt. Nihal Devi, A I R 1931 Lah 664=134 I C 299=12 Lah 688=32 P L R 434.

A. I. R. 1937 Lahore 316

TEK CHAND, J.

L. P. Verma—Defendant—Petitioner.

v.

Dyer Meakin Breweries, Ltd., Plaintiff and another, Defendant—Opposite Parties.

Civil Revn. No. 169 of 1936, Decided on 1st December 1936, from decree of Small Cause Court Judge, Simla, D/- 21st December 1935.

Punjab Excise Manual, Vol. 2, R. 27—Licensee can allow other persons to conduct sales without previous sanction of Collector—Such other person purchasing liquor and

selling it—Contract of purchase is not void for want of license.

Under the exception to R. 27, Vol. 2 of the Punjab Excise Manual, Chap. 5.39, p. 19, it is permissible for the licensee of a Bar to allow another person to conduct sales without previously submitting his name to the Collector for approval. Therefore such other person as the contractor of the Bar can sell liquor to persons visiting the Bar, and it cannot be said that his contract for the purchase of liquor was unlawful simply because he did not hold a license to sell retail liquor. [P 317 C 1, 2]

Kartar Singh for *R. L. Anand 2* — for Petitioner.

S. K. Ahmad — for Opposite Party (Plaintiff).

Order.—Dyer Meakin Breweries, Ltd. Simla, brought a suit for recovery of Rs. 236 against L. P. Verma as the owner of the Roxy Theatre Bar alleging that the aforesaid sum was due to them as balance of the price of liquor supplied. L. P. Verma pleaded that he was not the proprietor of the Roxy Theatre Bar, which was owned by one Beli Ram Sri, but that he was a contractor of the Bar under the proprietor who alone held an excise license in his own name. On this Beli Ram Sri was also impleaded as a defendant. He set up the defence that he had given the contract of the Bar to L. P. Verma, that he never gave any order for liquor to the plaintiffs and had no knowledge of the claim at all. L. P. Verma did not deny the correctness of the amount due, but pleaded that the contract with him was void as he held no license for the sale of liquor in his own name and, therefore, it was unlawful for him to purchase liquor from the plaintiffs.

The Judge, Small Cause Court, held that Beli Ram Sri was not liable, as he gave no order to the plaintiffs and had no account with them in 1933 when the supplies in dispute were made. He held defendant 1 liable, finding that the contract by him with the plaintiffs was not unlawful. He accordingly passed a decree for the sum claimed against L. P. Verma only, dismissing the suit against Beli Ram Sri. L. P. Verma has come up in revision and on his behalf it has been contended that no decree should have been passed against him as the contract was unlawful. After hearing counsel and examining the record I see no force in this contention. The petitioner was admittedly the contractor of the Bar under its proprietor Beli Ram Sri, who held a license in form L-12-B for the retail vend of liquor at the

Bar. Under the exception to R. 27 (Vol. 2 of the Punjab Excise Manual, Chap. 5.39, p. 19) it is permissible for the licensee of a Bar to allow another person to conduct sales without previously submitting his name to the Collector for approval. Therefore, the petitioner L. P. Verma as the contractor of the Bar could sell liquor to persons visiting the Bar, and it cannot be said that his contract with the plaintiffs for the purchase of liquor was unlawful. The petition fails and is dismissed with costs.

B.D./D.S.

Petition dismissed.

A. I. R. 1937 Lahore 317

JAI LAL, J.

Qazi Nur Hussain and others — Plaintiffs.

v.

Mt. Chanani and others—Defendants.

Civil Ref. No. 29 of 1936, Decided on 1st December 1936, made by Commissioner, Rawalpindi Division, D/- 29th August 1936.

Jurisdiction—Civil and Revenue Court—Suit by landlord for declaration that decree obtained in civil Court by transferee of occupancy tenant for mutation of names is null and void—Suit is cognizable by civil Court alone.

An occupancy tenant transferred his right and the transferee in a civil suit obtained a decree for the mutation of his name as occupancy tenant. The landlord therefore brought a suit for a declaration that the decree obtained by the transferee in the civil Court was fraudulent and therefore null and void :

Held : that the suit was cognizable by the civil Court alone. [P 318 C 1]

Ajit Ram—for Plaintiffs.

M. M. Aslam Khan—for Defendants.

Order.—One Bir Wali was the occupancy tenant of the land in dispute. On his death his widow Mt. Chanani succeeded to his rights but she had a mutation of such rights effected in favour of one Boota and Chanu. Subsequently this mutation was set aside on appeal by the Collector. Boota, however, instituted a suit in the Court of a Subordinate Judge for a declaration that he had the occupancy rights in the land and not the defendants, the defendants being Mt. Chanani and Chanu. The landlords were not parties to that

suit. On a confession of judgment the suit was decreed. Thereupon Boota, basing his title on the decree of the civil Court, applied for mutation in his favour and the occupancy rights were mutated in his favour. The landlords then instituted the present suit for a declaration that "the decree obtained by Boota was fraudulent and collusive and is null and void as against them." This suit was originally instituted in the Court of the Subordinate Judge, but the plaint was returned on the ground that the suit was cognizable by a revenue Court. When it was instituted in the revenue Court the Assistant Collector was of opinion that the civil Court alone had jurisdiction to entertain the suit because the only prayer in the plaint was to declare null and void a decree granted by the civil Court and consequently this reference has been made by the Commissioner, Rawalpindi.

I have heard counsel on both sides and am of opinion that the suit as framed is cognizable by the civil Courts alone. It is not a suit between a landlord and a tenant. The proprietors of the land are the plaintiffs but they do not admit that the defendants are their tenants. I do not know what their contention with regard to Mt. Chanani is, but the prayer is not to declare the rights of the plaintiffs as landlords or to negative the rights of the defendants as tenants. It is merely to declare a decree granted by a civil Court null and void. It may be that the effect of the decree, if granted in favour of the plaintiffs, would be to settle the rights of the parties as landlords and tenants respectively, but this is not the direct prayer made in the plaint and I express no opinion that this would necessarily be the effect of the decree. The prayer being merely to declare null and void the decree of the civil Court, the civil Courts alone are competent to hear the suit. I accordingly hold that the suit is cognizable by a civil Court and direct the Assistant Collector of Rawalpindi to return the plaint to the plaintiffs for being presented in the proper Court. There will be no order as to the costs of this reference.

S.C./D.S.

Order accordingly.

A. I. R. 1937 Lahore 318

ADDISON AND DIN MOHAMMAD, JJ.

Mt. Inderwati—Plaintiff—Petitioner.

v.

Hari Ram and another—Defendants—Opposite Parties.

Civil Misc. Petn. No. 431 of 1936, Decided on 30th November 1936, for leave to appeal as a pauper from decision of Sub. Judge, 1st Class, Amritsar, D/- 4th June 1936.

(a) Lahore High Court Rules, Ch. 1-B, Vol. 5—Application for leave to appeal in *forma pauperis* by agent of applicant—No mention in application that applicant is *pardanashin* lady and cannot appear in Court—Application cannot be allowed as pauper is not shown to be exempt under S. 132, Civil P. C.

Where an application for leave to appeal in *forma pauperis* is filed not by the applicant herself but by her authorized agent, but there is no mention in the application that the applicant pauper is a *pardanashin* lady and cannot appear in Court for this reason, the application should be dismissed as it does not appear on the face of the application that the pauper is exempt from appearance in Court under S. 132, Civil P. C.

[P 318 C 2; P 319 C 1]

(b) Power-of-attorney—Construction—Power-of-attorney giving power to conduct appeal—Agent filing application for leave to appeal in *forma pauperis*—Presentation is not proper.

Where an agent is authorized by a power-of-attorney only to conduct an appeal, such agent has no power to file application for leave to appeal in *forma pauperis*, on behalf of the applicant pauper and presentation thereof by him is not proper: *A I R 1915 Lah 369, Rel. on.*

[P 319 C 1]

(c) Letters Patent (Lahore) (1919), Cl. 8—Specially authorised agent must be advocate, *vakil* or attorney of High Court—Application for leave to appeal in *forma pauperis* by person not so qualified is not proper.

Under Cl. 8 of Letters Patent (Lahore) only an advocate, *vakil* or attorney of a High Court can appear, act or plead for or on behalf of a suitor. An application therefore for leave to appeal in *forma pauperis* by a person who is not so qualified is not proper.

[P 319 C 1]

Dev Raj Sawhney—for Petitioner.*Mela Ram Aggarwal* for *Manohar Lal*—for Opposite Parties.

Addison, J.—This is an application for leave to appeal in *forma pauperis*. The application was not presented by the applicant but by one Sada Nand, describing himself as the authorized agent of the applicant. There is nothing in the petition to the effect that the applicant is a *pardanashin* lady and for this reason cannot appear in Court. In Ch. 1-B,

Vol. 5 of the Rules and Orders of this Court it is laid down that no such application shall be received from any person other than the alleged pauper, unless it appears on the face of the application that the alleged pauper is a person who is exempt under S. 132 or S. 133, Civil P. C., from personal appearance in Court. The application is thus defective as it does not appear on the face of the application that the alleged pauper is a person who is so exempt. Further, the power-of-attorney in favour of Sada Nand does not specially authorize him to present an application for the applicant to appeal in *forma pauperis*. The power-of-attorney only gives him power to conduct the appeal. In these circumstances there has been no proper presentation by a person duly authorized to present it. This follows from 28 I C 448.¹

Lastly, under Cl. 8, Letters Patent, no person whatsoever but an advocate, vakil or attorney of the High Court shall be allowed to act or to plead for, or on behalf of, any suitor in this Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor. This appears to mean that a specially authorized agent should be an advocate, vakil or an attorney of this Court. In any case it is clear that there is no proper application before us and we therefore refuse leave to the applicant to appeal in *forma pauperis*. We however give her time up to and including 21st December 1936 within which to pay proper court-fees on any part of the claim in the appeal which she desires to prosecute. There will be no order as to costs.

K.B./A.L. *Application dismissed.*

1. Sakina Bibi v. Charanjit Singh, A I R 1915 Lah 369=28 I C 448=80 P L R 1915.

A. I. R. 1937 Lahore 319

TEK CHAND, J.

District Board, Jhang — Defendant — Appellant.

v.

Nanak Chand and another—Plaintiffs — Respondents.

Second Appeal No. 655 of 1936, Decided on 1st December 1936, from decree of Senior Sub-Judge, Jhang, D/- 16th March 1936.

Punjab District Boards Act (20 of 1883), S. 76—"Exaction" means "demand and realization with force"—'Haisiat tax' imposed—Suit against imposition of tax—Tax not realized—S. 76 is inapplicable—Suit is triable in civil Court.

A taxing statute which also takes away the ordinary jurisdiction of the civil Courts, must be strictly construed in favour of the subject and against the taxing authority. [P 320 C 2]

Words 'exaction' in S. 76 does not connote a mere 'demand' of an amount which is sought to be illegally taken, but means also the 'demand and wresting' of such an amount. Where, therefore a District Board imposed a 'haisiat tax' on a person, who filed a suit for a declaration that the Board had no authority to taxation and the tax was not realized, S. 76 was inapplicable and the jurisdiction of the civil Court was not barred: A I R 1933 Lah 124, Ref. [P 320 C 2]

Shabir Ahmad for *Tufail M. Malik*—for Appellant.

Narotam Singh for *S. L. Puri* and *S. L. Puri*—for Respondents.

Judgment.—The District Board, Jhang, assessed the plaintiffs respondents Nanak Chand and Dewan Chand sons of Ganesh Das to haisiat tax of Rs. 6 per annum for the years 1932-33, 1933-34 and 1934-35. Before the tax was collected, the plaintiffs instituted a suit in the civil Court for a declaration that the tax had been illegally imposed, as in none of the years in question did they or any of them reside for more than 180 days in the Jhang district or carry on any business there. An injunction was also asked for restraining the District Board from realising the amount from the plaintiffs.

The District Board pleaded that the allegation in the plaint that the plaintiffs did not reside in the district of Jhang for the prescribed period during the years in question was incorrect; that the tax had been imposed rightly; and that the civil Court had no jurisdiction to entertain the suit. The trial Court found on the evidence that the plaintiffs had successfully proved that they did not reside in the Jhang district for more than 180 days in any of the years in question and that, therefore, they were not liable to pay the tax. Following 34 P L R 219=A I R 1933 Lah 124¹ he held that the civil Court had jurisdiction to try the suit. He accordingly passed a decree in favour of the plaintiffs as prayed. The District Board appealed to the Senior Subordinate

1. Chairman, Dist. Board, Jhang v. Ganpat Ram, A I R 1933 Lah 124=141 I C 378=34 P L R 219.

Judge who affirmed the finding of fact arrived at by the Subordinate Judge that the plaintiffs had not resided in the Jhang district for 180 days in the year during the period in dispute and accordingly he held that the District Board was not entitled to impose the tax upon them. He further held that S. 76, Punjab District Boards Act on which the defendant relied in bar of the jurisdiction of the civil Court was inapplicable, as the words used there were "illegal exaction" which meant not merely a "demand" but "a demand followed by realization and recovery under compulsion." As in this case the amount had admittedly not been realised, S. 76, was inapplicable. The District Board has come on second appeal and before me the facts are no longer in dispute. It is conceded that the plaintiffs had not resided for the requisite period within the limits of the Jhang district during the three years in question and therefore they were not liable to be assessed to the tax in question. It is also admitted that the amount of the tax imposed for the three years in question has not been realised from the plaintiffs. It is, however, contended that the lower appellate Court has put an erroneous interpretation on S. 76, which is sufficiently wide to cover the case. S. 76, omitting the words which are not relevant to the point involved in this case, reads as follows:

Suits for the recovery of any rate or tax imposed under this Act, and suits on account of illegal exaction of any such rate or tax shall, unless the Local Government otherwise directs, be cognizable by Courts which for the time being have cognizance of suits for rent due on land.

The question for consideration is whether this is a suit "on account of illegal exaction" of the haisiat tax, which has admittedly been imposed under the provisions of the Punjab District Boards Act. The word 'exaction' is not defined in this Act or in the General Clauses Act. It, therefore, must be given its ordinary grammatical meaning. Etymologically, the word 'exact' is derived from *ex* (=out) and *agere* (=drive). The literal sense thus is 'to drive or force out.' Accordingly it is translated as meaning to "demand and enforce the payment of fees, money, taxes, tolls and penalties." In English law "exaction" has been defined as

a wrong done by an officer, or one in pretended authority, by taking a reward or fee for that which the law allows not.

Coke compares "exaction" and "extortion" as both meaning "unlawful" taking or realisation of reward or fee, the distinction being that "exaction" is taking an amount which the law does not allow, and "extortion" is taking more than is legally due (Coke on Littleton p. 368-b). It is thus clear that "exaction" does not connote a mere "demand" of an amount which is sought to be illegally taken, but also the "demand and wresting" of such an amount. I, therefore, agree with the conclusion of the learned Senior Subordinate Judge that S. 76 is inapplicable to this case. It is hardly necessary to say that a taxing statute, like the one before us, which also takes away the ordinary jurisdiction of the civil Courts, must be strictly construed in favour of the subject and against the taxing authority. The learned counsel for the appellant urged that this interpretation would lead to some anomalous results. But that is a matter with which the Courts are not concerned. I hold that civil Courts had jurisdiction to try the suit. The appeal fails and is dismissed with costs.

B.D./D.S. *Appeal dismissed.*

A. I. R. 1937 Lahore 320

TEK CHAND, J.

Asmat Ullah—Plaintiff—Appellant.

v.

Rahmat Ullah and others—Defendants—Respondents.

Second Appeal No. 545 of 1936, Decided on 2nd December 1936, from decree of Dist. Judge, Ludhiana, D/- 20th February 1936.

Easement—Prescription — *A's house abutting on B's courtyard — A can acquire easement by prescription to go over B's courtyard—A using B's courtyard nine or ten years before suit with B's permission — A is not entitled to easement by prescription—Nor to easement of necessity.*

A, whose wall of the house abutted on *B's* courtyard, claimed an easement by prescription to go over *B's* courtyard. *A* had used *B's* courtyard only nine or ten years ago, and taken *B's* permission to do so:

Held: that though such an easement could be acquired, *A* was not entitled to easement, as his user was permissive and not as of right, and this right was exercised more than two years, before the institution of suit: *A I R 1926 Bom 328, Rel. on.* [P 321 C 1]

Held further: nor could *A* possibly acquire easement of necessity, as the two tenements were not owned by him. [P 321 C 2]

Muhammad Amin—for Appellant.

Mela Ram—for Respondents.

Judgment. — The plaintiff and the defendant are owners of two adjoining houses situate in the town of Ludhiana. The northern and eastern walls of the house of the plaintiff abut on the courtyard of the defendant's house. It seems that the plaintiff wanted to repair these walls and for this purpose he arranged to send masons and labourers to the courtyard of the defendant without his permission. The defendant did not allow this to be done. Thereupon, the plaintiff brought the present suit for a perpetual injunction directing the defendant to allow the plaintiff and his masons and labourers to pass through his courtyard and to allow them to perform the building operations without let or hindrance. The suit has been dismissed by the Courts below and the plaintiff has come to this Court in second appeal.

The plaintiff's house is built to the extreme limit of the northern and eastern boundaries of his land and it is admitted by his learned counsel that apart from the easement, which the plaintiff claims to have acquired by prescription, he has no other legal right to compel the defendant to allow him or his workmen to pass through his courtyard or to carry on building operations from there without his permission. The sole question therefore is whether the plaintiff has acquired an easement by 20 years uninterrupted user. That an easement like the one claimed can be acquired under the law is not open to doubt: see 28 Bom L R 403.¹ But in order to establish the easement it must be proved that it had been enjoyed (a) peaceably and openly, (b) as of right, (c) without interruption, (d) for 20 years, and (e) this period of 20 years ended within the two years, next preceding the institution of the suit. In this case two of the essential ingredients, i. e. (b) and (e), are clearly wanting. The user must have been "as of right", that is *nec vi, nec clam, nec precario*. It must also be shown that it was last exercised within two years of the suit. Here however the plaintiff's own evidence shows that the repairs were last effected to the walls in question nine or ten years ago, and that this was done with the permission of the defendant's father, who was alive at that time. The user of the defen-

dant's courtyard for the purpose of repairing the plaintiff's walls was therefore permissive and not "as of right". In these circumstances, it is quite clear that no easement could have been acquired by prescription.

In the memorandum of appeal an alternative claim was based on the ground of "easement of necessity". But at the time of arguments counsel admitted that the two tenements were never owned by one person, and no easement of necessity could possibly have been acquired. The suit was rightly dismissed. The appeal fails and is dismissed with costs.

V.B.B./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 321

JAI LAL, J.

Nazir Hussain — Defendant — Appellant.

v.

Mt. Sultan Bi, Plaintiff and another, Defendant — Respondents.

Second Appeal No. 744 of 1936, Decided on 8th December 1936, from decree of Dist. Judge, Jhelum, D/- 18th March 1936.

Custom (Punjab)—Succession—Jhelum District—Sister versus daughter's son—Property inherited by two unmarried daughters and mother half and half — One daughter dying and other marrying, leaving mother in sole possession—Neither of daughters in possession 26 years before suit—After mother, sons of married daughter cannot succeed—Sister of deceased original owner inherits her brother's property.

A person died leaving two unmarried daughters and his mother, who inherited his property half and half. One daughter died and the other married, thus leaving their mother in possession of the entire land. After the mother the sister of the original owner claimed property in preference to sons of the married daughter. Neither of the daughters was in possession 26 years before suit:

Held: that sisters inherited the property of their brother. The married daughter ceased to be in possession of the property 26 years ago. Her sons were not consequently entitled to claim that property by right of inheritance. [P 322 C 1]

Bishan Narain for *M. L. Puri*—for Appellant.

Amar Nath Chona—for Respondent (Plaintiff).

Judgment.—The following facts are admitted: Saidan Shah was the original owner of this land. He died leaving a widow, two daughters and a mother *Mt. Anaran Bibi*. His widow remarried soon after his death and consequently half of

1. Official Trustee of Bombay v. Salebhai Sarafally, A I R 1926 Bom 328=94 I C 673=28 Bom L R 403.

his land was mutated in favour of the two daughters and the other half in favour of Mt. Anaran Bibi. Both the daughters were unmarried at the time of his death. One of them died unmarried and the other married a collateral of Saidan Shah in the 5th degree. On the death of the unmarried daughter and the marriage of the other daughter half of the land which had been mutated in their favour was taken by Mt. Anaran Bibi who consequently remained in possession of the entire land. I should have stated that Saidan Shah died about 35 years ago and his daughter married about 26 years ago. Thus it was 26 years ago that neither of the daughters remained in possession of half the land mutated in their favour and Mt. Anaran Bibi came into possession of the entire land. Mt. Anaran Bibi died about a year and a half before this suit and the respondent, who is a sister of Saidan Shah, instituted this suit for possession of his property alleging that according to custom she was a preferential heir to the appellants, the sons of the married daughter of Saidan Shah.

The learned District Judge relying upon the Customary law of the Jhelum District has decreed the suit but has granted a certificate to the appellants under S. 41, Punjab Courts Act. No evidence was produced by either party and admittedly, therefore, the decision of the question turns on the interpretation of the Riwajiam. There are two relevant paragraphs of the Riwajiam, para. 62 and para. 68. It is provided there that sisters inherit the property of their brother. With regard to the daughters' sons, it is recorded that they inherit only if their mother had inherited the property as a daughter and was in possession of such property. It has already been stated that after the death of the married daughter half of the property which had been mutated in favour of the daughters was mutated in favour of Mt. Anaran Bibi. That was 26 years ago. The married daughter, therefore, ceased to be in possession of the property 26 years ago. Her sons consequently are not now entitled to claim that property by right of inheritance. In my opinion the learned District Judge has correctly interpreted the Riwajiam in this case and I dismiss this appeal with costs.

V.B.B./K.S.

Appeal dismissed.

A. I. R. 1937 Lahore 322

ADDISON AND DIN MOHAMMAD, JJ.

Sardar Mohammad and others—Defendants — Appellants.

v.

Jagjit Singh and others, Plaintiffs and *others*, Defendants — Respondents.

First Appeal No. 148 of 1936, Decided on 15th December 1936, from decree of Senior Sub-Judge, Sheikhupura, D/- 21st December 1935.

Punjab Alienation of Land Act (13 of 1900), S. 3 — Enquiry by Revenue Officer, when granting sanction, regarding indebtedness of alienor—Alienation can still be challenged on ground of want of consideration and necessity and civil Court can come to its own finding regarding it.

Even where the Revenue Officer while sanctioning alienation under S. 3 has made an enquiry regarding the indebtedness of the alienor, it will neither stand in the way of any person's challenging the alienation on account of want of consideration and necessity nor will it debar a civil Court from coming to its own finding in this respect : C. A. No. 732 of 1935, Rel. on. [P 323 O 1]

Shuja-ud-Din, Indar Dev Dua and Manohar Lal Mehra for Dr. Mohammad Alam—for Appellants.

Shamair Chand and Kharak Singh—for Respondents (Plaintiffs).

Din Mohammad, J.—The facts of this case have been set out at length in the judgment under appeal and need not be recapitulated here. Suffice it to say that the land and houses in suit were sold by Autar Singh and Kartar Singh to the defendants-appellants for Rs. 45,000 and that that alienation has been challenged by the sons of the vendors on the usual grounds of want of consideration and necessity. The Subordinate Judge has decreed the suit conditionally on Autar Singh's sons paying Rs. 12,214-6-6 and Kartar Singh's sons paying Rs. 4,675 to the alienees when succession would open in the case of each. He has further ordered that the alienees should remove the material of the bungalow at Chak No. 283 at the time of their eviction. From this order both sides have preferred appeals, which can be conveniently disposed of together.

Counsel for the alienees at the outset contends that in view of the fact that the Collector had sanctioned the alienation under S. 3, Punjab Alienation of Land Act, 1900, a civil Court has no jurisdiction to go behind that sanction and question the

finding of the Collector as regards the indebtedness of the alienors. In other words, he urges that the alienees in this case could not be burdened with the proof of consideration and necessity of the alienation. In our view, this position is altogether untenable. In the first instance, no enquiry as to the indebtedness of the alienors appears to have been made by the Revenue Officers and secondly, even if they had made any such enquiry, it would neither stand in the way of the plaintiffs' challenging the alienation on account of want of consideration and necessity, nor will it debar a civil Court from coming to its own finding in this respect. If any authority is needed for this proposition, reference may be made to Civil Appeal No. 732 of 1935. In that case too a similar plea was raised on behalf of the alienee and a Division Bench of this Court held that, in spite of the report of the Tehsildar as to the indebtedness of the alienors, it was the duty of the alienee to ascertain whether any debts in fact existed and consequently it was incumbent on him to find out whether the report of the Tehsildar was based on any genuine enquiry into the indebtedness of the alienor's. (Their Lordships after going through the entire evidence modified the decree appealed from and then proceeded.) As both the parties have partially failed and partially succeeded in both the Courts, they will bear their own costs throughout.

B.D./D.S.

*Decree modified.***A. I. R. 1937 Lahore 323**

SKEMP, J.

Devi Das — Appellant.

v.

Lala Manohar Lal, Receiver and others
— Respondents.

Second Appeal No. 58 of 1936, Decided on 27th January 1937, from order of Dist. Judge, Mianwali, Camp Sakesar, D/- 19th July 1936.

Provincial Insolvency Act (1920), S. 4—Scope—Transfer by insolvent declared void under S. 4—Subsequent transfer by transferee of insolvent is also void and cannot stand.

Where a transfer by an insolvent is declared void under S. 4 of the Act, by the insolvency Court on the ground of fraud, subsequent transfer made by the transferee of the insolvent is also void and cannot stand : *A I R 1935 Lah 368, Rel. on.*

[P 324 C 1]

Pandit Bishan Narain — for Appellant.

Judgment.—This is a second appeal in insolvency proceedings. The relevant facts are that on 6th May 1930, Hem Raj mortgaged two houses and a shop to his real brother Nibahu Ram for Rs. 3,000. On 30th May 1930 he sold the equity of redemption of the same property to another real brother Devi Das for Rupees 2,000. On 5th January 1934 he presented a petition to be adjudged insolvent and was so adjudged on 22nd December 1934. On 8th March 1935 Nibahu Ram sold his rights under the first deed of May 1930 to Devidas for Rs. 4,000. On 5th April 1935 the Official Receiver applied under S. 4, Provincial Insolvency Act, that all three transactions should be set aside on the ground of fraud.

The matter was tried as an insolvency proceeding before the Senior Subordinate Judge of Mianwali. He found that S. 4, Provincial Insolvency Act, applied and that the two transfers made in 1930 were for consideration, but were tainted with fraud. He, therefore, set aside both these transfers as well as the subsequent alienation in March 1935 by Nibahu Ram to Devi Das. On appeal the learned District Judge agreed with the Court below on all points except that the alienation to Devi Das on 30th May 1930 was for an antecedent debt to the extent of Rs. 1,435 plus interest. He held to this extent that the alienation in favour of Devi Das was good but maintained the finding with regard to the remaining Rs. 400 of the transaction. Devi Das has come here in second appeal through Pandit Bishan Narain. The Official Receiver and the other parties have not been represented. Pandit Bishan Narain was unable to argue that an Insolvency Court could not consider an application under S. 4, Insolvency Act, in view of a Division Bench ruling reported as 15 Lah 294,¹ which finally laid down the law for this Province that :

An insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication of the transferor as insolvent.

Once this is held there is little further that can be argued. Even though con-

1. *Ram Ditta Mal v. Official Receiver, Lahore*,
A I R 1934 Lah 365=147 I C 1026=35
P L R 271=15 Lah 294.

sideration was paid, fraud is proved. Hem Raj pleaded that he wanted the money from Nibahu Ram to pay off his prior creditors. The alleged creditors were produced but their evidence was not believed by either of the Courts below and the finding of the District Judge is final on this point. Pandit Bishan Narain urged that it was necessary to see the financial circumstances of Hem Raj at the time of the alienation. This no doubt is true but the District Judge went into it and gave a finding that 'at that time he was on the verge of bankruptcy'. This is another finding of fact supported by evidence with which I cannot interfere. Finally it was argued that the insolvency Court had no jurisdiction to interfere with the third transaction by Nibahu Ram in favour of Devi Das. The Courts below gave no finding whether this was for consideration or not. The learned Senior Subordinate Judge followed A I R 1935 Lah 368,² and the District Judge agreed with him. In that case Ghulam Mohammad transferred his share in a house to Ata Mohammad who transferred it to a third party. The original transfer was within two years of Ghulam Mohammad's adjudication as insolvent. The Bench held that both transfers were void. They said :

We can find no reason for holding that a transferee from an insolvent can avoid the operation of S. 53 by merely passing on the property to some other person. The original transfer made by the insolvent is voidable under S. 53 and if once it is declared void as against the Official Receiver the subsequent transfer by the transferee cannot stand and can be annulled under S. 4, Insolvency Act, if not technically under S. 53. The superstructure cannot remain suspended in the air if the foundation is removed.

I can see no reason for not extending this principle to the present case where the original alienation by Hem Raj to Nibahu Ram has been declared void under S. 4, Insolvency Act. The result is that this appeal is dismissed. There will be no order as to costs the respondents not being represented.

K.B./A.L.

Appeal dismissed.

2. Ata Mohammad v. Mehr Chand, A I R 1935 Lah 368=156 I C 1018=16 Lah 1013.

A. I. R. 1937 Lahore 324

COLDSTREAM AND BHIDE, JJ.

Shiromani Gurdwara Parbhandhak Committee, Amritsar—Objector—Appellant.

v.

Tarlok Nath and others—Respondents.

First Appeal No. 2246 of 1935, Decided on 4th December 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 19th August 1935.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 7 and 16 (2)—Rang Mahal Gurdwara of Gurdaspur—Founder of institution Udasi Brahman—Some of presiding Mahants having leanings towards Hinduism—Principal endowment of land to institution by Mahomedan ruler, hater of Sikhism—Institution known as Thakardwara—Lingam and Hindu idols worshipped in institution—Principal object of reverence being Gaddinashin Mahant—Institution not described as Sikh Gurdwara in Government papers—Sikhs never found to be predominant worshippers—Institution held not Sikh Gurdwara.

On a petition to declare a Gurdwara known as Rang Mahal in Gurdaspur town in Punjab, to be a Sikh Gurdwara, it was found that the institution was established by a Udasi Brahman and presided over by his descendants as Mahants. The principal endowment being the land in Gurdaspur was by a Mahomedan ruler who hated the Sikhs and persecuted them. There was found to be a Hindu temple alongside the building claimed as Gurdwara proper and the institution was found to be referred to in papers as a Thakardwara, a description inconsistent with a Sikh Gurdwara and also at times as a Mandir of Udasis. Gurdaspur was not found to be a Sikh town as there were few Sikhs in it. The institution was never found at any time predominantly used by Sikhs. But to the contrary the principal object of reverence in it was the Gaddinashin Mahant and there were also a Lingam and Hindu idols and tobacco was also smoked in its precincts. Some of the Mahants who provided the institution were found to have strong leanings towards Hinduism. The institution was never referred to as a Sikh Gurdwara in Government papers nor Sikhs were found ever to be predominant worshippers :

Held : that the institution was not a Sikh Gurdwara as contemplated by S. 16 (2) of the Act. [P 327 C 1, 2 ; P 328 C 2]

(b) Practice—Evidence—Appreciation—Credibility of witness—Trial Court accepting evidence of one party and rejecting that of other—Trial Court's opinion should not be lightly interfered with by appellate Court.

Where there is an irreconcilable difference between the evidence of the opposite parties and the trial Court accepts the evidence of one party and rejects that of the other so far as it is in conflict with that party's evidence, a Court of review should be slow to differ as to credibility from the opinion of the trial Court who has seen and

heard the witnesses: *A I R 1931 P C 265, Rel. on.*
[P 326 C 2]

(c) Punjab Sikh Gurdwaras Act (8 of 1925), S. 16—Scope—Description of place as Gurdwara does not warrant presumption that it was founded for Sikh worship.

The use of the word 'Gurdwara' is not confined to Sikh institutions and the mere fact that the place has been called a Gurdwara as well as Mandir and Thakardwara does not warrant the presumption that it was founded for Sikh worship.
[P 327 C 2]

Charan Singh — for Appellant.

Achhru Ram, D. D. Khanna and Sardar Bhagat Singh — for Respondent (Tarlok Nath).

Coldstream, J.—In a petition presented to the Local Government under S. 7, Sikh Gurdwaras Act, a prayer was made to have a Gurdwara known as Rang Mahal in Gurdaspur town declared to be a Sikh Gurdwara. On the petition being notified Tarlok Nath, the Mahant in charge of the institution, submitted a counter-petition under S. 8 of the Act, claiming that the institution was not a Sikh Gurdwara but a Hindu temple containing a Lingam and Hindu idols used for worship by the Mahant's family and resorted to for ton-sure ceremonies by Hindus. This petition was duly forwarded to the Sikh Gurdwaras Tribunal under the provisions of S. 14 for disposal. It was opposed by the Shiromani Gurdwaras Parbhandhak Committee and two of the signatories to the petition under S. 7. The Tribunal decided that the institution was not a Sikh Gurdwara. Against this decision the Shiromani Gurdwara Parbhandhak Committee (to whom I will refer hereafter as the objectors) have appealed.

The objectors' case was that the institution fell within each of the four definitions of a Sikh Gurdwara contained in Cls. (ii), (iii), (iv) and (v), sub-s. 2 of S. 16 of the Act. The judgment of the tribunal was delivered by the President, Hilton, J., with whom one of the members R. S. Lala Dwarka Parshad concurred. The third member did not deliver any judgment. The learned President held that the petition must fail because the objectors (on whom the onus of proving that the institution was a Sikh Gurdwara was rightly laid) had not proved that the institution was used for public worship, either predominantly or otherwise, by Sikhs at the time when the petition under S. 7 was presented. He also held it not proved that the institution was

established owing to a tradition connected with the Sikhs, or that it had been established for public worship by Sikhs, or that it had been established in memory of a Sikh martyr, saint or historical person, or that it was used for public worship by Sikhs owing to some incident connected with the Sikh religion.

Before us it is not contended that Cl. (iv), sub-s. 2 of S. 16, is applicable to the institution. It is argued that the institution comes within the definitions in Cl. (ii), (iii) and (v) and that the decision of the tribunal, that it does not, is against the weight of the evidence documentary and oral. As regards Cl. (ii), it is pointed out that the learned President has mis-read this clause which does not require that the institution was founded owing to some tradition connecting it with one of the Sikh Gurus but merely that owing to such a tradition it was used for public worship predominantly by Sikhs. We have been taken through the whole of the evidence by counsel who have addressed us at length upon every aspect of the case.

The institution is one of two in Gurdaspur presided over by the descendants of Dip Chand, an Udasi Brahman, who was alive in the early part of the 18th century. He had two sons Harsaran Das and Narain Das. The descendants of Narain Das, who was the younger, have been in possession of an institution known as the Jhulna Mahal, a Sikh Gurdwara, included in Sch. 1, Sikh Gurdwaras Act. The descendants of Harsaran Das, the senior branch of the family, have been Mahants of the Gurdwara Rang Mahal, the subject of the present dispute, the gaddi passing according to the rule of primogeniture from father to son. For many generations the Mahants called themselves Udasis but latterly they have been described simply as Brahmans. A pedigree table of the Mahants is given in the judgment of the tribunal. Both institutions have been famous places of worship. When the country came under British rule, the Mahants were in possession of a number of muafis in different villages, the most important being a jagir of half of Gurdaspur. Some of these revenue assignments were resumed by Government in 1882 (with effect from 1880) those in Gurdaspur, Ojla and Halla alone being continued in favour of the Mahant Bishambar Nath and his successors for the maintenance of the Gurdwara. At that time the Mahants

were described in the Gazetteer of the Gurdaspur District as Brahman priests and the institution was "a monastery of Sarsut Brahmans who had adopted many of the Sikh modes and customs". That it was then, and had been for a long time, used for Sikh public worship is clearly established by a mass of documentary evidence to which I need not refer in detail.

In 1851 the Mahant in charge, Badri Nath, declared that it housed not only Sikhs and Brahmans but Granthis and Rababis (O. 8). Bishambar Nath in 1880 and 1881 stated that the Granth Sahib was recited in the Gurdwara at all times (O. 21 and O. 18). His successor Bal Nath occupied the gaddi for a short period and on his death in 1892 Ram Nath became the gaddinashin. There is no clear documentary evidence of public Sikh worship after that time and we have only the oral evidence produced by the parties on which to decide whether at the time of the presentation of the petition in 1926 and during the time of Ram Nath and his successor Prem Nath, who became Mahant in 1906, the institution was used for public worship by Sikhs. It is true that in 1891 Ram Nath, who was asking for the muafi to be continued in Bal Nath's favour (O. 54), stated that "service was being rendered to the Mandir as before"; but even if we interpret this to mean that public worship was then being carried on by Sikhs in his temple, the presumption that such public worship continued during Prem Nath's time is negatived by the oral evidence. We have considered the whole of this evidence with care and I do not think it necessary to add much to the description of it given by the learned President of the Tribunal. Prem Nath had strong leanings towards orthodox Hinduism, and he and his father Ram Nath were both Presidents of the Sanatan Dharam Sabha. The Singh Sabha used to hold meetings in the institution but after Prem Nath had been Mahant for a short time a separate Sikh Gurdwara was built on a site provided by him and subsequently the Singh Sabha meetings were held in that Gurdwara (O. W. 1). There is a platform in the verandah in front of the shrine which the objectors say was the resting place of the Granth Sahib but I believe the respondent's evidence that this platform is the Gaddi of the Mahant before whom the worshippers bow on ceremonial occasions and not the throne

of the Granth Sahib. It is to worship the Mahant and not the Granth Sahib that pilgrims come from and beyond the frontier.

Where there is an irreconcilable difference between the evidence of the opposite parties, and the trial Court accepts the evidence of one party and rejects that of the other so far as it is in conflict with that party's evidence, a Court of review should be slow to differ as to credibility from the opinion of the trial Court who has seen and heard the witnesses: A I R 1931 P C 265.¹ In the present case I can see no reason at all for reversing the Tribunal's finding on this part of the case, which in my opinion is amply justified by the evidence. On this conclusion alone the appeal must fail and it is unnecessary to deal at any length with the other questions on which the parties joined issue.

There is no direct documentary proof showing when and for what particular purpose (other than for the purpose of an Udasi religious and charitable house) this institution was established (Cl. (3), sub-s. 2, S. 16). The objectors' case is that it was founded at the time of Dip Chand who was a Sikh of the tenth Guru and in support of this case reliance is placed upon the statement made by Mahant Badri Nath in 1851 (O. 8) reference to a part of which has been made above. The Mahant's story was that Dip Chand's ancestor Nawal Rai bought land and settled in Gurdaspur some time about 1625. Guru Gobind Singh, the tenth Guru, became a disciple or admirer of Dip Chand, acknowledged him as his Guru, and gave him the title of Ganj Bakhsh (Treasure giver) for his help. It was then that the Gaddi was established in the family. The most important Jagir enjoyed by the family namely, that of the Gurdaspur lands had, he asserted, been given to Dip Chand by Muhammad Shah, Emperor of Delhi, for defraying his kitchen expenses. Half of this Jagir was confiscated in Sikh times and the income of the rest was still used for feeding Fakirs and travellers. This grant was confirmed by Raja Ranjit Singh about the year 1821. Other grants had been made by Raja Ranjit Singh, Raja Sher Singh, Sirdar Mahan Singh (Raja Ranjit Singh's father) and by other Sikhs, by lambardars of two

1. Arthur Wijetilaka v. Don Edmund Rana-singhe, A I R 1931 P C 265=134 I C 321 (P O).

villages and by a Brahman priest of the goddess Durga. In 1850 the institution was described by Mahant Badri Nath's Mukhtar as a makan of the Granth Sahib (O. 6). Records of that time show that a muafi in village Chaunta, had been granted for the recital of the Granth Sahib in the Gurdwara at Gurdaspur (O. 3, O. 4 and O. 5). The Tribunal has excluded the statements about Chaunta from consideration, holding it to be not clear that the Gurdwara mentioned was the Rang Mahal, but as the muafi was held by one of the family I think it probable that the reference was to the Rang Mahal. On the other hand as the elder branch of the family had a considerable Dharamsala at a village in Pathankot Tahsil called Gurdaspur it is possible that the reference is to that Dharamsala.

While this evidence shows that the Rang Mahal was not only used for public Sikh worship by Sikhs but was in part a Sikh Gurdwara from the time the Sikhs ruled the Punjab until the time of the Mahant Bishambar Nath, I agree with the finding of the learned President of the Tribunal that it does not prove that the institution was established for public worship by Sikhs. The principal endowment, the land in Gurdaspur, was by a Mahomedan ruler who hated the Sikhs and persecuted them, and it was made to a Brahman Udasi. There was admittedly a substantial Hindu temple alongside the building now claimed as the Gurdwara proper where the Granth Sahib is alleged to have been kept. The institution was referred to as a Thakurdwara, a most unlikely description, if it had been founded for Sikh worship in 1864 (P. W. 17/1) and as a Mandir of Udisis in 1880 (P. 7, O. 17). Mahant Bishambar Nath called it a Thakurdwara in 1886 (P. 20). There is no basis for an assumption that Dip Chand ever became a Sikh, while it is not improbable that Guru Gobind Singh expressed his appreciation of a Braham ascetic. There is nothing to show that the tenth Guru ever visited the institution or any clear indication that he had anything to do with its foundation. In 1852 the Raja of Kalanaur, in whose territory Gurdaspur appears to have been situated, was asked by the officer who was making an enquiry into the jagirs of the Province, to report when this institution was founded and whether the Jagir attached to it was meant for the langar

and other expenses connected therewith or it was divided among the residents of the institution. His reply (P. 23) was that the Gurdwara had been in existence since Moghul times and nothing certain was known about its foundation. But it was known, he reported, that all the income over and above what was spent on the langar was used by the Baba (Mahant) and the other residents. Nothing was said about Sikh worship in this report.

Here I may note that the use of the word Gurdwara is not confined to Sikh institutions and the mere fact that the place has been called a Gurdwara as well as Mandir and Thakardwara does not warrant the presumption that it was founded for Sikh worship. As pointed out by the learned President, S. 16 (1), Sikh Gurdwaras Act, itself draws a distinction between Sikh and other Gurdwaras, and Sch. 2 of the Act which mentions three Gurdwaras shows that a Gurdwara may be a non-Sikh shrine.

As regards Cls. 2 and 5, all that need be said is that there is no evidence whatever of any kind that the institution was at any time predominantly used by Sikhs. Gurdaspur is not a Sikh town. The evidence is that there are very few Sikhs in it. The evidence and the circumstances admitted point on the contrary to the place having always been a Hindu place of worship although during and after Sikh times until the time of Ram Nath it included what was recognized to be a Sikh Gurdwara. The principal object of reverence in it was, as already noticed, the Gaddinashin Mahant. There were a Lingam and Hindu idols in the Thakardwara and tobacco smoking went on in its precincts in Prem Nath's time. That a tradition connects Dip Chand with the tenth Guru cannot be denied. The tradition is that Dip Chand gave the Guru a lakh's worth of incense to help him to demonstrate publicly the impotence of Hindu gods, and that it was for this reason that he was called Ganj Bakhsh by the Guru but there is no evidence warranting an inference that it was owing to this tradition that either originally or at any time the Rang Mahal Gurdwara was used for public worship either by Sikhs or by Hindus.

To support their contention that the Gurdwara was used for worship by Sikhs owing to an incident connected with the Sikh religion, the objectors relied on the

evidence in a letter No. 863 dated 8th August 1881 from the Punjab Government to the Government of India, a copy of which (Ex. P. 11) was placed on record by the respondents (an Urdu translation was put in by the objectors as part of their document O. 23). In this letter the Punjab Government submitted their recommendations in respect of Bishambar Nath's Jagir. The Government of India had in 1853 sanctioned the continuance of twelve assignments of land revenue in favour of Badri Nath and his brother Kanshi Nath, who had been in enjoyment of the grants as their family property, on condition that the "temple at Gurdaspur" was maintained and the incumbents of the assignments remained of good behaviour. The Punjab Government, while proposing the resumption of the other assignments made for the benefit of the institution, recommended the continuance of those in Gurdaspur, Ojla and Halla (to be held by the mahant for the time being instead of by the descendants of the grantee as before), in consideration of Badri Nath's good services, the great reduction of land revenue at the settlement, the esteem in which the institution was held and the historical interest of the place as the site of the contest between Banda, the secular leader of the Sikhs after Guru Gobind Singh's death, and the army of the Moghal Emperor. The letter went on to quote Cunningham's History of the Sikhs where Banda's desperate defence of a fort in Gurdaspur District is described: see pp. 88 and 89 of Garrett's edition of 1918. The fort was captured and the defenders marched to Delhi and massacred, a hundred being killed daily. Banda himself was put to death with torture. The Punjab Government identified the fort with the institution managed by the family of Bishambar Nath.

It is contended that the contents of the Punjab Government's letter justify a presumption that it was owing to the identity of the Gurdwara with Banda's fort that the Sikhs worshipped at this shrine. Recent researches have disclosed that the actual place of Banda's retreat was not the present town of Gurdaspur but a village, now a heap of ruins, some four miles from Gurdaspur (see the Life of Banda Singh Bahadur by Ganda Singh, research scholar of the Khalsa College, Amritsar, published by the Sikh History Research Department of the College in

April 1935), a fact which raises some doubt whether there was any connexion between the worship at this Udasi shrine, when it first began, and Banda's defence of his fort. Nevertheless, though it is true that Banda's memory is not held in much esteem by the Sikhs (Cunningham's History, p. 89), and though Banda was, as described by the Punjab Government in their letter, only a secular leader of the Sikhs, he certainly did battle for them against their oppressors, and if there was evidence that this institution was resorted to for worship by the Sikhs owing to its being the scene of Banda's heroic defence, I would be inclined to find it proved that it was "owing to an incident connected with the Sikh religion that they did so". But there is no such evidence, and as I have already said there is no evidence that at any time the Sikhs have been the predominant worshippers.

Finding that the tribunal rightly decided against the objector-appellants I would dismiss this appeal with costs.

Bhide, J.—I agree.

W.D./A.L.

Appeal dismissed.

A. I. R. 1937 Lahore 328

SKEMP, J.

Harish Chandar and others, Judgment-debtors, Objectors — Appellants.

v.

Mt. Nanki, Decree-holder and others, Judgment-debtors — Respondents.

Exn. First Appeal No. 277 of 1936, Decided on 9th December 1936, from order of Senior Sub-Judge, Ambala, D/-6th June 1936.

Hindu Law — Joint family—Decree against undivided co-parcener—Interest of judgment-debtor not attached during his lifetime — After his death decree cannot be executed against other co-parceners who take estate by survivorship and not by succession.

A mere decree obtained by a creditor, not followed up by an attachment in the lifetime of the debtor will not defeat the right of survivorship. [P 329 C 1]

So where a decree-holder obtains a decree against a judgment-debtor who is a member of a joint Hindu family, the decree-holder cannot after the death of that judgment-debtor execute that decree against the other co-parceners, unless he had attached the interest of the judgment-debtor in his lifetime, because the other co-parceners take the property from the deceased not by succession but by survivorship: *A I R 1918 Bom 165* and *A I R 1921 Lah 34, Rel. on.*

[P 329 C 1],

Achhru Ram — for Appellants.

J. N. Aggarwal — for Respondent 1.

Judgment.— This appeal has arisen from the execution of a decree for a large sum, obtained by Mt. Nanki against Murari Lal and another. Murari Lal died shortly after the decree, before execution was taken out. Mt. Nanki then applied for execution against Murari Lal's widow Mt. Raj Devi and against the three sons of his brother, Harish Chandar, Parkash Chandar and Ishwar Chandar. Before the Subordinate Judge, objection was raised on behalf of the nephews that they were members of a joint Hindu family along with Murari Lal and that his interest in the co-parcenary property passed to them not by succession but by survivorship. The learned Subordinate Judge summarily overruled this contention saying that when it was an admitted fact that Murari Lal had a specified share in the joint property and that the objectors were now in possession of that share, they were legally his representatives. This proposition is erroneous. The proposition is correctly given in Mulla's Hindu Law, 8th Edn., para. 229 :

On the death of a co-parcener, his interest in the co-parcenary property does not pass by succession to his heirs. It passes by survivorship to the other co-parceners, subject to the rule that where the deceased co-parcener leaves male issue, they represent his rights to a share on partition.

Para. 229 also states that the right of a co-parcener to take by survivorship is defeated where the interest of the deceased co-parcener has been attached in his lifetime in execution of a decree against him ;

A mere decree obtained by a creditor, not followed up by an attachment in the lifetime of the debtor will not defeat the right of survivorship in circumstances like the present.

Mr. Achhru Ram for the appellants relies also on 42 Bom 504,¹ where the facts were similar. The plaintiff obtained a decree for injunction against two defendants who were members of a joint Hindu family, with three other co-parceners. After the death of both defendants, the plaintiff sought to execute the decree against the three surviving co-parceners. It was held that the surviving co-parceners were not bound by the decree because on no construction of the term "legal representative" could members of a joint Hindu family be brought within its definition as

contained in S. 2 (11), Civil P. C. This ruling was followed by a Division Bench of this Court in 2 Lah 114² at p. 117. Therefore, the order of the learned Subordinate Judge was erroneous; the appellants are not legally the representatives of Murari Lal. At the request of Mr. Jagan Nath Aggarwal, who represents the decree-holder, I add that this will not prevent the decree-holder proceeding against any self-acquired property of Murari Lal in whosoever's hands it may be found, the appellants or anyone else. I accept the appeal. The respondent is to pay the appellants' costs.

B.D./D.S.

Appeal allowed.

2. Dwarka Das v. Krishen Kishore, A I R 1921 Lah 34=61 I C 628=2 Lah 114=73 P L R 1921.

A. I. R. 1937 Lahore 329

ADDISON AND DIN MOHAMMAD, JJ.

Mt. Harnamo — Defendant—Appellant,
v.

Dewa Singh and others, Plaintiffs and
others, Defendants—Respondents.

Letters Patent Appeal No. 109 of 1936, Decided on 19th November 1936, from judgment of Jai Lal, J., D/- 26th March 1936.

Punjab Colonization of Government Lands Act (5 of 1912), S. 20—Grant of land to *B*, entering him as non-occupancy tenant — Provision for acquisition of occupancy and proprietary rights — *B*'s unmarried daughter *H* succeeding as non-occupancy tenant on *B*'s death—*H* acquiring occupancy rights soon after—On *H*'s marriage collaterals of *B* applying for mutation which was dismissed—Suit by collaterals for possession—*H* acquiring, pending suit, proprietary rights—Acquisition of proprietary rights by *H* held illegal as her rights of succession to *B*'s estate extended till her marriage under S. 20 (c)—Order of revenue authority conferring proprietary rights held ultra vires—Held also that subsequent acquisition of proprietary rights by *H* being illegal, collaterals would be entitled to succeed as occupancy tenants and not as absolute owners.

Certain land was granted to *B* by Government and he was entered as a non-occupancy tenant thereof. *B* had a right to acquire first occupancy rights and then the proprietary rights under the grant. *B* died as non-occupancy tenant and his unmarried daughter *H* succeeded to him. *H* acquired subsequently rights of occupancy tenant. On *H*'s marriage collaterals of *B* applied to revenue authorities for mutation, but the application was dismissed and *H* continued in possession of the land as occupancy tenant in spite of her marriage. Thereafter the collaterals filed a suit for

1. Chuni Lal Hari Lal v. Bai Mani, A I R 1918 Bom 165=46 I C 745=42 Bom 504=20 Bom L R 660.

possession. *H* acquired proprietary rights while the suit was pending :

Held : that as *H* succeeded to *B* as an unmarried daughter upon his death under S. 20 (c) of the Act, her rights under that clause extended only up to the time of her death or marriage or loss of rights under the provisions of the Act. *H* could not therefore after her marriage, continue to be an occupancy tenant of the land invested with the privilege of acquiring proprietary rights therein. The statute put an end to her rights and the decision of the Financial Commissioner could not alter the position, inasmuch as it went clearly against the provisions of the Act. No revenue authority could keep the rights alive which once had been terminated by the statute. Proprietary rights could be conferred only on a person who was legally enjoying the status of an occupancy tenant and *H* had been divested of this status on account of her marriage and was not in enjoyment thereof at the time when she was said to have acquired proprietary rights. Hence the act of the revenue authorities in conferring proprietary rights on her was *ultra vires*. The acquisition of proprietary rights by *H* was therefore illegal and she could not defeat the claim of the collaterals: *A I R 1935 Lah 613, Rel. on.* [P 330 C 2; P 331 C 1]

Held also : that the collaterals on succeeding will be entitled to possession of land as occupancy tenant only and not as absolute owners as the acquisition and conferring of the proprietary rights on *H* after her marriage being illegal, such acquisition of them by *H* would not enure to their benefit. [P 331 C 2]

Jhanda Singh—for Appellant.

Vishnu Datta and *Nawal Kishore*—for Respondents.

Din Mohammad, J.—The facts of the case out of which this appeal has arisen are these. One Buta Singh, a Sikh Jat of Amritsar, was granted land in the District of Montgomery. Under the conditions of the grant, he was entered as a non-occupancy tenant of the land but had a right to acquire, first, the occupancy tenancy and, later, proprietary rights at stated periods in accordance with the conditions of the grant. He, however, died in 1922, as a non-occupancy tenant, leaving him surviving an unmarried daughter, Mt. Harnamo. She acquired occupancy rights in the land soon after her succession. In 1930, Mt. Harnamo married and thereupon the collaterals of Buta Singh made an application to the revenue authorities that they should be substituted for her. This case went up to the Financial Commissioner who, however, did not accept their contention on the ground that as collaterals they could not claim greater rights in the colony land than they enjoyed under the provisions of S. 59 of the Tenancy Act in their home districts. Mt. Harnamo thus continued to be in

possession of the land as an occupancy tenant in spite of her marriage.

On 4th July 1933, the suit from which this appeal has arisen was instituted by the collaterals for possession of the land on the basis of inheritance. On 27th July 1933, Mt. Harnamo acquired proprietary rights in the land in suit and on 11th October 1933 she sold the land to Sardar Sant Singh and consequential amendments were made in the plaint accordingly. Several issues were framed in the case prior to the impleading of Sardar Sant Singh. Those issues, however, have not been touched at all in the trial Court. When Sardar Sant Singh was brought on the record, he contested the *locus standi* of the plaintiffs on the ground that Mt. Harnamo was an absolute owner of the property at the time of the sale in his favour and that therefore his title could not be defeated. The Senior Subordinate Judge, who was then taking cognizance of the suit, framed what he called a preliminary issue on the contention raised by Sardar Sant Singh and, holding that Mt. Harnamo had, by virtue of the acquisition of the proprietary rights, become an absolute owner of the property and that Sardar Sant Singh had succeeded to her rights, dismissed the suit. On appeal, the District Judge reversed this finding and remanded the suit for disposal in accordance with law. Mt. Harnamo appealed to this Court and her appeal came on for hearing before Jai Lal, J. He, however, maintained the order of the District Judge and dismissed the appeal. Hence this Letters Patent appeal. In our view, the decision of the learned Judge of this Court is right; but, as he has made certain observations which are liable to be misunderstood, it is necessary to set forth our reasons at length for upholding his judgment.

The crucial point in this case is whether Mt. Harnamo could validly acquire proprietary rights in the land in suit on 27th July 1933, that is, long after her marriage. If so, she cannot be ousted from the land. If not, the plaintiffs' suit must succeed. In order to determine this question, we shall have to refer to Ss. 20 and 21, Colonization of Government Lands (Punjab) Act, 1912. Buta Singh was the original tenant and on his death his unmarried daughter could only succeed under Cl. (c), S. 20 of that Act. Her rights under that clause extended only up to the time of her

death, marriage or loss of the rights under the provisions of the Act. Mt. Harnamo could not, therefore after her marriage, continue to be an occupancy tenant of the land invested with the privilege of acquiring proprietary rights therein. The statute put an end to her rights and the decision of the Financial Commissioner could not alter the position, inasmuch as, in our view, it went clearly against the provisions of the Act. No revenue authority could keep the rights alive which once had been terminated by the statute. Proprietary rights could be conferred only on a person who was legally enjoying the status of an occupancy tenant and, as Mt. Harnamo had been divested of this status on account of her marriage and was not in enjoyment thereof at the time when she is said to have acquired proprietary rights, the act of the revenue authorities in conferring proprietary rights on her was *ultra vires*. If an authority is needed for this proposition, reference may be made to 37 P L R 163.¹ There also a question arose as to the correctness of the Collector's order sanctioning mutation in favour of the nephews of the deceased tenant as his legal heirs and subsequently conferring proprietary rights on them.

A Division Bench of this Court held that if the order mutating the land in favour of the nephews as heirs of the deceased was not correct, the Collector was not empowered by the Act to sell the proprietary rights to them. Had Mt. Harnamo acquired proprietary rights before her marriage, the position would have been different, because then she would have been a person legally eligible to acquire those rights, but she could not be treated as an occupancy tenant after her marriage on account of the clear provisions contained in Cl. (c) of S. 20, restricting her succession up to the time of her marriage. In this view of the case, the questions envisaged by Jai Lal, J. do not arise. It is reliably established on the record that Mt. Harnamo acquired proprietary rights during the pendency of the suit, but even if she acquired them before the suit, the position would remain unaltered, as her acquisition would be illegal. Nor would the mere acquisition of proprietary rights by Mt. Harnamo after her marriage constitute a valid defence and enable her to

defeat the claim of the plaintiffs. It must be noted, however, that this result will follow only if Mt. Harnamo's estate terminates on her marriage. If, on the other hand, it continues for any reason, acquisition of proprietary rights by her will not be invalidated at all.

The only question that remains to be determined therefore is whether Mt. Harnamo's estate terminated on her marriage or not. For an answer to this question, reference shall have to be made to S. 21, Colonization of Government Land (Punjab) Act. That section provides that:

When, after the commencement of this Act,..... any female tenant.....marries....., the succession to the tenancy shall devolve (a), in the case of a female, to whom the tenancy has been first allotted, on the successor nominated by the Collector from the issue of such female tenant, or from the male agnates of the persons, on account of whose services the tenancy was allotted to her; and (b) in all other cases, on the person or persons, who would succeed if the tenancy were agricultural land acquired by the original tenant.

This case is evidently governed by Cl. (b), S. 21, and it would be necessary, therefore, to determine whether under the Customary law, by which the parties are governed, the plaintiffs have a preferential right to succeed to the tenancy in suit. The plaintiffs, if successful, will obtain possession of the land not as absolute owners but as occupancy tenants, as the subsequent acquisition of the occupancy rights by Mt. Harnamo would enure to their benefit. In these circumstances, Mt. Harnamo would clearly be entitled to the refund of any sum or sums that she may have paid to the Government to acquire occupancy or proprietary rights in the land in suit. If, on the other hand, the plaintiffs fail, the acquisition of proprietary rights by Mt. Harnamo will not be affected in any manner, and the vendee from her will acquire an absolute title in the land. We accordingly maintain the order of the District Judge remanding the case to the trial Judge for final disposal but limit the enquiry to the question formulated above and such other subsidiary matters as may arise in relation to that question. Court-fee on the memorandum of appeal will be refunded. Other costs will abide the event.

K.B./A.L.

Case remanded.

1. Ibrahim v. Mt. Zainab, A I R 1935 Lah 613=156 I C 29=37 P L R 163.

A. I. R. 1937 Lahore 332

ADDISON AND DIN MOHAMMAD, JJ.

Mt. Tuman and others — Defendants—
Appellants.

v.

Umrao Bahadur Khan and others—
—Plaintiffs—Respondents.

First Appeal No. 153 of 1936, Decided
on 5th January 1937, from decree of
Senior Sub-Judge, Ambala, D/. 2nd Janu-
ary 1936.

Custom (Punjab)—Succession — Mahome-
dan Rajputs of village Laha in Ambala Dis-
trict — Descendants of two wives of such
Mahomedan separate from each other and
forming two distinct groups — Relatives of

whole blood exclude those of half-blood
when succeeding *inter se*.

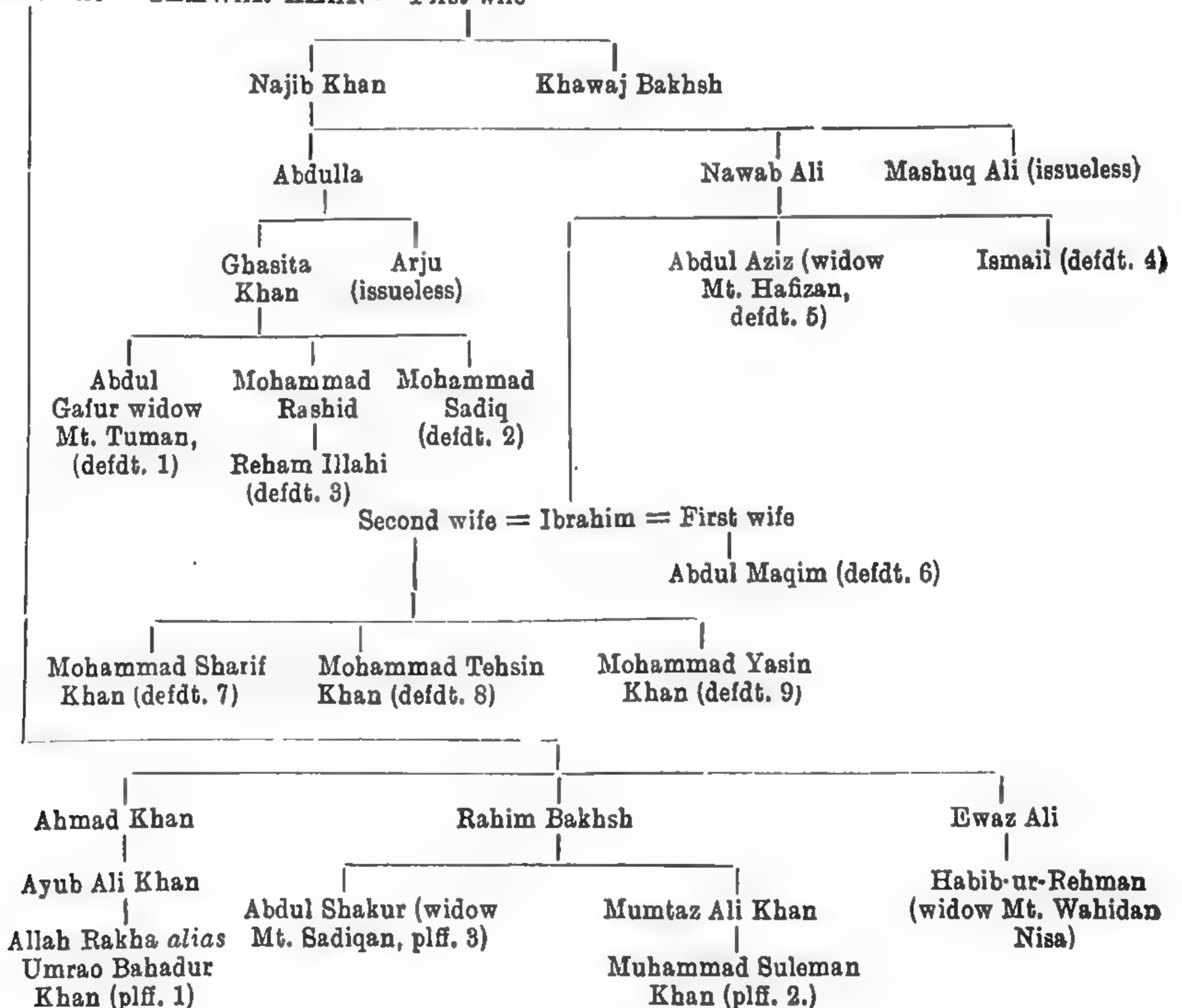
Amongst Mahomedan Rajputs of village Laha
in Naraingarh Tahsil of Ambala District, where
the descendants of two wives of such a Mahome-
dan have been proved to be separate from each
other and form two distinct groups, when succeed-
ing *inter se*, the relatives of whole blood exclude
those of half-blood as succession is governed by
the rules of succession to the owner of it and not
to the ancestral owner : *A I R 1924 P O 117*
and *A I R 1927 Lah 400, Rel. on.* [P 334 O 2;
P 335 O 1]

Malik Barkat Ali and Mohammad Amin
— for Appellants.

J. N. Aggarwal and S. M. Sikri — for
Respondents.

Addison, J. — The following pedigree
table is necessary in order to understand
this appeal :

Second wife = TEHWAR KHAN = First wife



The parties are Mohammadan Rajputs
residing in village Laha in Tehsil Narain-
garh of the Ambala District but they own
lands in Laha, Rampur, Chhoti Kori,
Sambhaloo, Rerki and Dhanora. Tehwar
Khan, the common ancestor, had two
wives. The plaintiffs are his descendants
by the second wife while the defendants
are his descendants by the first wife. The

land in dispute belonged to Habib-ur-
Rehman, grandson by the second wife.
He was succeeded, according to custom, by
his widow Mt. Wahidan Nisa who died
recently. The land was mutated by the
Revenue Officer in favour of the plaintiffs
only on the ground that the family fol-
lowed the chundawand rule of succession.
On appeal the Collector mutated the land

according to the pagwand rule. The plaintiffs thereupon brought the present suit for a declaration that they were entitled to the whole of the land in dispute and that none of it should go to the descendants by the first wife. Two issues were framed: (1) Are the parties governed by the chundawand rule of succession? (2) Whether on succession opening out on Mt. Wahidan Nisa's death relations of the full-blood exclude those of the half-blood? The trial Judge has held that the rule is pagwand but that in cases of succession the full-blood exclude the half-blood, that is, he decided issue 1 against the plaintiffs but issue 2 in their favour. The suit of the plaintiffs was accordingly decreed and the defendants have appealed. In the Customary law of the Ambala District compiled at the second settlement of 1888 the following is the reply to question 29 as regards uterine descent:

A great majority of tribes in all Tahsils assert the custom of equal division among all sons (pagwand) without regard to uterine descent. The custom is not universal in Naraingarh or Pipli Tahsils. Among the Rajputs of Naraingarh division is said to be according to the number of wives (chundawand) in the villages of Tepla, Laha (the residential village of the parties), Jangumajra, Ojalmajri, Badhaoli, Panjlassa and Kathemajra all Mohammadan villages except Badhaoli. Similarly among the Jats of Naraingarh Tahsil chundawand is stated as common in a long list of Hindu villages, most of them held by Jats of the Bachal got. Further more or less rare instances of chundawand are found among Jats of Rupar Tahsil, Sayads, Sainis and Gujars of Naraingarh Tahsil and Rajputs, Jats, Rains and Rors of Pipli Tahsil. The last mentioned tribe mention a curious custom of modified chundawand, which they upheld at attestation. On the whole it is pretty safe to say that chundawand rule is the very rare exception anywhere except in Naraingarh and Pipli, but that in those tahsils it is quite possible that it should be recognized in case of dispute. I have certainly come across cases where there can be no doubt that the custom really does prevail.

In the Customary law prepared at the third settlement in 1921 the answer recorded in 1887 is put down and as regards 1918 it is added as follows:

Since settlement the custom of chundawand has become still more rare, but at the present attestation instances were given among Jats of Kharar Tahsil, Rajputs of Naraingarh and Ambala Tahsils, and Gujars of Ambala Tahsil. The custom still prevails but has almost died out.

Taking these two statements of Customary law together the presumption would appear to be that chundawand is still the rule in Laha, a village in Naraingarh Tahsil, occupied by Mohammadan Rajputs, which was especially mentioned in the

statement of Customary law in 1887, whereas the trial Judge has placed the burden the other way. Part of the statement of Mohammadan Rajputs of Naraingarh Tahsil compiled at the settlement of 1888 in Ex. P/28 which is to the effect that they then said that if a proprietor died, leaving several sons by different wives, they inherit in equal shares and the chundawand rule of succession is not followed but against this the people of mauza Laha, with three individual exceptions, stated that the chundawand rule was followed. Below this statement is given a list of eleven instances amongst Mahomedan Rajputs where the chundawand rule was followed and in this list is the instance of the common ancestor of this family, Tehwar Khan. Besides these 11 instances quoted in the 1888 Settlement of Customary law the plaintiffs relied upon two instances of the chundawand rule being followed which took place in 1922 and 1926: see pp. 103 and 109 of the printed paper book. Another instance of 1912 is printed at p. 54. On the other hand there are the following instances where the pagwand rule was followed amongst Mahomedan Rajputs in this tehsil. One took place in 1927 in village Panjlassa: see p. 155. Another instance took place in village Laha, where the parties reside, in this very family in 1930 when Ibrahim, who was one of the descendants of Tehwar Khan by his first wife, died. He had two wives and one son by one wife, and three by the other, defendants 6 to 9. They asked that mutation should take place according to the pagwand rule. This was shortly before the succession opened out in the present case by the death of Mt. Wahidan Nisa, a widow of one of the grandsons by the second wife. Umrao Bahadur Khan, one of the plaintiffs, was lambardar and he appeared before the Revenue Officer at the time of mutation in that capacity. It is argued that he should have objected and said that the chundawand rule was followed, but it was no concern of his as no member of his branch could succeed and he had to attend to identify the parties before the Revenue Officer. No adverse inference, therefore, can be drawn from this instance on that account.

Further, Tehwar Khan left two sons by his first wife, namely, Najib Khan and Khawaj Bakhsh. Tehwar Khan was alive when settlement operations started

in 1852 but was dead before they were finished. Sometime after the first settlement and before the second settlement Khawaj Bakhsh died, and it has been established that the whole of his inheritance went to his full blood brother Najib Khan, the half blood brothers being excluded. This is a very important instance. Another instance of pagwand succession has been established amongst Mahomedan Rajputs in Laha. This is printed at p. 178 and relates to the year 1931. It was there stated, however, that in the patti in which the deceased resided the rule was pagwand. The instance thus loses some of its value. The last instance of pagwand succession amongst Mahomedans Rajputs in this tahsil which has been established relates to village Badi Rasaur and it took place in 1922. (It is printed at p. 143). When Tehwar Khan himself died the land he left in village Laha was mutated according to the chundawand rule, Najib Khan and Khawaj Bakhsh, the sons of his first wife, getting half and Ahmad Khan, Rahim Bakhsh and Ewaz Ali, the three sons of his second wife, getting one-half. In the other villages, however, the sons by the second wife got $\frac{3}{4}$ ths and the sons by the first wife got $\frac{1}{4}$ th. They should have got a half each if the chundawand rule was followed, while the sons of the first wife should have got $\frac{2}{5}$ ths and the sons by the second wife $\frac{3}{5}$ ths if the pagwand rule was followed. There is no one alive to explain how a different rule was followed in the other villages to that followed in Laha. Apart from what has been given above there is no other evidence which need be referred to except the oral evidence. Umrao Bahadur Khan, the first plaintiff, as witness P. W. 15, said that the descendants of Tahwar Khan by the first wife and his descendants by the second wife had partitioned their inheritance long before he was born except in one village Dudhli, where they did not reside. That was not partitioned till 1917. The parties had always been separate *inter se* in residence, mess and business, this separation having occurred before he was born.

D. W. 16, Ghulam Sabir Khan, another lambardar of Laha, stated that they follow the pagwand rule of succession but he had to admit to an instance of the chundawand rule being followed in his own family. He said that he did not object as the panchayat persuaded them

not to do so. He admitted that the plaintiffs as well as the defendants *inter se* were separate in residence, mess and business. He also stated that the rest of the landed property of the parties was separate except a joint baithak or bungla in village Laha. Muhammad Ismail, defendant 4, when re-examined as a witness, D. W. 12, stated that most of the land of the parties had been partitioned but that a baithak or bungla in village Laha was jointly owned by them still. He added that the plaintiffs and the defendants were separate and also lived separately *inter se*. With the exception of the bungla referred to there was no joint property of the parties in village Laha. On this evidence it would seem that the better finding would have been that the rule of chundawand prevailed in this family. The instance in 1930, when defendants 6 to 9 succeeded according to the pagwand rule, is not important as in that branch of the family there was nothing to gain by continuing the chundawand rule as they had already inherited before 1888 all the land of Khawaj Bakhsh, the only brother of Najib Khan; while the plaintiffs got nothing whether the rule was pagwand or chundawand. But this matter is not important as we are in agreement with the finding of the trial Judge that at any rate as regards succession *inter se* it has been established that the relatives of the whole blood exclude those of the half blood. There is the clear instance of Khawaj Bakhsh's share going to his full blood brother Najib Khan, and the defendants' branch of the family gained considerably thereby. Many of the mutations quoted as supporting the chundawand rule are instances where descendants of one wife *inter se* succeeded to each other. These instances can be taken as supporting either the rule of chundawand or of the full blood excluding the half blood. These have been set out in the judgment of the trial Judge and have also been referred to already by us.

Further, it has been shown that the descendants of two wives separated from each other and became two distinct groups, Najib Khan being allowed to succeed to Khawaj Bakhsh inside one group while the two groups became separate in all matters. As in the Privy Council case 5 Lah 278,¹ therefore, in which also each

1. Nabi Bakhsh v. Ahmad Khan, A I R 1924 PC 117=80 IC 158=51 I A 199=5 Lah 278 (PC).

portion of the property succeeded to by the children of the second wife became a separate entity so that the rules of succession to it were the rules of succession to the owner of it and not to the ancestral owner, so also in this case that happened. Accordingly, as was held by their Lordships of the Privy Council, the full blood would exclude the half-blood. Another instance of this, though in another district, is furnished by 8 Lah 127.² In our judgment, therefore, the decision of the trial Court is correct and we dismiss this appeal with costs.

W.D./A.L.

Appeal dismissed.

2. Khuda Yar v. Mahomed Yar, A I R 1927 Lah 400=101 I C 807=28 P L R 414=8 Lah 127.

A. I. R. 1937 Lahore 335

ADDISON AND ABDUL RASHID, JJ.

Manohar Lal and another—Plaintiffs—Appellants.

v.

Mt. Hira Devi, Defendant and *another*, Plaintiff—Respondents.

First Appeal No. 829 of 1935, Decided on 27th April 1936, from decree of Sub-Judge, 1st Class, Lyallpur, D/- 6th March 1935.

Hindu Law—Joint family—Partition—Partition among brothers established not only by mere separate acquisitions and keeping of separate purses but by other direct evidence—One brother dying after partition and his widow succeeding to his share—Son of other brother alleging property to be joint family property—Reference to civil Court under S. 117 of Punjab Land Revenue Act—Onus to prove that there was no partition lies on person disputing partition.

A person and his sons B, C, D formed a joint Hindu family. A partition took place between the three sons and in addition to direct evidence in support of partition the sons after the death of their father began to make separate acquisitions of property and also kept separate purses. C and D subsequently died. The widow of D instituted a suit to recover 1/3 of the property as a share of her husband. B contested the claim on the ground that the family was joint and therefore the widow had only right of maintenance. B contended that as the family was once joint family the presumption was that property acquired by any member was joint family property and the mere fact of separate acquisitions and keeping separate purses did not prove that B, C and D had separated from each other :

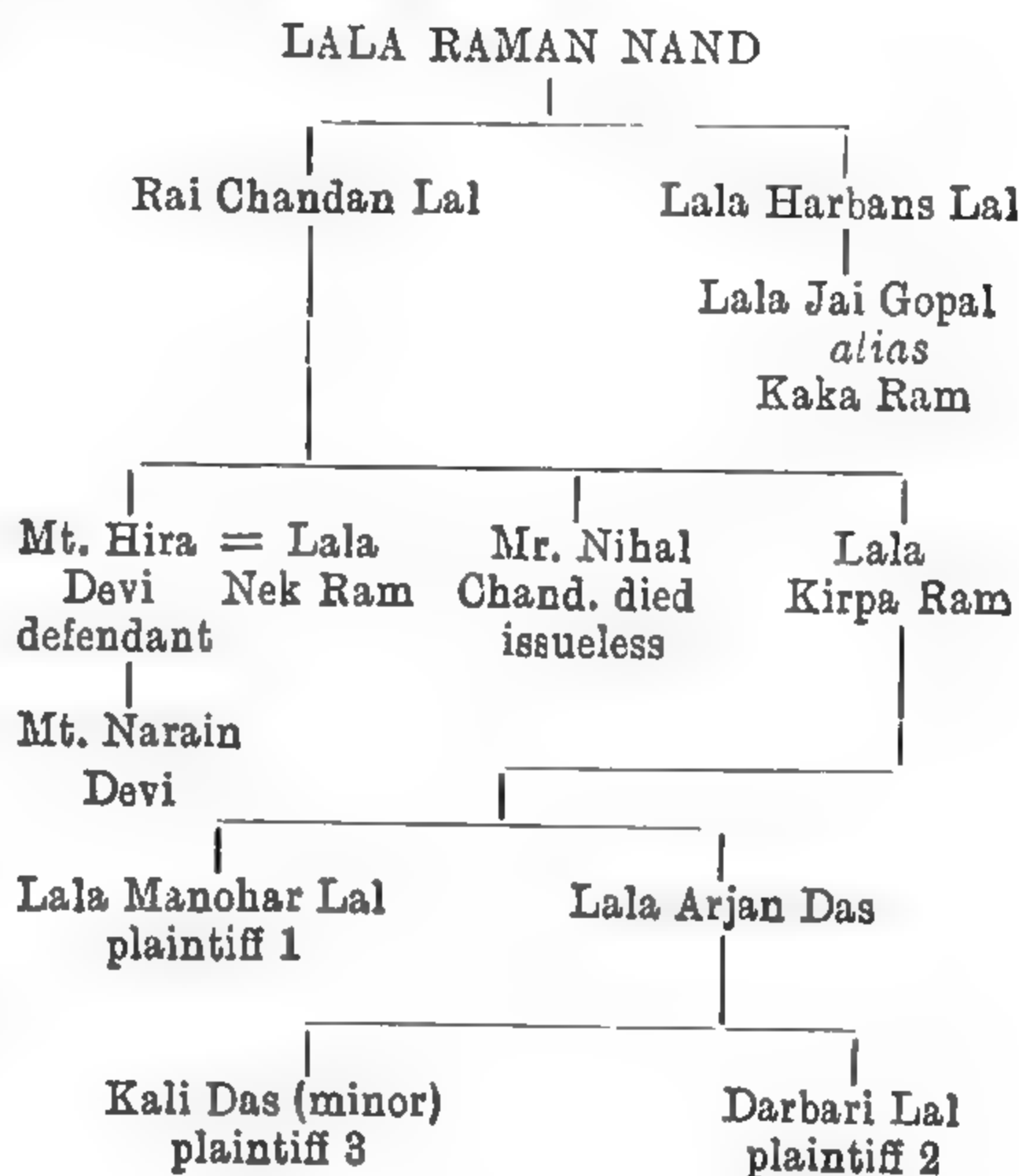
Held : that separate acquisitions and keeping of separate purses were not the only evidence of partition. There was other direct evidence establishing partition of B, C, D before D's death and

separate acquisitions and keeping of separate purses corroborated it; the onus to prove that the family was joint family and that D died as a member of joint family was on B. [P 337 C 1; P 338 C 2]

Jagan Nath Aggarwal, Achhru Ram and Asa Ram Aggarwal—for Appellants.

Mukand Lal Puri, Chandar Bhan and Kishen Swarup—for Respondents.

Abdul Rashid, J.—The following pedigree-table will be helpful in understanding the facts of this case :



This appeal arises out of an action brought by Manohar Lal, Darbari Lal and Kali Das for a declaration to the effect that the plaintiffs are members of a joint Hindu family consisting of Rai Chandan Lal and his descendants, and as such are owners of 12 squares of land situate at Chak No. 110, Jhang Branch, Tahsil and District Lyallpur; that the defendant has neither any right of ownership in the land in dispute nor is she entitled to have it partitioned; and that she is entitled only to maintenance out of the assets of the joint Hindu family property.

The case of the plaintiffs was that Rai Chandan Lal resident of village Babari in the Muzaffar Nagar District (U.P.) was an Extra Assistant Commissioner in the Punjab and acquired proprietary rights in 12 squares of land on payment of Rupees 6,400.5-2 to the Government. On the death of Rai Chandan Lal in the month of November 1906, his three sons Kirpa Ram, Nihal Chand and Nek Ram came into possession of the joint Hindu family property by the rule of survivorship. Lala Kirpa Ram was serving as a Tahsildar in

the Punjab, while Nihal Chand was practising as a Barrister in the Allahabad High Court, and Nek Ram resided at village Babari and managed all the joint Hindu family property. Nek Ram died in December 1917, and on his death one-third share of the land situate at Chak No. 110, Jhang Branch was mutated in favour of his widow Mt. Hira Devi, defendant, without any notice to the plaintiffs. When the plaintiffs came to know of it they did not raise any objection as the family was a joint Hindu family and all the members thereof continued to be in proprietary possession of the land in dispute. Arjan Das died in England in December 1918 and Nihal Chand died at Allahabad in the year 1929. Thus by the rule of survivorship the plaintiffs became owners and possessors of the entire joint Hindu family property including the land in dispute. In 1930, the defendant instituted a suit in respect of the produce of the land in dispute and also applied for partition of her one-third share on the ground that Nek Ram, her husband, had separated from his other brothers before his death. The plaintiffs controverted this application stating that the parties were members of a joint Hindu family and that the defendant was only entitled to maintenance. The revenue authorities directed the plaintiffs under S. 117, Punjab Land Revenue Act to seek their remedy in a civil Court, and, thereupon, the plaintiffs instituted the present suit. The defendant admitted that the property in suit was acquired by Rai Chandan Lal, but pleaded, *inter alia*, that her husband had separated from his brothers in the lifetime of Rai Chandan Lal, and that in any case the separation between the three brothers took place before the death of Nek Ram. It was further stated that in pursuance of this separation mutation of one-third share in the land in dispute and the lands situate in villages Gogwan, Shamaspur and Babari in the U. P. in favour of the defendant took place soon after the death of her husband.

The trial Court held that it had been established that about Rs. 50,000 and part of the immoveable property belonging to Rai Chandan Lal were divided between the three brothers in October 1905. It was further held that soon after the death of Mrs. Chandan Lal in 1912 cash and jewellery amounting to about Rs. 18,000 were divided between the three brothers.

The trial Court was also of opinion that ever since the death of Chandan Lal the three brothers had been acquiring property separately, that they resided and messed separately and divided the income of the property in specified shares, and that this was conclusive proof of the fact that there had been a complete separation between the three brothers before the death of Nek Ram. On these findings the plaintiffs' suit was dismissed. Against this decision the plaintiffs have preferred an appeal to this Court. (After discussing the evidence to decide the question whether there was partition, the judgment proceeded.) This application makes it perfectly clear that in 1916 the position taken up by Manohar Lal was that his father Kirpa Ram had separated from his other two brothers Nihal Chand and Nek Ram and that in 1916 the only joint family of which Manohar Lal was a member consisted of himself and his elder brother Arjan Das. Nek Ram died a year after Kirpa Ram and if Kirpa Ram had separated from his brothers during his lifetime, it is obvious that Nek Ram died after a separation with his brothers had taken place.

The trial Court has given a number of instances of separate acquisitions of immoveable property by the three brothers. Most of these acquisitions consist of mortgages of houses or landed property. The learned counsel for the appellants was unable to challenge these transactions as they were supported by reliable documentary evidence. The position taken up by the learned counsel was, that as the family of Rai Chandan Lal was once a joint Hindu family the presumption was that property acquired by any member was joint family property and the mere fact of separate acquisitions did not prove that the three brothers had separated from each other. Reliance was placed in this connexion on 82 P R 1917.¹ In our opinion this argument is without any force. In the present case we have the direct evidence of a partition in 1905. We have the evidence of a further partition in 1912. The acquisition of separate property by members of a family which was admittedly joint at one time, is not the only evidence of separation in the present case. In the circumstances of the present

1. Nanak Chand v. Lachhman Das, A I R 1917 Lab 374=40 I C 775=82 P R 1917.

case acquisition of separate property by the three brothers between the years 1912 to 1917 constitutes very strong indication of the fact that before his death in December 1917 Nek Ram had completely separated from his brothers.

It has been amply established on the present record by unimpeachable documentary evidence that all the three brothers had separate purses from the year 1905. The deposits made by Rai Chandan Lal with Saudagar Mal and the firm Nihal Chand-Janki Das ultimately fell to the share of Nek Ram and these accounts were operated on by Nek Ram in his lifetime and by his widow after his death. In his letter, dated 8th July 1924 Nihal Chand advised Narain Devi, the daughter of the defendant, to ask her mother to have entries made in her own name from all the persons who owed money to her father. This advice implies an admission on the part of Nihal Chand that all the money left by Nek Ram belonged to the defendant and that the other brothers had no concern with it. The fact of the brothers keeping separate purses was not seriously challenged by the learned counsel for the appellants. It was however contended on the basis of certain observations in 82 P R 1917¹ that the keeping of separate purses was not conclusive evidence of a formal partition of the joint family. This argument again ignores the fact that this is only one of the items which has been used as furnishing corroboration of the fact that two partitions took place in 1905 and 1912 respectively.

The learned counsel for the appellants placed a great deal of reliance on certain letters written by Nihal Chand to Manohar Lal or Narain Devi. He contended that the letter of Nihal Chand, dated 24th July 1916 (Ex. P-16), showed that Nek Ram was allowed to live in the small haveli on account of a family arrangement and that this haveli had not fallen to his share in any partition. The letter of Nihal Chand is to the effect that Nek Ram had had an ailment which had affected his head and that he should be allowed to live in peace in any of the houses he pleased so that he may be able to look after the ladies of the family and there may not be any relapse which may prove disastrous to all the members of the family. Particular emphasis was laid by the learned counsel on the words to the effect that :

He (Nek Ram) does not want any partition of the house or houses, but what he wants is that he may live separately.

It is obvious that this letter proceeds on certain information received by Nihal Chand from Nek Ram. The letter of Nek Ram to Nihal Chand containing Nek Ram's allegations was evidently with Nihal Chand when this letter was written. We have it in the statement of Radhe Lal (P. W. 21), the clerk of Nihal Chand, that he gave all the papers left by his master to Manohar Lal. It was the duty of Manohar Lal to place the letter of Nek Ram on the record, so that the Court may be in a position to appreciate the meaning of the words occurring in the letter of Nihal Chand and referred to above. In the absence of the letter written by Nek Ram to Nihal Chand it is impossible to appreciate the exact significance of the phrase : "He does not want any partition or division of the house or houses". The next letter of Nihal Chand alluded to by the learned counsel for the appellants is dated 9th December 1923. This letter is addressed to Narain Devi, the daughter of the defendant. Nihal Chand stated in this letter that Manohar Lal had sent him the accounts of the Lyallpur land and he had directed him to pay a third-share to Mt. Hira Devi after deducting the expenses, etc. This letter in our opinion does not show, as was claimed on behalf of the appellant, that one-third share of the Lyallpur land was paid to the defendant by way of maintenance. In fact in this letter Nihal Chand stated that he had instructed Manohar Lal to pay Rs. 300 to each of the three out of the income of the villages Babari, Shamaspur and Gogwan and to keep in trust with him the remaining sum for sinking a well in Shamaspur. This observation, if anything, goes against the case set up on behalf of the appellants. The next letter on which reliance was placed by the learned counsel for the appellants was written by Nihal Chand to Manohar Lal on 21st November 1928 (Ex. P. 18). In this letter the following observations occur :

I have been forcing you to give her (Mt. Hira Devi) one-third of the net income of Lyallpur property so that she might not be handicapped. I know nothing about the income of Babari, Shamaspur and Gogwan property, as I never knew anything about it even during her husband's lifetime. I do not know of any separation but I know I did not receive any money from the property in any place nor did I care for it as it was represented to me that the other two brothers

wanted for their various needs, and I having a good income was not in any need for any income.

This letter is again in reply to a letter written by Manohar Lal to Nihal Chand. As explained above Manohar Lal could easily produce the letter to which Ex. P/18 is the reply but he has refrained from doing so. This letter appears to have been written by Nihal Chand when Mt. Hira Devi had already instituted her suits in which Nihal Chand also had been made a defendant. Nihal Chand at the time of writing this letter was indignant that disgrace had been brought upon the family by the institution of certain suits by Mt. Hira Devi. Moreover, by using the words that "he did not know of any separation" he may be implying merely that no formal partition by metes and bounds had been carried out. In any case the letters of Nihal Chand to Manohar Lal at a time when Mt. Hira Devi had sued them both do not possess any great evidentiary value against Mt. Hira Devi, even if they are considered to be admissible in evidence which is doubtful. The written pleas filed by Nihal Chand in the Court of the Assistant Collector, Muzaffarnagar in the year 1929, and the will executed by Nihal Chand shortly before his death, stand on the same footing as the letters alluded to above. The letters and other documents emanating from Nihal Chand are not in any way sufficient to rebut the overwhelming evidence produced by defendant on the question of separation.

It is clear from the record that Manohar Lal has suppressed a great deal of valuable documentary evidence and has resorted to various tricks and subterfuges to gain his end. Originally the case of the plaintiffs was that the sons of Rai Chandan Lal never separated, that Nek Ram continued to manage the property of the joint family as a karta, and that after his death the duties of karta were performed by Nihal Chand and thereafter by Manohar Lal plaintiff. To explain away the mutation of the Lyallpur squares and United Provinces lands in favour of the defendant it was asserted that the lands had been mutated in the name of Nek Ram's widow in order to console her for the loss of her husband and that she had been merely getting a fixed allowance by way of maintenance from the joint family property. This position was maintained by the plaintiff in his statement dated 7th December 1934. It appears however that

at the end of the case the counsel for the plaintiffs realized the untenability of the contention that only a fixed allowance was paid to the defendant by way of maintenance. It was therefore urged during the course of the arguments that the mutation of a one-third share had been effected in favour of the defendant in order to make a provision for her maintenance, and the theory of a fixed allowance by way of maintenance was given up. In our opinion, in view of the evidence summarised above, even this position is unsustainable. The evidence regarding the partitions in 1905 and 1912 is overwhelming, and we are of the opinion that it has been conclusively established that the three sons of Rai Chandan Lal had in any case separated before the death of Nek Ram.

In view of the finding given above, the question of onus loses all importance. We are however of the opinion that as the plaintiffs had been referred to a civil Court by the revenue authorities under S. 117, Land Revenue Act, when they opposed the partition of the property in dispute at the instance of Mt. Hira Devi, the onus of proving that Nek Ram was a member of the joint Hindu family consisting of Rai Chandan Lal and his three sons lay on the plaintiffs, and that the onus of issue 1 was therefore rightly placed by the trial Court on them. It is apparent that they have utterly failed to discharge this onus. For the reasons given above, we affirm the decision of the Court below and dismiss this appeal with costs.

P.R./D.S.

Appeal dismissed.

* * A. I. R. 1937 Lahore 338

FULL BENCH

MONROE, BHIDE AND DIN

MOHAMMAD, JJ.

Messrs. B. C. G. A. (Punjab), Ltd. — Assessee—Petitioner.

v.

Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces—Opposite Party.

Civil Ref. No. 1 of 1937, Decided on 26th February 1937, made by Commissioner, Income-tax, Punjab, etc., D/- 20th January 1937.

(a) *Income-tax — Exclusion of items—Suspense accounts—Assessee entitled to use any system of accounts — Such system should*

however reflect on his income and should be one regularly adopted by him — In mercantile system entries made on dates of transaction irrespective of payment — Terms of interest so entered but later credited to suspense account — Such interest held cannot be excluded from computation of taxable income.

An assessee is, no doubt, at liberty to adopt any system of account that he likes, but it must be one that clearly reflects his income in respect of the fixed period of the "previous year" and that it is the one regularly adopted by him for the purposes of his business. [P 340 C 2]

Under the mercantile system entries are made in the accounts on the date not of receipt or expenditure of money but on the date of transaction irrespective of the date of payment; ordinarily as soon as the transaction is entered in account books, the assessee can be said to have received the sum whether it is actually realized or not.

[P 340 C 1]

Where therefore, after entering such transaction, an assessee credits that sum to suspense account, because he is not hopeful of recovering that sum :

Held : that this crediting to the suspense account is not based on any regular system and as such sum credited to suspense account cannot be excluded in computing income-tax that is taxable. [P 340 C 2]

(b) Partnership Act (1932), S. 4 — Person sharing profits and not losses—Presumption of partnership is not mitigated.

The mere circumstance that a person is to share profits only and not losses does not by itself militate against the presumption of partnership : *A I R 1927 Mad 1053, Disting.* [P 343 C 1]

* * (c) Income-tax — Separate business — Profits of one can be set off against losses of other—But both businesses should be alive during current year — Dead business's losses cannot be set off against living business's gains.

Where a person carries on two different trades, he is entitled to set off for purposes of income-tax the losses incurred by him in respect of one against the profit made by him in the other. But for this principle to apply the condition precedent is that both businesses should be alive during the current year. A dead business's losses cannot be set off against a living business's gains : *A I R 1935 Mad 330 ; A I R 1936 P C 133 and A I R 1924 Mad 474, Ref.* [P 343 C 2]

* (d) Income-tax—Question of fact — Bad debt — Time-barred debt is not necessarily bad — Whether debt is bad or not is question of fact to be decided by appropriate tribunal — Its finding on it is conclusive—High Court cannot change such finding.

Whether a debt is a bad debt, and if so, at what point of time it became a bad debt, are questions of fact to be decided in the event of dispute by the appropriate tribunal. The mere fact that a debt was incurred at a date beyond the period of limitation will not of itself make the debt a bad debt ; still less will it fix the date at which it became a bad debt. A statute-barred debt is not necessarily bad ; neither is a debt which is not statute-barred necessarily good. The

age of the debt is no doubt a relevant matter to be taken into consideration. In every case it is a question of fact to be determined after consideration of all relevant circumstances. However gross the error, High Courts have no jurisdiction to interfere on the ground of an erroneous finding of fact : *A I R 1932 P C 178 ; A I R 1934 P C 180 ; 18 Cal 23 (P C) and A I R 1929 P C 152, Rel. on.* [P 344 C 1, 2]

* (e) Income-tax — Bad debt — So long as there is even faint hope of realizing debt and it is being recorded it cannot become bad debt.

So long as there is any ray of hope left to recover a debt, however dim it may be, and so long as a debt is in the process of realization, it cannot be said that it has become irrecoverable and hence bad. [P 345 C 1]

Kirpa Ram Bajaj — for Petitioner.

S. M. Sikri and J. N. Aggarwal — for Opposite Party.

Din Mohammad, J.—This is a reference under S. 66 (2), Income-tax Act. The five questions of law propounded by the Commissioner have arisen out of the appellate order of the Assistant Commissioner in the matter of the assessment of the British Cotton Growers Association (Punjab) Limited, (hereinafter called the assessee) for the year 1935-1936. The assessee while computing his total income claimed the exclusion of certain items, but this was disallowed by the Income-tax Officer. On appeal, the Assistant Commissioner affirmed the conclusions arrived at by the Income-tax Officer regarding these items. Thereupon the assessee petitioned the Commissioner challenging the decision of the Assistant Commissioner on the points covered by these questions. Hence this reference. The first question formulated by the Commissioner is :

Has the assessee established justification for excluding the sum of Rs. 12,447 charged against Wazir Chand-Chaman Lal, from interest account (and crediting it to suspense), out of ordinary course by evidence so cogent that in issue of law it was impossible for the Assistant Commissioner to hold such justification not proved ?

This question has arisen in the following circumstances : A cotton ginning and pressing factory belonging to the firm Wazir Chand-Chaman Lal was in 1930 mortgaged to the assessee for Rs. 1,50,000. Sometime later it transpired that the mortgagors were not in a position to discharge the mortgage debt. Consequently, the assessee entered into an agreement with the mortgagors by which it undertook to finance the working of the factory and to appropriate the profits to their

loan account. In the year of accounting, the assessee made a profit of Rs. 90,000 and after appropriating this sum to the entire amount outstanding against the mortgagors, debited them with a sum of Rs. 68,365 which represented the balance due from them. This sum included an amount of Rs. 12,447 on account of interest which was, however, after being entered in the mortgagors' account taken to suspense account, and was thus excluded from the computation of profits. At the assessment a question arose as to whether this amount could be so excluded. The assessee contended that it had been properly excluded while the department held otherwise. The question now before us in plain language is whether this exclusion can be upheld.

Counsel for the assessee has at the outset urged that the question has not been properly framed, and that the onus of proving that the amount in question could not be excluded or, in other words, was taxable, should have been placed on the Income-tax authorities and not on the assessee. In my view, the true legal position is this. By S. 13, Income-tax Act, income, profits or gains are to be computed for the purposes of S. 10, with which alone we are at present concerned, in accordance with the method of accounting regularly employed by the assessee and it is common ground that the assessee has been regularly following what is known as the mercantile system. Under that system entries are made in the accounts on the date not of receipt or expenditure of money but on the date of transaction irrespective of the date of payment. Ordinarily therefore as soon as the transaction in question was entered, the assessee could be said to have received the sum of Rs. 12,447 by way of interest, whether it was actually realized or not. In fact, the assessee admitted before the Assistant Commissioner that no other similar item had been credited to the suspense account and further that the opening of this 'suspense account' was not in accordance with its general system of accounts. Interest debited to the debtor's personal accounts had in every other case been credited to the interest account and the only reason advanced for this variation was that the assessee was not hopeful of recovering it. It was on this account that the Income-tax authorities came to the conclusion that this item should have been included

in the accounts of income and that its exclusion was 'out of ordinary course' and 'for reasons not to be justified'. In these circumstances whatever the form of the question, in my view, in the words of their Lordships of the Privy Council in 14 Lah 682,¹ the only question open to judicial determination is whether there was any evidence before those officers upon which they might find that the appellant's system of accounting required the inclusion in his accounts of this item.

Now, the assessee justifies the exclusion of this item before us on the grounds, first that it was a part of its regular system of accountancy to exclude such items inasmuch as it had similarly excluded an item in the preceding year without any protest on behalf of the Income-tax authorities, and second that in spite of the mercantile system, this item was liable to exclusion as it was not under its control in such a way as to be convertible into cash at any time that the assessee liked. In support of the first ground the assessee relies on its balance sheet for the year ending 30th September 1933. It is true that in that balance sheet a sum of Rs. 18,000 odd was credited to the suspense account and it was left unchallenged by the Income-tax authorities; but that solitary instance is not in my opinion enough to establish that the exclusion of that item was based on any system adopted by the assessee or that that system was regular. An assessee is no doubt at liberty to adopt any system of account that he likes, but as indicated in para. 50 (i) of the Notes and Instructions regarding the Income-tax Law and Rules, it must be one that clearly reflects his income in respect of the fixed period of the 'previous year' and that it is the one regularly adopted by him for the purposes of his business. In this case the assessee's own admission that this crediting to the suspense account is not based on any regular system clinches the whole matter. The first ground urged by the assessee therefore fails. Coming now to the second ground: the assessee has relied on 44 Mad 65² (particularly the remarks made by Sadasiva Ayyar, J.),

1. Feroz Shah v. Income-tax Commissioner, Punjab, A I R 1933 P O 198=144 I O 686=60 I A 325=14 Lah 682 (P O).

2. Secy. to the Board of Revenue Income-tax, Madras v. Arunachalam Chettiar, A I R 1921 Mad 427=59 I O 482=44 Mad 65=39 M L J 649 (S B).

2 I T C 69,³ 3 I T C 28⁴ and 8 I T C 59.⁵ In 44 Mad 65² it was held by the majority of the Court that interest which accrued due to a moneylending firm in the year of account was not assessable as a profit of the business unless it was received or realized in that year. In the course of his judgment Sadasiva Ayyar, J. expressed an opinion that an income to be assessed must accrue or arise in the sense that it should be so completely under the assessee's control that in the language of Lord Fitzgerald 'by an act of his will he would have it actually transferred to its bankers'. This judgment however has lost its force as the Act was amended afterwards apparently to nullify its effect and is therefore no longer good law: see Sundaram's Law of Income-tax in India, p. 458. In 2 I T C 69³ the assessee contended that he was not liable to be assessed on prospective interest, not actually realized by him or payable during the assessment period and on this ground a mandamus was issued to the Commissioner to state the case. All that was decided in this case was that the question whether such interest was taxable or not was a question of law.

In 3 I T C 28⁴ the method of accounting was mercantile but it was held that sums shown in the accounts as having fallen due but not received or paid in cash or by adjustment of accounts could not be treated as assessable income. In 8 I T C 59,⁵ a Division Bench of the Allahabad High Court, mainly relying on the three judgments mentioned above, held that an unrealized decree, although shown in the account books, was not taxable. These judgments, however, in my view, are not applicable in the present case, as in all of them, the assessee does not appear to have shown the interest accrued as interest received while in the present case it is not denied that any sum entered in the interest account although not actually received in cash or realized is all the same received under the system of account adopted by the assessee. The only ground

for exclusion relied upon by the assessee is that there was no hope of its recovery and apart from the fact that that is a different matter, there was not a shred of evidence before the Assistant Commissioner to substantiate that plea.

On behalf of the Commissioner reliance has been placed on 2 I T C 365,⁶ 8 I T C 171,⁷ 8 I T C 217⁸ and 14 Lah 682.¹ In 2 I T C 365,⁶ a Full Bench of the Madras High Court held that the assessee having adopted the mercantile system of accountancy must be assessed upon that basis alone, and so assessed, the amount of interest entered in the accounts as a profit and as money actually received like other interest entries, was income accruing or arising within the meaning of S. 4(1) read with Ss. 10 and 13, Income-tax Act. In 8 I T C 171,⁷ in a case where the assessee treated as realized in the interest account as well as in the debtors' accounts the interest included in fresh promissory notes or mortgages taken in a settlement of account to cover outstanding principal and interest and where assessed to income-tax on the interest so included in the previous year, a Full Bench of the Rangoon High Court held that there was material to justify the finding that the said sum was interest on loans that had accrued to the assessee during the accounting year and as such assessable to income-tax. In that case, all the relevant judgments of their Lordships of the Privy Council were duly considered and explained.

Similarly, in 8 I T C 217,⁸ a Full Bench of the Madras High Court held that where in accordance with the method of accounting regularly followed by the assessee in his moneylending business year after year, interest included in renewed promissory notes and mortgages was debited to the debtors' accounts and credited to the interest or profit account at the time of renewal, interest so included could be considered as income realized for purposes of assessment to income-tax. In 14 Lah 682,¹ their Lordships of the Privy Council recognized that the outstanding feature of the mercantile system of account was that

3. Pandurang Ramchandra v. Commissioner of Income-tax, A I R 1926 Nag 180=91 I C 980=21 N L R 175=2 I T C 69.

4. Commr. of Income-tax v. Nanhelal, A I R 1928 Nag 241=111 I O 159=24 N L R 176=3 I T C 28.

5. Jagmandar Das Vaish v. Commr. of Income-tax, Central and United Provinces, A I R 1935 All 378=156 I O 939=57 All 737=1935 A L J 374=8 I T C 59.

6. Commr. of Income-tax, Madras v. Subramanian Chettiar, A I R 1927 Mad 841=104 I C 645=53 M L J 379=50 Mad 765=2 I T C 365 (F B).

7. V. S. A. R. Firm v. Commr. of Income-tax, Burma, A I R 1935 Rang 109=155 I O 703=13 Rang 231=8 I T C 171 (S B).

8. J. Kesava Rao v. Commr. of Income-tax, (1935) 8 I T C 217 (F B).

transactions were recorded on the dates when they were effected, whether cash payment was then made or not. The two judgments reported in 8 I T C are distinguishable inasmuch as the account had been adjusted in those cases, but the other two judgments relied upon by the Commissioner do bear out his contention. In view of the above discussion, I would hold that there was evidence before the Assistant Commissioner to justify the course adopted by him and that the assessee had not placed any material on the record which would have warranted the exclusion of the item in dispute from its total income.

Questions Nos. 2 and 3 relate to one and the same matter and may be set out together. They have been formulated as follows :

Q. 2.—The assessee having been the sole financing partner in a business which had been discontinued, leaving sums due to the partnership from third parties in respect of their liabilities on contracts made on their behalf, was it impossible in law to find that the deficit in the account of the assessee with the partnership was not established by the assessee-claimant to lie in revenue charge ?

Q. 3.—The assessee having claimed as his deficit in the above account, the amount of sums due to the partnership which reached limitation in and before the year of account; and having failed to produce evidence to the Assistant Commissioner (who had material for ascribing their badness to an earlier year), either that the amounts reached de facto irrecoverability in the year of account or that there had been any regular practice of prima facie ascription of badness to the limitation year: query, was it impossible in law for the Assistant Commissioner to find that the said amount was not proved to be a deficit in account with the partnership, reaching irrecoverability in the said year.

The material facts are these: In 1928, the assessee started a separate business under the style of the 'Seeds Department' at Khanewal, Okara, Mian Channu and Vihari. At Mian Channu and Vihari the business was conducted through paid employees while a partner each was taken at Khanewal and Okara. These partners were allowed a definite share in the profits of the venture but were saddled with no liability for its losses. The business was however to be financed by the assessee alone. The account books were maintained at Khanewal and contained separate ledger accounts for each branch. The assessee suffered heavy losses in this business and had to close it in 1931. For some of the moneys outstanding against the debtors, bonds were accepted which however could not be realized and which

eventually became time-barred in the account year. These bonds were of the value of Rs. 1,78,052. In the present assessment the assessee claimed to exclude these bond debts as irrecoverable loans and both the Income-tax Officer and the Assistant Commissioner disallowed the claim on the following grounds:

(a) That the claim related to a business which was discontinued in 1931 and was thus inadmissible under S. 10, Income-tax Act, which was confined to a current business alone. (b) That the claim related to distinct firms since discontinued. (c) That there was no evidence that the loans became irrecoverable during the account year inasmuch as the mere fact that limitation had expired during the account year was not enough to prove their irrecoverability during that year.

The Commissioner in his statement of the case has endorsed these views and has further remarked that in his opinion the amount claimed was not a 'revenue loss' but a 'capital loss'. The assessee contends at the outset that even on facts found, the Income-tax authorities were not justified in holding that there was any partnership in existence and that the so-called admission attributed to it was not conclusive inasmuch as it had used the word 'partnership' loosely in order to denote the nature of its relationship with the two outsiders at Khanewal and Okara, respectively. In support of its contention that the relationship in question did not constitute partnership in the eye of law, the assessee has relied on A I R 1927 Mad 1053.⁹ There several persons had executed an agreement in favour of the assessee by which each of the executants was to have a certain share in the profits of the business when ascertained. No provision was made for their liability in case of loss and the complete control of the business was retained by the assessee who had contributed the whole capital. Not only was the assessee to have the control of the business but even persons holding power-of-attorney from him were to exercise the same power. Further the executants had agreed to be bound by his orders and the orders of his attorneys, and had also agreed that if they contravened the provisions of the agreement, they could be dismissed. The assessee as proprietor had also the power of altering their shares. It was in these circumstances that the learned Judges of the Madras High Court held that there was no 'valid and genuine'

9. Commissioner of Income-tax v. Mahomed Kassim Rowther, A I R 1927 Mad 1053=106 I C 303=54 M L J 219 (S B).

partnership. That judgment is obviously of no relevancy in the present case as the facts on which it proceeds are entirely different from the facts before us. The mere circumstance that a person is to share profits only and not losses does not by itself militate against the presumption of partnership. Under S. 4, Partnership Act, 1932, 'partnership' is defined as

the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

In English law, where the Act merely says that the receipt by a person of a share in the profits of a business is *prima facie* evidence that he is a partner in the business, it has been held that:

The inference that where there is community of profit there is partnership is so strong that even if community of loss be expressly stipulated against, partnership may nevertheless subsist: see Lindley on Partnership, 1935 Edn., p. 47.

The same learned author at p. 41 observes:

The effect of sharing profits as *prima facie* evidence of partnership was considered by the Court of Appeal in 38 Ch D 238¹⁰ and was there explained to be that if all that is known is that two persons are participating in the profits of a business, this, unless explained, leads to the conclusion that the business is the joint business of the two, and that they are partners.

I am of opinion, therefore, that the business in the name of the 'Seeds Department' was to all intents and purposes a partnership business. In fact from the various orders of the Income-tax authorities it appears that throughout the proceedings before them, the assessee had maintained that position and the only plea raised was that the amount represented 'valid bad debts'. This being so, the question arises whether the assessee can claim any relief on account of those losses, the business having been long discontinued before the year of account. The answer is clearly in the negative. In 8 I T C 128,¹¹ in a case where the assessee had carried on several separate businesses before, but in the account year some of those businesses had closed, a Special Bench of the Madras High Court held that the assessee could not set off the losses of the discontinued businesses against the profits of the current businesses, inasmuch as

S. 10, Income-tax Act, dealt with businesses that were being carried on and not with businesses which had ceased to exist, and further that the losses were capital losses and not revenue losses. It is indisputable that where a person carries on two different trades, he is entitled to set off for purposes of income-tax the loss incurred by him in respect of one against the profit made by him in the other. This principle was recognized by their Lordships of the Privy Council in 63 I A 233¹² and has been followed in several Courts in India: see, among others, 47 Mad 660¹³; but for this principle to apply the condition precedent is that both businesses should be alive during the current year. A dead business's loss cannot be set off against a living business's gains. I would, therefore, answer Question 2 in the negative. In view of my finding on Question 2, as was conceded by the assessee in the course of arguments, Question 3 does not arise. I now come to Question 4. It reads as follows:

The Assistant Commissioner having reason to believe that debts in business account totalling Rs. 14,775 reached *de facto* irrecoverability in a prior account, and the assessee having declined to give any evidence of date of this *de facto* irrecoverability, was the Assistant Commissioner bound in law to allow claim on the ground of limitation reached in the account period.

The facts bearing on this question are simple. The assessee as a moneylender advanced certain loans to its tenants, which became time-barred in the year of account. These items were consequently claimed as bad debts but the claim was disallowed both by the Income-tax Officer and the Assistant Commissioner. Both officers mainly relied on the balance sheet of the assessee for the year ending 30th September 1933 and remarked that the assessee having itself considered these debts as bad in that balance sheet could not urge that they had become bad during the account year merely because their limitation had expired in that period. The Commissioner, while agreeing with this view, has left the question of their admissibility open even if it were held that the debts had become bad during the 'previous year'. Counsel for the Commissioner has drawn our attention to 6 I T C

10. *Badeley v. Consolidated Bank*, (1888) 38 Ch D 238=57 L J Ch 468=59 L T 419=36 W R 745.

11. *South Indian Industrials, Ltd. v. Commr. of Income-tax, Madras*, A I R 1935 Mad 330=157 I C 143=68 M L J 379=58 Mad 433 = 8 I T C 128 (S B).

12. *Arunachalam Chettiar v. Commr. of Income-tax, Madras*, A I R 1936 P C 133=162 I C 1=63 I A 233=59 Mad 716 (P C).

13. *Commr. of Income-tax, Madras v. Arunachalam Chettiar*, A I R 1924 Mad 474=77 I C 772=46 M L J 68=47 Mad 660 (S B).

453¹⁴ and 58 Bom 579¹⁵ and has urged that it is not open to us to go behind the finding arrived at by the appropriate tribunal as to when the debts had become bad. In 6 I T C 453,¹⁴ their Lordships of the Privy Council observed:

Whether a debt is a bad debt, and if so, at what point of time it became a bad debt, are questions which in their Lordships' view are questions of fact, to be decided in the event of dispute by the appropriate tribunal, and not by the *ipse dixit* of anyone else. The mere fact that a debt was incurred at a date beyond the period of limitation will not of itself make the debt a bad debt; still less will it fix the date at which it became a bad debt. A statute barred debt is not necessarily bad; neither is a debt which is not statute-barred necessarily good. The age of the debt is no doubt a relevant matter to take into consideration. In every case it is a question of fact to be determined after consideration of all relevant circumstances.

The same principle was re-affirmed in 58 Bom 579.¹⁵ There the debts were due from a going concern and in the judgment under appeal it had been remarked that to constitute moneys due by a company a bad debt or a business loss to the creditor, it is necessary that the company should have ceased to be a going concern. Animadverting on these remarks, their Lordships remarked:

Their Lordships know of no principle or authority upon which these views of the learned Chief Justice can be supported. Whether a debt is wholly or partly and to what extent bad or irrecoverable is in every case (and whether the debtor is a human being or a Joint Stock Company or other entity) a question of fact to be decided by the appropriate tribunal upon a consideration of the relevant facts of that case. There is no justification for the suggestion that a practice should prevail in the Commissioner's office under which a debt due from a limited Company which is still a going concern is incapable of being treated as a bad debt.

In view of such clear pronouncements of their Lordships of the Privy Council, I consider that the only thing open to us in this matter is to determine whether the finding arrived at by the appropriate tribunal is vitiated on any ground or, in other words, is perverse or unwarranted by the material on the record. If once it is found that the finding is based on relevant and admissible evidence, our interference will be barred. As stated above, the finding of the Assistant Commissioner that these debts had become bad during the

preceding year is based on the balance sheet for the year ending September 1933 where these debts were shown under the head 'Bad and Doubtful'. It is further remarked by the Assistant Commissioner that the assessee has adduced no evidence to show that the debts had become bad during the year of account and that it has solely relied on the limitation test which is not final. In these circumstances, it cannot be said that this finding is bad in law. It may be an erroneous finding of fact but nevertheless it is conclusive. It has been remarked by their Lordships of the Privy Council in the case of second appeals, that however gross the error, High Courts have no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact: 18 Cal 23¹⁶ and 52 Mad 538.¹⁷ The same principle applies here. I would accordingly answer Question No. 4 in the negative. Question No. 5 is as follows:

The assessee having an amount due from an insolvent estate, as to the badness of which the only evidence was that petty realizations were received during the prior year and the subsequent year, was it impossible in law for the Assistant Commissioner to find that badness thereof did not eventuate in the year of account?

This question relates to a transaction which the assessee had with a trading concern known as Dart & Company. It is common ground that the Official Assignee in whom Mr. Dart's estate vests at present has not wound up the whole affair and has even after the year of account paid paltry dividends to the creditors of the estate. The Income-tax Officer, however, came to the conclusion that the debt had in fact become bad long before the commencement of the previous year and consequently disallowed the item. The Assistant Commissioner agreed with the Income-tax Officer but on grounds which were not correctly expressed. In fact, his reference to the previous balance sheets was erroneous. The Commissioner pointed out the mistake but supported the final conclusion on the ground that the scheme of the Act did not favour 'piecemeal write-off'—He observed:

The loss eventuates when the whole balance of any item reaches irrecoverability. On this footing the amount in issue certainly did not fall bad until after the period.

The assessee contends that the mere expectation of a negligible dividend does

14. Commr. of Income-tax, C. P. & Berar v. S. M. Chitnavis, A I R 1932 P O 178=137 I O 772=59 I A 290=28 N L R 205=6 I T O 453 (P C).

15. F. E. Dinshaw v. Commr. of Income-tax, Bombay, A I R 1934 P O 180=150 I O 806=61 I A 318=58 Bom 579 (P C).

16. Durga Chowdhani v. Jowahir Singh, (1891) 18 Cal 23=17 I A 122=5 Sar 560 (P O).

17. Rajah of Pittapur v. Secy. of State, A I R 1929 P O 152=117 I O 481=56 I A 223=52 Mad 538 (P C).

not keep the debt alive but, in my view, in maintaining this position, the assessee lays itself open to the criticism advanced by the Income-tax Officer and the Assistant Commissioner, and invites the finding that the debt may have become bad prior to the year of account. As I read the Commissioner's order, however, that finding has been set aside and has now been replaced by a finding that the debt had not become bad even during the year of account. To my mind, this position in the circumstances of the case is most reasonable. So long as there is any ray of hope left to recover a debt, however dim it may be, and so long as a debt is in the process of realization, it cannot be said that it has become irrecoverable. I would, therefore, support the Commissioner's view in this matter in preference to the finding of the Assistant Commissioner and answer Question No. 5 in the affirmative.

Monroe, J.—I agree.

Bhide, J.—I agree.

B.D./R.K. *Answer accordingly.*

A. I. R. 1937 Lahore 345

TEK CHAND, J.

Mt. Fatima Bibi—Plaintiff—Appellant.
v.

Lall Din—Defendant—Respondent.

Second Appeal No. 777 of 1936, Decided on 3rd December 1936, against decision of Dist Judge, Jhelum, D/- 23rd May 1936.

(a) Mahomedan Law—Dower—Dower may be fixed before, as well as after marriage—So also dower already fixed may be increased or remitted by wife—Post-nuptial agreement for dower being binding on husband is binding on his surety also.

Under Mahomedan law it is not necessary that dower should be agreed upon before marriage; it may be fixed afterwards. So also where a certain sum is fixed at the time of the marriage, it may be increased afterwards, or it may be subsequently remitted by the wife. Post-nuptial agreement for dower is binding on husband as well as person guaranteeing its payments. [P 345 C 2]

(b) Mahomedan Law — Dower—Dower is not consideration in technical sense for contract of marriage—It is effect of contract imposed as token of respect—Agreement by third person guaranteeing post-nuptial dower—Though no consideration passes, third person cannot escape liability.

Under Mahomedan law dower is not the exchange or consideration, as understood in the technical sense in the Contract Act, given by the man to the woman for entering into the contract, but an effect of the contract imposed by the law

on the husband as a token of respect for its subject, the woman. So an agreement by a third person guaranteeing payment of a post-nuptial dower, is not void as being without consideration and the third person cannot escape liability under it. [P 346 C 1]

Mohammad Din Jan for S. D. Kitchlew—for Appellant.

Mohammad Amin for *Barkat Ali*—for Respondent.

Judgment.—This appeal arises of a suit instituted by Mt. Fatima Bibi, plaintiff, against her husband Lal Din and one Nizam Din for recovery of Rs. 1,000 on account of dower. The suit has been decreed by the Courts below against Lal Din but has been dismissed against Nizam Din. The plaintiff appeals urging that the claim should have been decreed against Nizam Din also. Both counsel admit before me that the marriage of the plaintiff with Lal Din took place on the 27th August 1932. On the same day a document (Ex p/1) was executed by Lal Din as principal, and Nizam Din as surety, reciting that a sum of Rs. 1,000 had been fixed as dower, that Lal Din was liable to pay it and that if he failed to do so, Nizam Din, surety, would pay the same and that his moveable and immovable property as well as his person would be liable. The Courts below have found that this deed was executed some time after the marriage and, therefore, it was without consideration. After hearing counsel for the respondent I find myself unable to agree with this conclusion. Assuming that the amount of dower was fixed subsequent to the marriage and that Nizam Din guaranteed the payment of the amount by the husband to the wife, I do not see why he is not liable. Under Mahomedan law it is not necessary that dower should be agreed upon before marriage; it may be fixed afterwards: see 3 All 266¹ at p. 274. It is also well settled that where a certain sum is fixed at the time of the marriage, it may be increased afterwards, or it may be subsequently remitted by the wife. If, therefore, a post-nuptial agreement fixing or increasing, the dower is binding on the husband, there seems no reason why it should not be binding on the person who guaranteed its payment. The learned counsel for the respondent has referred me to the remarks in certain judgments that "dower is the consideration for the mar-

1. *Kamar-un-nissa Bibi v. Hussani Bibi*, (1881) 3 All 266 (P C).

riage", but it is clear that the word "consideration" in these remarks is not to be taken to have been used in the technical sense in which the word is used in the Indian Contract Act. As observed by Sir Abdur Rahim in his Mahomedan Jurisprudence (p. 334):

Under Muhammadan law a marriage is valid though dower is not settled at the time, and it is wrong to say that dower is a 'consideration' proceeding from the husband for the contract of marriage. In reality it is an obligation imposed by Mahomedan Law as a mark of respect for the wife.

In Bailie's Digest (Vol. 1, p. 91) it is stated that:

Dower is not the exchange or consideration given by the man to woman for entering into the contract, but an effect of the contract, imposed by the law on the husband as a token of respect for its subject, the woman.

Similarly in the Hedaya (Vol. 1, Book 2, Chapter 3) it is laid down that:

Marriage is valid although no dower has been mentioned because literally nikah signifies a contract of union which is fully accomplished by the performance of the marital rites. Dower is obligatory as a mark of respect for the subject (al-mahal); therefore its mention is not essential to the validity of the marriage. For the like reason, a marriage is valid, although the man were to engage in the contract on the special condition that there should be no dower.

There is, therefore, no force in the contention of the respondent's learned counsel. The post-nuptial agreement by Lall Din to pay to his wife Rs. 1,000 as dower was perfectly legal; and the agreement by Nizam Din guaranteeing this payment is not void as being without consideration, as erroneously held by the lower Court. There is no valid reason, therefore, why he should escape liability under it. I accept the appeal and, in modification of the judgment and decree of the learned District Judge, pass a decree for the amount claimed against Nizam Din also with costs throughout.

V.B.B./D.S. *Appeal accepted.*

A. I. R. 1937 Lahore 346

BHIDE, J.

Ishwar Datt Churamani — Plaintiff — Appellant.

v.

General Assurance Society, Ltd. — Defendant—Respondent.

Second Appeal No. 1979 of 1935, Decided on 11th February 1936, from decree of Dist. Judge, Lahore, D/- 16th July, 1935.

Civil P. C. (1908), S. 11 — Difference between applicability of S. 11 and general prin-

ciple of res judicata—S. 11 applies when two Courts concerned have concurrent jurisdiction—General principle of res judicata has wider application—It governs cases where matter is same and has been previously decided by competent Court.

Sec. 11, C.P.C., applies when two Courts concerned have 'concurrent' jurisdiction; but the general principle of res judicata is of wider application. It governs cases where the matter in issue is the same and has been previously decided by a competent Court. Hence, when a Court having jurisdiction to decide certain matter has decided, its decision on that point will operate as res judicata when the same matter arises in another suit though the former Court is not competent to try the subsequent suit: *A I R 1933 Lah 551* and *A I R 1933 Lah 646, Disting.; Case law referred.* [P 347 O 1]

Kidar Nath and Badri Nath — for Appellant.

Partap Singh — for Respondent.

Judgment. — The plaintiff who is an agent of the defendant Insurance Co., instituted a suit in the Court of Subordinate Judge, Fourth Class, for an account, claiming commission due to him for transactions between 1st January 1932 to 3rd August 1932. He had previously instituted a suit for Rs. 108-15-0 in the Small Cause Court, claiming commission from 1st January 1932 to 31st March 1932. Both suits were based on an agreement between the parties dated 21st September 1927. The previous suit in the Court of Small Causes was dismissed on the finding that the plaintiff had violated the terms of the agreement by joining a rival concern and thus lost his right to the commission. It has been held by the Courts below that this finding operates as res judicata in the present suit and consequently the suit has been dismissed. From this decision, plaintiff appeals. It is not denied that the plaintiff's claim was based on the same agreement in both the suits, but it is urged that the case was not covered by S. 11, Civil P. C., and hence the matter was not res judicata. It was contended that the Small Cause Court which tried the previous suit was not competent to try the present suit and hence S. 11 was inapplicable. Reliance was placed on 14 Lah 369¹ and 14 Lah 437.²

The decision of the point raised in this case turns upon the question whether S. 11 is applicable to the present case and

1. *Fazal Hussain v. Jivan Shah*, *A I R 1933 Lah 551=141 I O 454=14 Lah 369=34 P L R 196.*

2. *Kapuria v. Ganga Devi*, *A I R 1933 Lah 646=146 I O 880=34 P L R 817=14 Lah 437.*

if not, whether the matter in issue can be held to be res judicata on general principles independently of that section. S. 11, Civil P. C., has been interpreted to apply when the two Courts concerned have concurrent jurisdiction: *cf.* 9 Cal 439.³ But the principle of res judicata is of wider application, as pointed out by their Lordships of the Privy Council in 48 Cal 499⁴ and 45 Mad 320.⁵ It has been held to govern cases where the matter in issue is the same and has been previously decided by a competent Court. For instance, when a Court has exclusive jurisdiction to try any matter its decision on that point will operate as res judicata: *cf.* A I R 1926 Sind 236,⁶ A I R 1934 Sind 112,⁷ A I R 1934 Lah 324,⁸ A I R 1932 Lah 623⁹ and A I R 1929 Lah 586.¹⁰ In the present instance, the Small Cause Court had jurisdiction to decide the validity of the agreement on which the plaintiff's claim is based and consequently, the rule of res judicata would appear to be applicable. The two rulings in 14 Lah 369¹ on which the appellant relies are distinguishable as the rule laid down therein applies only when a case falls within the four corners of S. 11, Civil P. C. I dismiss the appeal with costs.

R.W./R.K.

Appeal dismissed.

3. *Misser Raghubar Dial v. Sheo Bakhsh Singh*, (1883) 9 Cal 439=9 I A 197=4 Sar 295 (P O).
4. *George Henry Hook v. Administrator-General of Bengal*, A I R 1921 P C 11=60 I C 631=48 I A 187=48 Cal 499 (P O).
5. *Ramchandra Rao v. Ramchandra Rao*, A I R 1922 P C 80=67 I C 408=49 I A 129=45 Mad 320 (P C).
6. *Velji Dayalji v. Firm of Nandlal*, A I R 1926 Sind 236=94 I C 423=21 S L R 23.
7. *Hemraj Harnam Das v. Hargolal*, A I R 1934 Sind 112=152 I C 894.
8. *Ohampat v. Toti Ram*, A I R 1934 Lah 324=150 I C 17=36 P L R 64.
9. *Daulat Ram v. Munshi Ram*, A I R 1932 Lah 623=143 I C 59=34 P L R 462.
10. *Mauj v. Sardara*, A I R 1929 Lah 586=121 I C 507=30 P L R 427.

A. I. R. 1937 Lahore 347

AGHA HAIDAR, J.

Sadhu Mal-Khazana Mal — Auction-purchaser—Appellant.

v.

Devi Chand and others—Respondents.

Miscellaneous First Appeal No. 1246 of 1935, Decided on 6th February 1936, from Senior Sub-Judge, Simla, D/- 4th June 1935.

(a) Civil P. C. (1908), S. 47—Auction-purchaser being representative of judgment-debtor any question between them is not covered by S. 47 — Auction-purchaser is incompetent to file appeal from order on such question as from decree under S. 47.

An auction-purchaser is the representative of the judgment-debtor and therefore any question arising between him and the judgment-debtor cannot be said to be one between the parties to the suit or their legal representatives within the meaning of S. 47, and therefore the auction-purchaser has no locus standi to maintain an appeal as from a decree passed under the provisions of S. 47: *A I R 1917 P C 121, Not foll.; Case law discussed.* [P 348 C 1, 2]

(b) Appeal — Non-party to suit cannot appeal.

Only persons whose names appear as parties to the decree or order of the Court below are entitled to appeal if they are aggrieved. A person whose name does not appear in the array of parties can ask the Court to implead him by including his name among the parties. If he does not choose to do so, he cannot maintain an appeal.

[P 349 C 1]

Mehr Chand Mahajan and Ratan Lal Chawla—for Appellant.

S. L. Puri and Dina Nath Bhasin—for Respondents.

Judgment.—Buta Mal-Lachhman Das obtained a mortgage decree against Anant Ram and others sometime in 1929. This decree was followed by an Execution Case No. 195 of 1931 in which the decree-holders took out execution proceedings and obtained the order of the Court for the sale of the mortgaged property according to the usual process of law. On 4th October 1931 the property was sold at auction and purchased by Khazana Mal. On 30th August 1932 the sale in favour of Khazana Mal was confirmed and on the 12th September Khazana Mal obtained possession of the property which he had purchased. On 22nd September 1932 Khazana Mal filed a receipt as regards the property of which he had obtained possession. In this receipt he mentioned khasra Nos. 55/1 and 179, aggregating 18 biswas, and further detailed that he had obtained possession over 6 biswas *ghair mumkin abadi kothi* and 12 biswas *ghair mumkin bhattah*. This receipt apparently did not attract anybody's attention at the time and was a document filed by Khazana Mal himself. Any statements contained therein cannot, according to general principles, be invoked in aid by Khazana Mal in order to prove his title to the whole of 18 biswas over which he purported to have obtained possession in consequence of

his auction-purchase. On 14th October 1932 the judgment-debtors made an application that the auction-purchaser Khazana Mal was entitled only to the house which covered 6 biswas of land and not to the land which had an area of 12 biswas. Khazana Mal at this stage put in an objection that he had purchased the whole of the 18 biswas including the house as well as the land.

It appears that one Devi Chand also held a decree against the same judgment-debtors namely, Anant Ram and others, and in the execution of that decree he applied to the Court that he may be allowed to sell the land only and not the house. This land is the same land which had formed the subject matter of the previous sale proceedings. Khazana Mal intervened and on 31st July 1934 the parties agreed that it may be announced at the time of the auction sale that any purchaser who purchased the property would do so at his own risk. The property was eventually sold and the land adjoining the house, namely 12 biswas was purchased by Devi Chand. The dispute now really is between Khazana Mal and the judgment-debtors. The judgment-debtors put in objections contesting Khazana Mal's claim so far as he professed to have purchased the whole 18 biswas including the house and the land surrounding it. The executing Court has gone into the question carefully and has given a finding as to what was the property actually purchased by Khazana Mal and has arrived at the conclusion, after a consideration of evidence, both oral and documentary, that Khazana Mal had in reality purchased the house only and not the land. Khazana Mal being naturally dissatisfied with this order has preferred an appeal to this Court. The appeal purports to have been filed as from a decree under the provisions of S. 47, Civil P. C.

It is admitted that he could only appeal if the case came within S. 47 and under no other provision of law. Mr. S. L. Puri who represents the respondents has raised a preliminary objection to the effect that, in view of the fact that Khazana Mal was an auction-purchaser in execution of a mortgage decree, he must, on the authorities, be deemed to be the representative of the judgment-debtors and therefore any question arising between him and the judgment-debtor cannot be said to be one between the parties to the suit or their

legal representatives within the meaning of S. 47, Civil P. C., and therefore he had no *locus standi* to maintain an appeal as from a decree passed under the provisions of S. 47. He relies upon 26 All 447¹ and 31 All 82.² He further relies upon 12 P R 1919³ and A I R 1925 Lah 176.⁴ These authorities undoubtedly support his contention and, if I may say so with respect, I am in full agreement with the view of law laid down in these cases. As pointed out by the Court below the contest is between the judgment-debtors and Khazana Mal, his representative, and the auction sale in which Khazana Mal purchased the property was in a mortgage decree. Therefore 26 All 447¹ fully applies. In fact the learned Judges have gone further in the subsequent Full Bench decision in 31 All 82.² Mr. Ratan Lal, who was followed by Mr. Mehr Chand Mahajan, has invited my attention to 19 Cal 683⁵ and 41 Mad 403.⁶ He has also referred to 43 Mad 107.⁷ The Privy Council ruling, 19 Cal 683⁵ was referred to in 26 All 447.¹ The Madras view seems to lend support to the contention of Mr. Mehr Chand Mahajan, but the volume of judicial opinion on the other side is overwhelming. Allahabad, Patna, Rangoon and Bombay are all against the contention of the learned counsel for the appellant. There are two cases of the Lahore High Court, one in 12 P R 1919³ and the other in A I R 1925 Lah 176,⁴ which seem to go even further and lay down that an auction-purchaser is not even a party to the suit. In this state of authorities I hold that Khazana Mal had no *locus standi* and could not maintain the present appeal.

There is another objection which, in my judgment, is fatal to the maintainability of the appeal. Khazana Mal was never formally impleaded as a party in the pro-

1. Gulzari Lal v. Madho Ram, (1904) 26 All 447 = 1904 A W N 61 = 1 A L J 65.
2. Bhagwati v. Banwari Lal, (1909) 31 All 82 = 1 I C 416 = 6 A L J 71 (F B).
3. Hukam Chand v. Ganga Ram, A I R 1919 Lah 176 = 49 I C 140 = 12 P R 1919.
4. Mr. Asghari Begam v. Irshad-ud-Din, A I R 1925 Lah 176 = 79 I C 57.
5. Prosunno Kumar Sanyal v. Kali Das Sanyal, (1892) 19 Cal 683 = 19 I A 166 = 6 Sar 209 (P C).
6. Ganpathy Mudaliar v. Krishnamachariar, A I R 1917 P O 121 = 44 I C 855 = 45 I A 54 = 41 Mad 403 (P C).
7. Veyindramuthu Pillai v. Maya Nadan, A I R 1920 Mad 324 = 54 I C 209 = 43 Mad 107 = 38 M L J 32 (F B).

ceedings in the Court below. In fact the heading of the order under appeal does not mention Khazana Mal at all. In my judgment it is an elementary rule of procedure that only persons whose names appear as parties to the decree or order of the Court below, are entitled to appeal if they are aggrieved. Khazana Mal's name does not appear in the array of parties and it was open to him to ask the Court to implead him by including his name among the parties. This he has not chosen to do and I fail to understand on what principle he can maintain the appeal. In these circumstances I do not think that the appeal is maintainable. I therefore dismiss the application filed by Khazana Mal which has been registered as an appeal in this Court with costs.

R.W./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 349

TEK CHAND AND SKEMP, JJ.

Mt. Karm-ul-Nisa and others—Defendants—Appellants.

v.

Sarfraz Khan—Plaintiff—Respondent.

Second Appeal No. 1602 of 1934, Decided on 14th February 1936, from decree of Dist. Judge, Jullundur, D/- 19th June 1934.

(a) Custom (Punjab)—Alienation—Ancestral property—Power of alienation—Ghorewaha Rajputs of Rahon, Tahsil Nawanshehr have not unrestricted powers of alienation at Rahon or anywhere else.

Among the Ghorewaha Rajputs of Rahon, Tahsil Nawanshehr, the original tribal or common bond has not been broken and their powers of alienation in respect of ancestral property are not unrestricted either at Rahon or anywhere else; 152 P R 1884; 95 P R 1890; 64 P R 1894 and 101 P R 1895, *Ref.* [P 350 C 2]

(b) Custom (Punjab)—Alienation—Ancestral property—Power of alienation—Proof of—Instances of mortgage of recent dates and without details are of little value.

Instances of mortgages which are of recent dates and in respect of which details showing that the alienations could have been but have not been attacked are not forthcoming, are of little value in proving unrestricted power of alienation in respect of ancestral property. [P 350 C 1]

Achhru Ram—for Appellants.

Badri Das—for Respondent.

Skemp, J.—This judgment is to be read in continuation of our order dated 7th February 1935. The return to the remand on the issue framed has now been made

and the Courts below have both found that the tribal or other common bond among Ghorewaha Rajputs in Rahon, Tahsil Nawanshehr, has been broken. Rai Bahadur Diwan Badri Das for the respondent contends that this is not a town. He points out that by tradition as set forth in Purser's Settlement Report of the Jullundur District Ghorewaha Rajputs are descended from common ancestors, and in particular all Ghorewaha Rajputs in Rahon are descended from a single ancestor. Custom is tribal and not local and Ghorewaha Rajputs living in Rahon, intermarry with other Ghorewaha Rajputs living elsewhere and in some instances they hold land in villages as well as in the town of Rahon. His main point is that according to the *Riwaj-i-am* prepared in the settlement of 1885, and again in the *Riwaj-i-am* of the last settlement of 1913-1914, it was laid down for Muhammadan Rajputs of Nawanshehr Tahsil that a gift is valid only for a small portion of the property. The signatories to the later *Riwaj-i-am* included two leading men from Rahon by caste Ghorewaha Rajputs.

There are no instances against this. On the other hand four judicial instances were quoted before the trial Court upon remand. The first in point of time is a case *Rahmat Khan v. Mt. Asmat*, decided by Sardar Gulab Singh, Munsif First Class, in the year 1899 to which the parties were Ghorewahas of Rahon. A mortgage by a widow to a stranger was set aside at the instance of the collaterals. The plaintiff in that case was Rahmat Khan, the donor in the present instance. In the next case of *Ghulam Jilani v. Mt. Aziman*, the parties were Ghorewaha Rajputs of Rahon. It was decided by Lala Rangi Lal, Subordinate Judge, in the year 1912. In this case the gift was made by a widow of her husband's property to her daughter's son. She alleged that she had become absolute owner under a will by her husband, but it was held that the husband had no power to make a will of ancestral property. On appeal the learned Divisional Judge held that the ancestral property went to the collaterals and non-ancestral property to the daughters.

The third is the case *Inayat v. Nabi Bakhsh of Ghorewahas of Village Awar*, decided by Lala Devi Das, Subordinate Judge, Nawanshehr, in 1923. In this a gift by a male proprietor to a collateral was contested by his son and decreed in

accordance with the usual rule of custom. The fourth is *Maula Bakhsh v. Mt. Hashmat*, decided by Lala Dwarka Parshad, Subordinate Judge, in 1931. The parties were Ghorewaha Rajputs of the town of Garh Shankar. In this case it was admitted that the land in suit having been proved to be ancestral the powers of Miran Bakhsh, Mt. Hashmat's husband, in matters of alienation, were not unrestricted. Diwan Badri Das also relied on a series of reported cases among Ghorewahas. In 152 P R 1884,¹ Ghorewahas of Jullundur, Mauza Bahram, Tahsil Nawanshehr, a gift to a son-in-law who was also sister's son was set aside at the instance of agnates.

In 95 P R 1890² it was held that among Ghorewaha Rajputs of Tahsil Nawanshehr a gift to a wife's relatives in the presence of sons was invalid by custom. In 64 P R 1894³ it was held that among Ghorewahas of Garh Shankar Tahsil a gift by a sonless proprietor to a sister's son or grandson or a daughter's son was inadmissible according to custom. In 101 P R 1895⁴ among Ghorewahas of Nawanshehr Tahsil gifts to four sons-in-law were not upheld in the presence of collaterals the nearest of whom was in the fifth degree. L. Achhru Ram relies on the principle set forth in para. 61 of Rattigan's Digest of Customary Law, proviso 2, and the remarks thereunder. He urges that the original bond has been broken because since 1914-15 there have been in Rahon over 3,000 alienations of which 2,900 are mortgages, 197 sales and 46 gifts. The significant figures are 124 sales by Rajputs and 33 gifts by Rajputs.

In my opinion the mortgages are of little value as instances. They may be subsisting; they may have been redeemed. As to the sales and gifts by Rajputs the statement put in by the patwari gives no details. It does not show how recent the transactions are or for what areas and amounts. Without details showing that the alienations could have been, but have not been attacked, or on the other hand that they are recent, these instances are of little value. In my judgment the

appellants have not proved that in this case the original bond has been broken or shown that we ought to lay down a principle in opposition to all the instances placed on this record and to all the published cases. Lala Achhru Ram was unable to cite a single judgment in which it has been held that Ghorewaha Rajputs have unrestricted powers of alienation at Rahon or anywhere else. For these reasons I would reject the appeal with costs throughout.

Tek Chand, J.—I agree.

R.M./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 350

ABDUL RASHID, J.

Mt. Khairan — Defendant—Appellant.
v.

Raghbir Singh—Plaintiff—Respondent.

Second Appeal No. 1243 of 1936, Decided on 5th February 1937, from decree of Addl. Dist. Judge, Lahore, D/-16th July 1936.

Adverse Possession—Symbolical possession given where actual or khas possession ought to have been given—Delivery of such possession does not interrupt adverse possession.

Symbolical possession given in circumstances in which actual possession ought to have been given is a nullity as symbolical possession is not actual possession nor is it equivalent to actual possession except where the Civil Procedure Code expressly or by implication provides that it should have that effect. The delivery of such possession does not interrupt adverse possession: 36 Bom 373, *Foll.*; A I R 1935 Lah 612, *Expl. and Disting.*; A I R 1917 P C 197, *Expl.* [P 351 C 2; P 352 C 1]

Sheikh Abdul Aziz—for Appellant.

Mathra Das — for Respondent.

Judgment. — The present appeal has arisen out of a suit instituted by Sardar Raghbir Singh against Mt Khairan for possession of land measuring 6 kanals and 16 marlas. It was stated in the plaint that the plaintiff was the owner of the land in dispute, that he had obtained possession thereof in execution of a decree on 18th March 1923; that he was subsequently unlawfully dispossessed by the defendant, and that he was therefore entitled to a decree for possession. The defendant denied the plaintiff's claim and stated that she had been in possession of the land for a long time and that she had thus become its owner by adverse possession. The trial Court framed the following issues: (1) Whether the plaintiff is

1. *Mian Khan v. Ranjhe Khan*, (1834) 152 P R 1884.

2. *Ghulam Nabi v. Khairu Khan*, (1890) 95 P R 1890.

3. *Sultan Bakhsh v. Mt. Mahian*, (1894) 64 P R 1894.

4. *Mt. Lakhan v. Rahmat Khan*, (1895) 101 P R 1895.

the owner of the land in dispute and Mt. Khairan has nothing to do therewith? (2) Whether the plaintiff obtained actual possession of the land in dispute from the defendant on 18th March 1923? (3) If the delivery of actual possession be not proved and if it be found that only symbolical possession was delivered, then what is its effect? (4) Whether the defendant has been in adverse possession of the land in dispute for more than 12 years.

It was held by the trial Court that the plaintiff had established his ownership of the land in dispute. On issues 2 and 3 it was held that the plaintiff had not obtained actual possession of the land in dispute on 18th March 1923, but that he had only obtained symbolical possession. It was further held that symbolical possession was sufficient, in the circumstances of the present case, to disturb the possession of the defendant and that the defendant could not therefore be held to be in adverse possession of the land in dispute for more than 12 years. On these findings the plaintiff's suit was decreed. On appeal the findings and the decision of the trial Court were affirmed and the defendant has therefore preferred the present appeal. It appears that on 16th August 1915, Raghbir Singh, plaintiff, sued Mt. Khairan and the Court of Wards of Iftikhar-ud-din's estate for possession of the property in dispute. A decree for possession was passed in favour of the plaintiff on 12th February 1917. The plaintiff took out execution of this decree against Mt. Khairan and the Court of Wards of Iftikhar-ud-din's estate. According to the findings of the lower Courts on 18th March 1923, the plaintiff was given symbolical possession of the land in dispute. At the time of the execution of the decree the land was in possession of the judgment-debtor's and the decree-holder was entitled to actual possession, but both the lower Courts have held that actual possession was not given and only symbolical possession was given to Sardar Raghbir Singh, decree-holder. It was contended by the learned counsel for the appellant that symbolical possession was awarded to Sardar Raghbir Singh without observing the provisions of O. 21, R. 36, Civil P. C. It was urged that as no copy of the warrant was placed on a conspicuous place of the property and no proclamation was made by beat of drum, the delivery of symbolical possession in this manner

was insufficient to disturb the possession of Mt. Khairan. It was maintained that by delivery of symbolical possession in this manner the plaintiff did not get a new period of limitation for the institution of a suit. Reference was made in this connexion to a Division Bench ruling of the Punjab Chief Court reported as 20 P R 1917¹ where it was held that :

When the law lays down a definite procedure for the delivery of possession which is purely symbolical that procedure must be strictly followed and any omission therein must therefore be regarded as material.

It was laid down by this Court in 118 I C 391² that :

Where a party to a suit has symbolical possession given against him by methods informal, the said symbolical possession does not interrupt his adverse possession.

To the same effect is 55 I C 19,³ 59 I C 770⁴ and A I R 1936 Lah 749.⁵ In the present case the plaintiff was entitled to actual possession as the land was in possession of the judgment-debtors. He was not only not given actual possession but the provisions with respect to symbolical possession were also not complied with. It has been held by a Full Bench of the Bombay High Court in 36 Bom 373⁶ that symbolical possession given in circumstances in which actual possession ought to have been given is a nullity and that symbolical possession was not actual possession nor was it equivalent to actual possession except where the Code expressly or by implication provided that it should have that effect. Reliance was placed on behalf of the respondent on a Division Bench ruling of this Court reported as A I R 1935 Lah 612⁷ where it was held that :

Symbolical possession is sufficient to dispossess a person, who is a party to the execution proceedings.

It was further held that :

When a person is put in symbolical possession of property by an officer of the Court, the form in which execution is given is immaterial, and as between the parties to the proceedings, such formal possession is as effectual as a complete

1. Khub Ram v. Surat, A I R 1917 Lah 364=39 I C 753=20 P R 1917=26 P L R 1917.

2. Harnam Singh v. Milkhi Ram, A I R 1929 Lah 545=118 I C 391.

3. Jauhri Lal v. Peman, A I R 1920 Lah 473=55 I C 19.

4. Ram Chand v. Jana, A I R 1921 Lah 236=59 I C 770=43 P L R 1921.

5. Bhagat Ram v. Ali Bakhsh, A I R 1936 Lah 749=166 I C 377.

6. Mahadeo v. Jannu Namji, (1912) 36 Bom 373=14 I C 447=14 Bom L R 115 (F B).

7. Mt. Ram Kali v. Gowardhan Lal, A I R 1935 Lah 612=159 I C 1100.

transfer of possession from one party to another, even though there may be some formal defect in effecting the symbolical possession.

This ruling in my opinion is inapplicable to the facts of the present case. In the reported case the learned Judges pointed out carefully that only symbolical possession could have been delivered as the land was in possession of the tenants. It follows therefore that all that this ruling lays down is that irregularities in giving formal possession are of no consequence provided the decree-holder is entitled only to formal possession as against the judgment-debtor. In the present case however the decree-holder was not entitled to formal possession only as against the judgment-debtors, but he was entitled to get actual or khas possession. A tenant was not in possession of the land on 18th March 1923, but the land was in possession of the judgment-debtors. In these circumstances *A I R 1935 Lah 612*⁷ is of no assistance to the respondent, and the observations contained in the Full Bench ruling of the Bombay High Court are fully applicable. The ruling of their Lordships of the Privy Council in *43 I C 268*⁸ merely lays down that symbolical possession is sufficient to dispossess a person who is a party to the execution proceedings. It does not lay down that symbolical possession is sufficient to dispossess a person who is a party to the execution proceedings in cases where the decree-holder is not entitled merely to symbolical possession but is entitled to actual possession.

For the reasons given above I am of the opinion that the symbolical possession obtained by the plaintiff on 18th March 1923 did not interrupt the adverse possession of Mt. Khairan, defendant. The suit of the plaintiff was therefore barred by limitation. I accordingly accept this appeal, set aside the judgments and the decrees of the Courts below, and dismiss the plaintiff's suit with costs throughout.

S.C./D.S.

Appeal allowed.

8. Radha Krishna Chanderji v. Ram Bahadur,
A I R 1917 P C 197=43 I C 268 (P C).

A. I. R. 1937 Lahore 352

BHIDE, J.

Mohammad Arif & others—Petitioners.
v.

Mohammad Ishaq and another, Plaintiffs and another, ad interim Receiver—Opposite Parties.

Civil Revn. No. 102 of 1936, Decided on 9th April 1936.

Civil P. C. (1908), O. 41, R. 11—Judge must record judgment complying with requirements of law — Remark, that there is ample material in trial Court's order without any indication that he considered grounds of appeal and of his view, is not sufficient compliance with requirements of law.

In dismissing an appeal under O. 41, R. 11, C.P.C. a Judge should record a proper judgment, complying with the requirements of law. It is not sufficient if he simply remarks that there is ample material to support the order passed by the trial Court, and does not give any indication as to whether he has considered the grounds of appeal and what view he has taken: *A I R 1931 All 597 (F B)*; *37 Bom 610 (F B)*; *A I R 1926 Rang 129* and *A I R 1926 Cal 992, Foll.*

[P 352 C 2]

*Manohar Lal—*for Petitioners.

*Sheikh Niaz Ali and Mohammad Amin—*for Opposite Parties.

Order.—The first point raised in this petition for revision is that the learned District Judge has acted with material irregularity in the exercise of his jurisdiction in not writing a judgment in appeal in accordance with law. In support of this contention the learned counsel for the petitioner has cited *54 All 220*,¹ *37 Bom 610*,² *A I R 1926 Rang 129*³ and *A I R 1926 Cal 992*,⁴ which show that even in dismissing an appeal under O. 41, R. 11, Civil P. C., it is obligatory on the Court to record a proper judgment complying with the requirements of law. In the present case, the learned District Judge has simply dismissed the appeal with the remark that there was ample material to support the order passed by the trial Court. The judgment does not give any indication as to whether the learned District Judge had considered the grounds of appeal and what view he took of them.

This petition must, in the circumstances, be accepted. I set aside the order of the learned District Judge and remand the case to him for deciding the appeal after recording a proper judgment in accordance with law. No order as to costs. Parties to appear before the learned District Judge on 27th April 1936.

V.B.B./K.S.

Revision allowed.

1. Durga Thathera v. Narain Thathera, *A I R 1931 All 597=136 I C 274=54 All 220=1931 A L J 875 (F B).*
2. Hanumanta Rukhmaji v. Annaji Hanumant, (1913) *37 Bom 610=20 I C 966=15 Bom L R 765 (F B).*
3. Ng. Saw v. Ma Bwin Byu, *A I R 1926 Rang 129=95 I C 881=4 Rang 66.*
4. Haridasi Devi v. Gadadar Roy, *A I R 1926 Cal 992=96 I C 136=43 C L J 499.*

A. I. R. 1937 Lahore 353

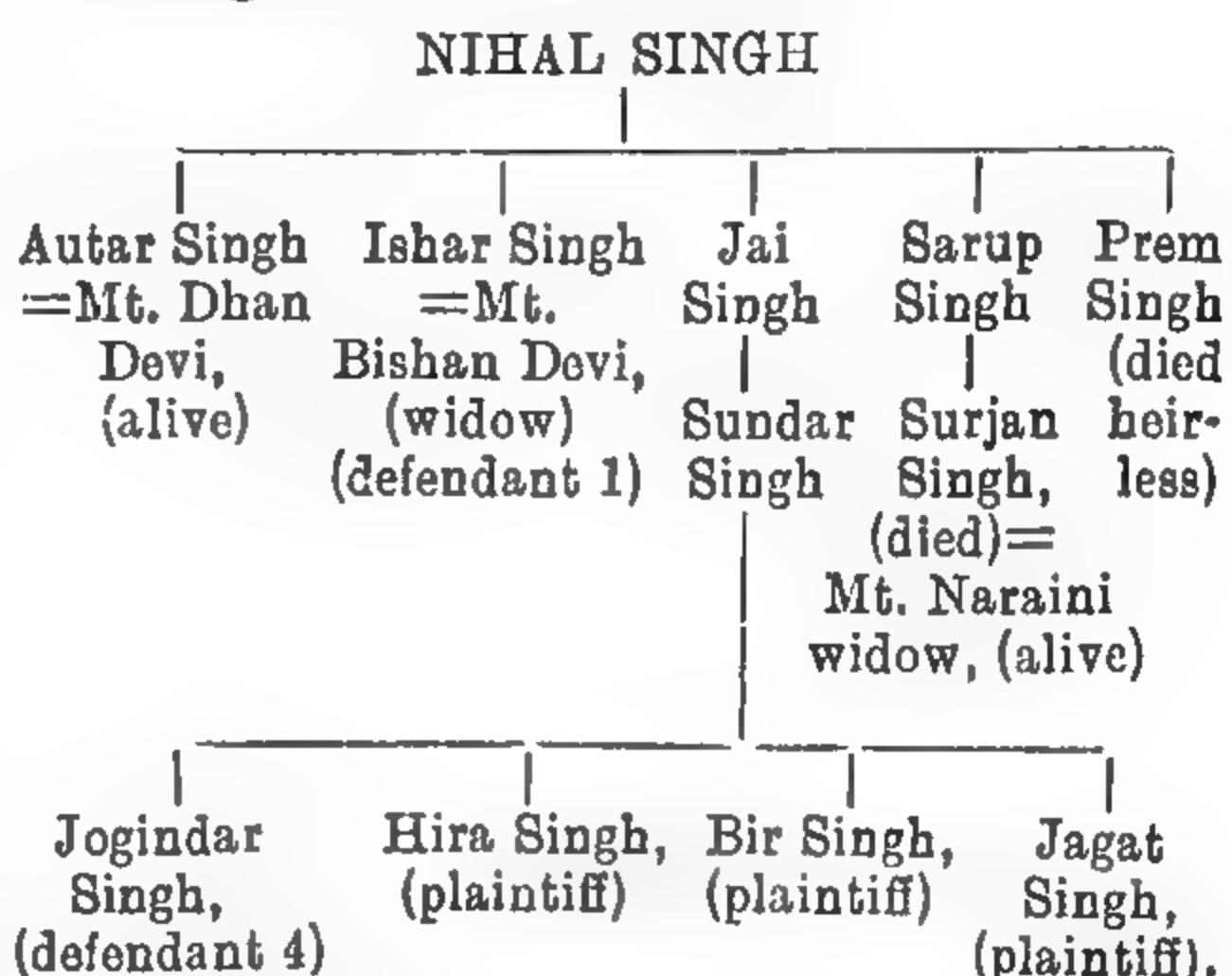
ADDISON AND ABDUL RASHID, JJ.

Mt. Bishan Devi and others —
Defendants — Appellants.

v.

Jagat Singh and others, Plaintiffs and
another, Defendant—Respondents.First Appeal No. 863 of 1935, Decided
on 31st January 1936, from decree of Sub-
Judge, First Class, Lyallpur, D/- 31st
January 1935.(a) Will — Construction — Earlier clause
giving absolute estate — Later clause of res-
triction is invalid.—Where the earlier part of a will confers an
absolute estate in favour of the testator's wife,
but the later clauses in it seem repugnant to that
absolute estate created in her favour, the later
clauses must be regarded as invalid, as they
cannot cut down the estate: *A I R 1935 P C*
187, Foll. [P 355 C 2](b) Will — Interpretation — Intention of
testator is to be gathered from words used—
Words can be explained by surrounding
circumstances.In interpreting a will, it is the duty of the
Court to find out the intention of the testator.
The intention is to be gathered from the language
used by the testator but the meanings attached to
the words may be affected by surrounding cir-
cumstances, and when this is the case, those cir-
cumstances should be taken into consideration :
A I R 1935 P C 187, Foll.; *A I R 1930 P C 239*
and *A I R 1929 P C 214, Disting.*; *A I R 1922*
P C 63, Expl. [P 355 C 2](c) Deed—Pardanashin lady—Deed should
be read out and must be understood in its
nature and effect.In the case of a document executed by a
pardanashin woman, it is not sufficient to show
that the document was read out to her; it must
further be proved that she understood its nature
and effect: *A I R 1934 P C 208, Foll.*; *A I R*
1935 Cal 671, Rel. on. [P 358 C 1](d) Compromise—Procedure in O. 23, R. 3,
Civil P. C., not followed — Compromise
recorded — Property not included in suit
included in compromise—Compromise is not
exempt from registration.Where while passing a decree on a compromise,
the Judge does not comply with the provisions of
O. 23, R. 3, Civil P. C., and the compromise, so
far as it concerns certain lands, was never ordered
to be recorded in the suit, the portion of a com-
promise does not become a part of the judicial
proceedings and is not exempt from registration :
A I R 1918 Mad 1331; *A I R 1930 Lah 855* and
22 Mad 508 (P C), Disting.; *A I R 1919 P C 79,*
Rel. on. [P 359 C 1; P 360 C 1]*Mehr Chand Mahajan, Ratan Lal*
Chawla and Shiv Charan Das
Goswami — for Appellants.*Sangat Singh* (Appellant) in person.*J. N. Aggarwal and J. L. Kapur* — for
Respondents.*Jagat Singh* (Respondent) in person.

1937 L/45 & 46

Abdul Rashid, J. — The following
pedigree table will be helpful in under-
standing the facts of this case :

On 18th March 1899, the land in dis-
pute, consisting of about 7 squares, was
allotted to Ishar Singh as a *sufaid poshi*
grant under Government Tenants (Punjab)
Act, 1893. The proprietary dues in res-
pect of this land were paid to Govern-
ment by Ishar Singh on 8th September
1905. Ishar Singh died on 6th October
1905. The proprietary rights were ulti-
mately granted to Mt. Bishan Devi, widow
of Ishar Singh, on 5th November. On
19th September 1905 Ishar Singh had
made a will whereby he bequeathed the
land in dispute in favour of his widow
Mt. Bishan Devi. The probate of this
will was granted to Mt. Bishan Devi by
the District Judge, Peshawar, on 3rd
November 1906.

On 12th November 1906, Sundar Singh,
father of the present plaintiffs, instituted
a suit in the Court of the District Judge,
Peshawar, for a declaration to the effect
that Ishar Singh had no power to make
a will and that the will was not binding
on him. It was, however, stated in the
plaint that the plaintiff was bringing the
declaratory suit only with respect to
32 kanals and one marla of land situate in
the village Nathe (which was in the pos-
session of the plaintiff), and that he would
bring a separate suit for recovery of
ornaments valued at Rs. 15,000 and other
moveable property and lands situate in
Lyallpur, which were in possession of
Mt. Bishan Devi as well as the present
plaintiffs and Jogindar Singh, and some
other members of the family of the deceased
were made defendants in that case. On
1st December, one Arjan Singh was ap-
pointed as her general agent by Mt. Bishan
Devi to carry on the litigation on her
behalf. The general agent appointed

Jagat Singh as a special agent to act for him. On 9th June 1907, a deed of compromise was written at Rawalpindi and was sent to the Court of the District Judge, Peshawar, by means of a registered letter. On 11th June, Jagat Singh made a statement in Court to the effect that Mt. Bishan Devi had signed the compromise in his presence, but subsequently she had stated that she would accept the compromise only if Rs. 8,150 were paid to her at once and if Rs. 13,000 were invested in a bank. On the same day, the learned District Judge passed a decree in the following terms:

It is ordered that a decree be and the same is hereby passed on the terms and under the conditions embodied in the deed of compromise dated 9th June 1907 as a whole, with this reservation that the sum of Rs. 8,150 shall be paid into Court within 15 days from today. In case of failure defendant 1 to be entitled to recover that amount by execution.

On 7th February 1929, Mt. Bishan Devi made a gift of over 6 squares of land in favour of Sangat Singh, defendant 2, who was alleged to be an adopted son of Ishar Singh, and gifted about half a square of land to the Gurdwara situate in Chak. No. 3. The suit out of which the present appeal has arisen was instituted by the plaintiffs on 7th August 1933, for a declaration to the effect that the gift dated 7th February 1929 was null and void and ineffectual as against the reversionary rights of the plaintiffs. The principal allegations of the plaintiffs were that Sangat Singh, defendant 2, was not the adopted son of Ishar Singh or Mt. Bishan Devi, that the land in dispute was the property of the joint Hindu family consisting of Ishar Singh and their father Sundar Singh, that Mt. Bishan Devi had only a life estate in the property in dispute and that she was not therefore entitled to make a gift of this land in order to deprive plaintiffs of their reversionary rights. It was further pleaded that the compromise dated 9th June 1907 was binding on Mt. Bishan Devi, and that by means of this compromise she had admitted that she held only a life estate in the property in dispute. As Jogindar Singh, the brother of the plaintiffs, had not joined them in bringing the suit, they had made him a defendant in the case.

It was pleaded on behalf of defendants 1 to 3, *inter alia*, that the proprietary rights with respect to the land in suit having been acquired by Mt. Bishan Devi, she

was its absolute owner, that in any case Mt. Bishan Devi had acquired an absolute estate in the property in dispute under the will of Ishar Singh, that Sangat Singh had been validly adopted by Ishar Singh as a son, that the compromise dated 9th June 1907 was not binding on the defendants, as it was brought about by coercion, undue influence and fraud, that the compromise was inadmissible in evidence for want of registration, and that Ishar Singh was separate from his brothers and the property in dispute could be validly bequeathed by him to his widow. The trial Court has held that as Rs. 3,604 were paid by Ishar Singh in his lifetime to obtain proprietary rights in the land in dispute, the land must be regarded as the property of Ishar Singh, though in fact proprietary rights were granted after his death. It has been further held that Ishar Singh was not a member of a joint Hindu family with Sundar Singh, the father of the plaintiffs, and that he could dispose of the land in dispute by means of a will. The will of Ishar Singh, according to the trial Court, conferred an absolute estate on Mt. Bishan Devi so far as the land in dispute was concerned which was the self-acquired property of Ishar Singh. As regards the compromise, the trial Court has held that it did not require registration and was admissible in evidence, that it was signed by Mt. Bishan Devi of her own free will after fully understanding its contents. The suit of the plaintiffs was, therefore, decreed mainly on the ground that by means of the compromise dated 9th June 1907, Mt. Bishan Devi had consented to take a life estate in the property in dispute. Against this decision defendants 1 to 3 have preferred an appeal to this Court.

In appeal, only three questions were agitated before us, namely (1) whether the will of Ishar Singh dated 19th September 1905, conferred an absolute estate or merely a life estate on Mt. Bishan Devi, so far as the land in dispute is concerned? (2) Whether the compromise dated 9th June 1907 was brought about by coercion and undue influence, or whether Mt. Bishan Devi signed the deed of compromise after fully understanding its contents? (3) Whether the deed of compromise was compulsorily registrable, and was inadmissible in evidence for want of registration? The will of Ishar Singh consists of 8 paragraphs. In para. 1 the testator gives the

history of the family and states that his father left only one residential house situate in Rawalpindi City, and that he and his brother Sarup Singh acquired one house at Nowshera in equal shares. The testator further recites that in accordance with the provisions of the will of Sarup Singh, he had become owner of three-fourths share of the house in Nowshera, but that the properties in Mauza Nathe, Peshawar District, and in the Lyallpur District were his self-acquired properties and that none of his brothers had any connexion with them. In para. 2 of the will, the testator states that his nephew Sundar Singh was inimical to him, that he was addicted to liquor and other vices and that therefore he totally disinherited Sundar Singh from his exclusive property and declared that Sundar Singh will have no connexion with the moveable or immoveable property belonging to him, nor would he be concerned with its management. In para. 4 of the will the testator stated that his wife Mt. Bishan Devi had rendered him great services throughout his lifetime and that he was making the will in her favour to the effect that she will be the exclusive owner (*wahid malik*) of the following properties after his death: (a) Entire cash including promissory notes for Rs. 13,000 and other items; (b) Liquor, charas, opium, etc., of all kinds; (c) lands situate in Nathe; (d) lands situate in Lyallpur; (e) three-fourth share in Nowshera property; and (f) all ornaments. In the same paragraph the testator definitely stated that Mt. Bishan Devi shall have all kinds of power to deal with the above mentioned property, that she shall be considered its full owner (*pure pure taur par malik*). Para. 7 of the will however strikes a discordant note and is in the following terms:

After the death of my wife Mt. Bishan Devi, whatever property remains shall be owned by the sons of Sundar Singh. Sundar Singh shall have no connexion or concern therewith. Besides, my wife Mt. Bishan Devi shall not be entitled to sell immoveable property. The sons of Sundar Singh shall also have no such right.

The will concludes with para. 8 which is to the effect that the remaining moveable or immoveable property of the testator shall be exclusively owned by his wife Mt. Bishan Devi. The main question for consideration, regarding the interpretation of the will is whether in view of the recital in para. 7 to the effect that Mt. Bishan Devi shall not be entitled to

sell immoveable property, the will confers on Mt. Bishan Devi merely a life estate with respect to the property in dispute in the present litigation and other properties mentioned in para. 4, or whether the recitals in paras. 4 and 8 of the will have the effect of conferring an absolute estate on Mt. Bishan Devi with respect to these properties. It was held by their Lordships of the Privy Council in 37 P L R 666¹ that where the earlier part of a will conferred an absolute estate in favour of the testator's wife, but the later clauses in it seemed repugnant to the absolute estate created in her favour, the later clauses must be regarded as invalid as they could not cut down the estate. It was observed in this ruling that in interpreting a will it is the duty of the Court to find out the intention of the testator. The intention is to be gathered from the language used by the testator, but the meanings attached to the words may be affected by surrounding circumstances, and when this is the case, those circumstances should be taken into consideration. In the will it is mentioned three times that Mt. Bishan Devi would be the exclusive owner (*wahid malik*) of the properties mentioned in para. 4. It is also stated that Sundar Singh was addicted to different vices and that he would have no concern with the property of the testator. It must also be remembered that if the testator did not wish to confer an absolute estate on his widow, there was absolutely no necessity to make a will, as under the law governing the parties the widow would be entitled to a life estate even in the absence of a will. Para. 7 of the will on which reliance is placed on behalf of the plaintiffs is also not entirely unambiguous. It states that after the death of Mt. Bishan Devi whatever property remains shall be owned by the sons of Sundar Singh. This implies that it would be open to Mt. Bishan Devi to alienate property bequeathed to her during her lifetime. Moreover para. 7, which purports to restrict the power of Mt. Bishan Devi regarding alienation of immoveable property is followed by para. 8 which states that the rest of the moveable or immoveable property of the testator shall be exclusively owned by his wife Mt. Bishan Devi. The earlier part of the will and its

1. *Rameshwar Baksh Singh v. Balraj Kaur*, A I R 1935 P C 187=157 I C 888=37 P L R 666 (P C).

concluding part undoubtedly confer an absolute estate in favour of the testator's wife and as there are no circumstances which may show in an unequivocal manner that only a limited estate was conferred on Mt. Bishan Devi, the earlier part of the will must be given effect to in accordance with the observations of their Lordships of the Privy Council referred to above. It was held in 2 Lah 175² that a will by a Hindu in favour of a female must be interpreted in the same way as if it was in favour of a male and that the use of the word "malik" implies absolute ownership unless there is anything in the context or surrounding circumstances to qualify such meaning. Reliance was placed on behalf of the respondents on A I R 1929 P C 214,³ 1 Pat 305⁴ and 11 Lah 645.⁵ The first of these rulings is not applicable to the facts of the present case as the will in that case definitely contained a prohibition against partition by the daughters to whom the property was bequeathed. This together with the provision for the benefit of their sons was held to indicate that the whole scheme of the will was that the property should remain intact after the death of the daughters for the benefit of their sons, as the heirs of the testator. In 1 Pat 305⁴ their Lordships of the Privy Council laid down that the term "malik", when used in a will or other document, as descriptive of the position which a devisee or donee is intended to hold, means an owner possessed of full proprietary rights including full rights of alienation unless there is something in the context or surrounding circumstances to indicate that full proprietary rights were not intended to be conferred. This ruling does not in any way lay down a different proposition of law from that enunciated in 37 P L R 666¹ alluded to above. In the case reported in 11 Lah 645,⁵ a Hindu testator, after devising a house to his daughter for her life, provided that the property should be divided into three shares and that his two widows and the widow of his son, who was childless,

should be heirs (waris). The will contained no gift over upon the death of the widows. It was held that the intention of the testator was to confer upon each of his two widows and his daughter-in-law full proprietary rights in a one-third share in the residue of his estate.

There is also another way of looking at the matter. The will shows that the testator possessed one ancestral house in Rawalpindi City. That house is not referred to in para. 4 of the will, which makes Mt. Bishan Devi the exclusive owner (wahid malik) of the five properties mentioned in that paragraph. It may, therefore, be that para. 7 merely refers to the ancestral property of the testator and it is with respect to that property only that he intended to restrict Mt. Bishan Devi's power of alienation. This interpretation receives some support from the fact that para. 8 is to the effect that the rest of the moveable or immoveable property of the testator shall be exclusively owned by his wife Mt. Bishan Devi. Even if it be held that para. 7 of the will is repugnant to the absolute estate created in favour of Mt. Bishan Devi by para. 4, the earlier part of the will must be given effect to and the later clause must be held to be invalid, as it could not cut down the absolute estate. I am, therefore, of the opinion that the trial Court was right in holding that Mt. Bishan Devi became an absolute owner of the property in dispute under the will of Ishar Singh.

As regards the compromise, the case of Mt. Bishan Devi is that she was a pardanashin woman and that her signatures were secured on a blank piece of paper by means of undue influence and coercion and that the terms of the compromise were not explained or read over to her at any time. Mt. Bishan Devi appeared as a witness and stated that in June 1907 the marriage of Nidhan Singh, her sister's son, was to be performed. Sunder Singh, the father of the plaintiffs, asked every member of the baradri to bring pressure to bear upon her to compromise the case that had been brought by him against her in the Court of the District Judge of Peshawar. The families of Malaks and those of Bhagat Narain Das, Sardar Narain Singh and Sardar Thakar Singh began to put pressure upon her, saying that they would not join the marriage ceremony unless she compromised with Sunder Singh. Malak Chhab-

2. Mohan Lal v. Niranjana Das, A I R 1921 Lah 11=60 I C 619=2 Lah 175.

3. Joydurga Dasi v. Saroj Ranjan Sinha, A I R 1929 P C 214=120 I C 53.

4. Sasiman Choudharani v. Shib Narayan Choudhury, A I R 1922 P C 63=66 I C 193=49 I A 25=1 Pat 305 (P O).

5. Shalig Ram v. Chiranjit Lal, A I R 1930 P C 239=128 I C 265=57 I A 282=11 Lah 645 (P O).

ber Singh went to her house on the day on which the 'kangna' ceremony of Nidhan Singh was to be performed and sweets had to be distributed to the brotherhood. Malak Chhabber Singh stopped the distribution of the sweets (bhaji) and said that the brotherhood would not accept it. Thereafter Bhagat Sain Das approached her and told her that Bhagat Narain Das had sent for him and asked him to advise her to effect a compromise, otherwise they would not let the marriage take place. She did not, however, consent. Jagat Singh, her Mukhtar, brother of Nidhan Singh, then came and threatened her, saying that his brother's betrothal contract would be cancelled unless she consented to the compromise. He told her that his brother's wedding was more important than her case. As a result of these threats by the various members of the brotherhood, she was made to affix her signatures on a blank piece of paper, which was taken away by Jagat Singh. The case of the plaintiffs, on the other hand, is that Mt. Bishan Devi entered into this compromise of her own free will, as it was in her interest. It was contended by Mr. Jagan Nath Aggarwal that the compromise was in the interests of the lady and that the legal advisers of Mt. Bishan Devi brought about the compromise, as they were afraid that it might be held by the Court at Peshawar that Ishar Singh was a member of the joint Hindu family consisting of himself and Sundar Singh, and that in that case Mt. Bishan Devi would have lost her life estate also and would merely have been granted maintenance at a reasonable rate.

The plaint of the case instituted by Sunder Singh in 1907 shows that the cause of action in that suit was the alleged invalidity of the will of Ishar Singh, on the ground that he was the member of a joint Hindu family and could not, therefore, make a will in favour of his wife. The property sued for, however, was only 32 kanals of land situate at village Nathe in the Peshawar District. The Lyallpur squares, the ornaments valued at Rupees 15,000 and Rs. 13,000 deposited by Ishar Singh with the Government by way of security, did not form the subject matter of that suit. It is perfectly clear, therefore, that in view of the provisions of O. 2. R. 2, Civil P. C., Sundar Singh could not institute another suit for recovery of these properties at a subsequent time.

By omitting to include these properties in his previous suit he had lost all rights in these properties. A mere note at the end of the plaint, that a separate suit would be instituted for recovery of these properties, could not be of any avail. Mt. Bishan Devi on 9th June was, therefore, in a very strong position in so far as Sundar Singh could no longer deprive her of the seven squares of land which form the subject matter of the present suit, as well as jewellery worth Rs. 15,000 and the sum of Rs. 13,000 deposited by her husband with the Government, by way of security. By means of the compromise Mt. Bishan Devi relinquished her claim to Rs. 13,000 in favour of the present plaintiffs and defendant 4. She further agreed that she will keep the squares of land in Lyallpur only for her life and thereafter these squares shall be owned by Sundar Singh and his male descendants. In lieu of this she was to receive Rs. 8,150. The compromise was thus utterly one-sided, and the advantage secured to Mt. Bishan Devi was purely illusory, as Rupees 8,150 was obviously to be paid to her out of the Rs. 13,000 lying as security with the Government. It is amply established on the present record that Mt. Bishan Devi was a pardanashin lady in the year 1907. It was therefore incumbent on the plaintiffs to establish that Mt. Bishan Devi signed the deed of compromise after fully understanding its contents and import.

It was held in A I R 1935 Cal 671⁶ that in the case of a transaction by a pardanashin lady, the disposition made must be substantially understood and must really be the mental act, as the execution is the physical act, of the person who makes it. The parties relying on it must satisfy the Court that the deed has been explained to and understood by the party thus under disability, under circumstances which establish adoption of it with full knowledge and comprehension. Mere execution by such a person, although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of the true understanding mind in the executrix. It was laid down by their Lordships of the Privy Council in A I R 1934 P C 208⁷

6. Benoy Krishna Sadhu Khan v. Panchanan Sadhu Khan, A I R 1935 Cal 671=159 I C 133=40 C W N 45=62 C L J 99.

7. Kalyan Mal v. Ahmad Uddin Khan, A I R 1934 P C 208=151 I C 45 (P C).

that in the case of a document executed by a pardanashin woman, it is not sufficient to show that the document was read out to her; it must further be proved that she understood its nature and effect. In the present case, there is not a tittle of evidence on the record showing that it was present to the mind of Mt. Bishan Devi, at the time she is alleged to have signed the compromise, that the land in dispute did not form the subject matter of the suit pending in Peshawar, and that by means of that suit she could not be deprived of it. The circumstances, therefore, point strongly to the fact that she was never made to understand the effect of the compromise. (His Lordship after considering the evidence regarding the compromise proceeded.) After a careful consideration of the evidence alluded to above and the circumstances bearing on the point, I am of the opinion that it has not been established that the deed of compromise was ever read out to Mt. Bishan Devi or that she signed it after fully understanding its meaning or effect.

It was contended by the learned counsel for the respondents that Mt. Bishan Devi had received a sum of Rs. 7,535 out of Rs. 8,150 which she was entitled to receive under the terms of the compromise, and that the compromise had therefore been acted upon by the parties. The application filed on behalf of Mt. Bishan Devi through Jagat Singh in the Court of the District Judge, shows that Mt. Bishan Devi prayed that a sum of Rs. 7,535, lying in the Government treasury on account of security deposited by her husband, may not be given to Sundar Singh but may be paid over to her. This sum was ultimately received by Jagat Singh on behalf of Mt. Bishan Devi on 15th July 1907. Mt. Bishan Devi, according to the terms of the will was entitled to the return of the security deposited by her husband Ishar Singh in the Government treasury. The realization of this security, therefore, does not show that Mt. Bishan Devi had voluntarily entered into the compromise dated 9th June 1907. I would accordingly hold that the compromise dated 9th June 1907 was invalid and not binding on Mt. Bishan Devi or the other defendants.

In view of the findings given above it is unnecessary to give a considered opinion on the question whether the compromise is inadmissible in evidence for want of

registration. As however this point has been argued at some length, I proceed to deal with it. It has already been stated in the earlier part of this judgment that the lands at Lyallpur, which form the subject matter of the present litigation, were not included in the suit brought by the father of the plaintiffs in 1907, in the Court of the District Judge of Peshawar challenging the validity of the will of Ishar Singh. The compromise, however, dealt with the Lyallpur lands as well. It was, therefore, incumbent on the District Judge of Peshawar to proceed in accordance with the provisions of O. 23, R. 3, Civil P. C., which runs in the following terms :

✓Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit.

The judgment of the learned District Judge ordering the compromise to be recorded has not been placed on the record of the present case by the respondents. The decree passed by the learned District Judge, however, shows that he was under the impression that the whole of the property dealt with by the compromise had been included in the suit pending in his Court. He, therefore, merely passed an order in the following terms :

It is ordered that a decree be and the same is hereby passed on the terms and under the conditions embodied in the deed of compromise dated 9th June 1907 as a whole, with this reservation: that the sum of Rs. 8,150 shall be paid into Court within 15 days from today.

If the learned District Judge was, however, aware of the fact that the compromise dealt with property other than that included in the suit, he should have passed a decree in accordance with the compromise only in so far as it related to the suit. The method adopted by the learned District Judge was, therefore, clearly wrong. Reference may be made in this connexion to a passage in the judgment of their Lordships of the Privy Council in 47 Cal 485,⁸ which runs as follows :

In the first place, it is plain that the agreement or compromise, in whole and not in part, is to be recorded, and the decree is then to confine its operation to so much of the subject matter of the

8. Hemanta Kumari Debi v. Midnapur Zamin-dary Co., A I R 1919 P C 79=53 I C 534=46 I A 240=47 Cal 485 (P C).

suit as is dealt with by the agreement. Their Lordships are not aware of the exact system by which documents are recorded in the Courts in India, but a perfectly proper and effective method of carrying out the terms of this section would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject matter of the then existing litigation, the decree taken as a whole would include the agreement. . . .

Turning now to the Registration Act of 1908, and considering the meaning of the word "decree" in S. 17 (2) (vi), this must be read in connexion with the purpose of the statute, which is to provide a method of public registration of documents, and there is therefore no reason why a limit should be imposed upon the meaning of the word so as to confine it to the operative portion only of the decree.

It is clear that the procedure indicated by their Lordships was not followed in the present case and no conscious act of ordering the compromise to be recorded was performed by the District Judge of Peshawar. Had the learned District Judge followed the procedure laid down in O. 23, R. 3, Civil P. C., the respondents would have been able to utilize the deed of compromise in evidence in the present suit without having it registered. Such of its terms relating to the property then in suit as had been embodied in the decree would have been binding upon the parties as *res judicata*, and the order of the Court incorporating the other terms contained in the compromise would have been judicial evidence available to the respondents. In view of the observations of their Lordships of the Privy Council and of a Division Bench of this Court in 4 Lah 263⁹, I am of the opinion that it cannot be said that the decree passed by the learned District Judge of Peshawar embodied the whole of the compromise and thereby exempted it from registration so far as the land in dispute is concerned, under S. 17 (2) (vi), Registration Act, as it stood before the amendment made in 1929.

The learned counsel for the respondents relied on a ruling of their Lordships of the Privy Council reported as 26 I A 101.¹⁰ In that case however the compromise dealt only with the lands which formed the subject matter of the suit thereby compromised. The compromise did not deal

with any property which was extraneous to that suit. Their Lordships therefore laid down that :

The *razinamah*, in so far as it was submitted to and was acted upon judicially by the learned Judge, was in itself a step of judicial procedure not requiring registration; and any order pronounced in terms of it constituted *res judicata*, binding upon both the parties to this appeal, who gave their consent to it.

The *razinamah* merely referred, by way of remark, to the lands which formed the subject matter of dispute in subsequent litigation and the Judge was only asked to give effect to the compromise so far as it related to the land then in dispute before him. It is obvious that this ruling has no applicability to the facts of the present case as the compromise was held to be exempt from registration on the ground that all its terms were embodied in the order of the Court and a decree was passed in accordance with its terms. The learned counsel for the respondents also relied on a Division Bench ruling of this Court reported in A I R 1930 Lah 855¹¹ where it was observed that :

If a decree is passed in terms of the compromise and the compromise forms part of the judicial order made by the Court, the case is substantially governed by S. 17 (2) (vi) and the compromise can be exempted from the law of registration and that it is not necessary that the compromise should be bodily transcribed in the order of the Court or in the decree.

It is not clear from the report whether the compromise in that case dealt with property which was not included in the suit thereby compromised. It was held by a Division Bench of the Madras High Court in 42 I C 223¹² that :

If in passing a decree a Court takes into consideration the whole of a *razinamah*, and not merely in so far as it affects the property in suit, e.g., in order to determine whether the *razinamah* as a whole is beneficial to a minor, the whole *razinamah* must be taken to have been submitted to and acted judicially upon by the Court and becomes part and parcel of the decree, and is admissible in evidence without registration.

This ruling is also not of much assistance to the respondents as the decree passed by the District Judge dated 11th June 1907, does not show that he took the terms of the compromise into consideration at all or that he was even aware of the fact that the compromise dealt with property extraneous to the suit. It is not

11. *Mt. Jai Lagi v. Alliance Bank of Simla*, A I R 1930 Lah 855=128 I C 300=12 L L J 113.

12. *Ariya Putra Goundan v. Ettiya Goundan*, A I R 1918 Mad 1331=42 I C 223=33 M L J 615.

9. *Ghulam Mustafa Khan v. Ghulam Nabi*, A I R 1923 Lah 581=75 I C 461=4 Lah 263.
10. *Pranal Annee v. Lakshmi Annee*, (1899) 22 Mad 508=26 I A 101=7 Sar 516 (P C).

necessary to deal with several other rulings quoted by the learned counsel for the respondents as they have no direct bearing on the question of registration. After a careful consideration of the entire matter I have reached the conclusion that the decree of the learned District Judge dated 11th June 1907 does not comply with the provisions of O. 23, R. 3, Civil P. C., and that the compromise dated 9th June so far as it concerns the Lyallpur lands, was never ordered to be recorded. This portion of the compromise therefore did not become a part of the judicial proceedings and was not exempt from registration. For the reasons given above, I would accept this appeal, set aside the judgment and the decree of the trial Court and dismiss the plaintiffs' suit. In view of all the circumstances, I would order the parties to bear their own costs throughout.

Addison, J.—I agree.

B.D./R.K.

Appeal allowed.

A. I. R. 1937 Lahore 360

COLDSTREAM AND BHIDE, JJ.

Rahmat Ullah—Defendant—Appellant.
v.

Atta Mohammad Khan and others,
Plaintiffs and others, Defendants—
Respondents.

Second Appeal No. 68 of 1931, Decided on 27th March 1936, from decree of Dist. Judge, Hoshiarpur, D/. 10th November 1930.

(a) Civil P. C. (1908), O. 21, Rr. 58 and 63—Mortgage decree—Proceedings by way of attachment are not appropriate—Decree-holder, however, attaching property—Claims and objections under O. 21, R. 58 can be made—Suit lies under O. 21, R. 63 on dismissal of objection.

While proceedings by way of attachment are not appropriate to mortgage decrees, claims and objections to the attachment can be made under O. 21, R. 58, Civil P. C., if the decree-holder applies for and obtains an order of attachment and the property is attached. On dismissal of his objection, the objector is entitled to bring a suit for declaration of his title under O. 21, R. 63: *A I R 1915 L B 136 (F B)*, *Rel. on.* [P 361 C 2]

(b) Landlord and Tenant — Tenancy — Nature of—Tenancy alleged by landlords to be not transferable by custom—Burden of proving custom is on landlords.

Where the question is as to whether a particular right of tenancy is transferable or not, the presumption under the general law as laid down in Section 108 (j), T. P. Act (the general principles of which have been consistently followed by the

Courts in the Punjab), is, that in the absence of contract or local usage to the contrary, the right is alienable. Where, therefore, the landlords allege that the tenancy is by custom not transferable, the burden of proving the existence of such custom is on them. [P 362 C 1]

(c) Landlord and Tenant—Building by tenant — Right of residence — Presumption — There is no presumption that right of residence on city site is inalienable as in case of villages.

There is no presumption that a right of residence on a city site is inalienable such as arises in the case of villages or small towns where the residential sites belong to the agriculturists who own the revenue estates in which they are situate. [P 362 C 1]

(d) Custom (Punjab)—Mohalla Khajurian of Jullunder city—Custom prohibiting tenant from mortgaging his permanent right of residence does not exist.

No custom to the effect, that when a tenant mortgages permanent right of residence without the landlord's permission, the right vanishes and the landlord can evict the tenant or the mortgagee in possession without paying the value of the tenant's superstructure, exists in Mohalla Khajurian of Jullunder city. [P 363 C 2]

Lala Badri Das—for Appellant.

Abdul Haye—for Respondents.

Coldstream, J.—On 23rd May 1848, one Masita, a butcher, took on lease a site, 10 marlas of Niai land, in Mohalla Khajurian of Jullundur city which belonged to Atta Mohammad and other Afghan proprietors of the Mohalla. The deed provided that Masita would build a shop on the site and pay Rs. 4 annually as rent and would occupy the shop as long as he wished. If the landlords had the house vacated, Masita would be entitled to recover the price of the materials from the landlords but if he left it of his own accord the landlords would have the right to take the materials. Masita sold the house built upon the site and his right to occupy it to one Kamun for Rs. 70 and on 10th December 1865, Kamun executed a deed in favour of the landlords agreeing to pay the ground rent. Kamun died leaving a widow and a daughter and on 1st June 1901 his widow, Mt. Bharo, made a gift of the property to her daughter's son, Mohammad Ishak. The deed purported to convey the materials of the building on the site and the right of residence in it. Mohammad Ishak gifted part of the property to his sister and mortgaged the rest in favour of the Co-operative Credit Society of Jullundur city. The mortgagees obtained a decree on the basis of their mortgage and proceeded to execute it by

attaching the property mortgaged including the site. The property was ordered to be auctioned. On the landlord's objection the site was released from attachment but not the right of residence which with the superstructure was purchased on 11th January 1917 by Rahmat Ullah, the present appellant, for Rs. 3,100.

On 29th July 1918 six of the fourteen proprietors of the Mohalla instituted a suit against the Co-operative Credit Society, Rahmat Ullah, the auction-purchaser (who was also the President of the Co-operative Credit Society) and the remaining landlords who had not joined with the plaintiffs, asking for a declaration that the right of residence was not liable to attachment and sale in execution of the decree against Mohammad Ishak because according to a local custom prevalent in Jullundur city Mohammad Ishak had no power to alienate it. The suit was decreed by the Subordinate Judge on 4th February 1920. Rahmat Ullah appealed. The District Judge remanded the case for decision of the questions whether a declaratory suit lay, whether the previous conduct of the plaintiffs showed that the tenancy was transferable, whether the sale though made by a competent Court could be cancelled and whether the defendant could be directed to remove the materials of the house he had purchased. The Junior Subordinate Judge who dealt with the case on remand held that a declaratory suit lay, that the tenancy was not transferable, that the sale could be set aside and that if the vendee was found entitled only to the materials and not to the site of the building, he ought to be ordered to remove his materials. The District Judge upheld the finding that a declaratory suit lay, but he accepted the appeal and set aside the decree on the ground that the plaintiffs could not impugn the sale under the decree against a third party. This decision was, however, reversed by the High Court, *C. A. No. 778 of 1924*,¹ who held that this proposition was not sound and remanded the appeal to the District Judge for re-decision on a consideration of the question whether, in view of the fact that a mortgage decree does not require attachment for its execution, a suit under O. 21, R. 63, Civil P. C., was competent. The decision of the District Judge was

that a declaratory suit was maintainable and that under the custom prevailing in Jullundur City the tenancy or right of residence was not alienable. On these findings he dismissed the appeal, ordering Rahmat Ullah to remove the materials of the superstructure within six months. At the same time he granted a certificate under S. 41, Punjab Courts Act, permitting an appeal on the question of custom involved.

Against this dismissal the auction-purchaser Rahmat Ullah has come to this Court on second appeal. It is contended on his behalf that a declaratory suit was not competent in the circumstances and that the decision of the lower Courts that by custom the right of residence of a tenant like Mohammad Ishak is inalienable is wrong. It is also contended that in any case the order for the removal of the superstructure could not be passed in a declaratory suit in which this relief had not been asked for. It is admitted that this last contention has force and that the appeal must in any case succeed to the extent that the order for the removal of the materials must be set aside.

As regards the first contention, I have no doubt that it was open to the plaintiffs in this case to sue for a declaration under the provisions of O. 21, R. 63, Civil P. C. The decree in execution of which the property was put to sale had not been drawn up in the form of a mortgage decree in accordance with Order 34, Civil P. C., but as if it had been one in an ordinary money suit. It was not only the mortgaged superstructure which was attached but also the site and the right of residence. Once there was an attachment under Order 21, the landlords clearly had a right to object, and when their objection in respect of the right of residence was rejected Rule 63 gave them the right to sue for a declaration to establish their title. As pointed out in the Full Bench ruling of the Lower Burma Chief Court in 29 I C 941,² while proceedings by way of attachment are not appropriate to mortgage decrees, claims and objections to the attachment can be made under O. 21, R. 58 of the Code if the decree-holder applies for and obtains an order of attachment and the property is attached. The appellant's counsel had not been able to cite any authority to the contrary.

1. *Ata Mahomed Khan v. Rahmatullah*, Reported in AIR 1929 Lah 760=116 I C 882.

2. *Mg. Mra Tun v. U Kaing*, AIR 1915 L B 136=29 I C 941=8 L B R 215 (F B).

I come now to the main question in the case, whether Mohammad Ishak's tenancy was or was not transferable. The deed in which the tenancy in favour of Masita was originally recorded has already been described. Its language is not perfectly clear but *prima facie* makes it apparent that the landlords could evict the tenant, that is to say, the tenancy was not strictly a permanent one. But from the judgment of the District Judge it appears that the permanent nature of the tenancy was admitted by the plaintiffs and the case has been fought on the presumptions that it was and that unless the plaintiffs could prove a special local custom enabling them to have the mortgage declared void as against them their suit must fail. It is possible that the plaintiffs adopted this attitude because they were not prepared to pay the value of the superstructure in accordance with the terms of the lease deed. But whether this is so or not, it is clear that in this case the plaintiffs could not succeed unless the custom pleaded was proved to govern the tenancy, for under the general law the presumption, in the absence of a contract or local usage to the contrary, would be that the right was alienable as laid down in S. 108 (j), T. P. Act, the general principles of which have consistently been followed by the Courts of this Province. The onus of proving the existence of the custom was therefore rightly put upon the plaintiffs. The learned District Judge has based his decision in favour of the plaintiffs on the evidence that the "general custom in the Punjab is against the power of alienation", an admission by defendants' counsel that the power is not possessed by the tenants in any other mohalla and on judgments deciding that such a tenancy is not transferable in the mohallas Asarian, Rasta, Karar Khan, Said Kabir, Kot Achhi and Purana Kacheri, which mohallas are not shown to be in any way different from the Khajurian Mohalla (referred to in the judgment as the Mandi Buchar Khana).

There is no presumption that a right of residence on a city site is inalienable, such as undoubtedly arises in the case of villages or small towns where the residential sites belong to the agriculturists who own the revenue estate in which they are situated. In the case of revenue estates the customary restriction on the right of alienation is ordinarily recorded in the original *wajib-ul-arz* which document itself

raises a presumption to rebut which cogent evidence is required. From the record of the appeal (*Appeal No. 1898 of 1877*³) decided by a Division Bench of the Chief Court on 27th February 1879, it appears that there was then in existence a *wajib-ul-arz* relating to Jullundur City. But no *wajib-ul-arz* applicable to Jullundur town or Mohalla Khajurian has been referred to before us and we are assured by counsel that none exists now. We must therefore proceed without any initial presumption based on prevailing custom in favour of the landlords whose suit cannot succeed unless they prove that the mortgage in this case was not allowed by custom. In the Chief Court case just cited the defendant had, it appears, mortgaged a house of which he was tenant situated on land in Kazi Mohalla belonging to the plaintiff and the plaintiff sued to have the alienation set aside and to be given possession of the house. The case came on appeal from a decision of the Additional Commissioner, Jullundur Division. The learned Judges ordered an enquiry to be made into the customary right of tenants in Jullundur remarking :

As at present informed we have reason to believe that there are in the City of Jullundur a class of house occupiers who hold either their houses or the sites of their houses in subordination to superior proprietors. They are locally known as *raiya*ts in respect of the tenure of these houses and may be liable to pay rent in some form or other.

An inquiry was made by the Tahsildar who in his report referred to the *wajib-ul-arz* as recording that hereditary tenants had the power to sell, mortgage or gift the property in their possession. This report was first dealt with by an Extra Assistant Commissioner who found that custom forbade the alienation by tenants of property belonging to their landlords and that in fact the house in dispute belonged to the landlords. The Additional Commissioner decided that the plaintiff was owner only of the site and that under the custom prevailing, the tenant was bound to offer the house to the landlord of the site before mortgaging or selling it to anyone else and that as such offer had not been made the plaintiff was entitled to have the sale or mortgage set aside. These findings were accepted by the Chief Court who passed a decree setting aside the mortgage. In *Appeal*

3. Mohammad Shah v. Ghulam Mohiuddin, Appeal No. 1898 of 1877.

No. 889 of 1884,⁴ decided by the Chief Court on 15th June 1885, the dispute was of a similar nature, the tenant having mortgaged his house for Rs. 30 and the plaintiffs having sought to set the mortgage aside on payment of a reasonable sum—the stated amount of Rs. 30—being alleged to be fictitious. The house was in Mohalla Kabir. The suit was decreed and the decree upheld on first appeal. The Chief Court found the decision justified by the evidence and referred to the case last described and also to another case, Ghulam Mohammad v. Kutba and Imam-ud-Din, decided on 9th September 1874 (which dealt with a case from Mohalla Sayad Kabir).

Another judgment of the Chief Court dealing with tenancy rights in Jullundur City is 75 P R 1897.⁵ That was a case of a tenancy in Mohalla Ansarian. The tenant had mortgaged his house by a deed expressly recognizing the plaintiffs' title in the site and after his death the proprietors of the site sued to have the mortgage set aside. They obtained a decree for possession against the mortgagee and the nephews of the dead tenant and the decree was confirmed in appeal. A second appeal was dismissed by Chatterjee and Clark, JJ., so far as the question of the right to alienate was concerned, and a decree was given for possession, contingent on the plaintiffs paying Rs. 94-8-6 to Bug for the value of his materials. In his judgment Chatterjee, J. said:

The custom set up by the plaintiffs is akin to that which ordinarily prevails in respect of non-proprietary residents in villages or villages which have expanded into towns. There is therefore an initial element of probability in favour of the plaintiffs' contention and it is to be seen whether there is sufficient evidence to support it. The defendant's would require much stronger evidence to establish it.

After remarking that the mere fact that other alienations had taken place did not tell against the landlords, and expressing approval of the principle laid down in 119 P R 1884⁶ and 124 P R 1888,⁷ the judgment referred to a number of rulings supporting the custom alleged by the plaintiff, noting that *Sondhi v. Hidayat Ullah*⁴ was the most valuable in this respect, and that other cases throwing light

on the custom prevailing in other mohallas of the city more or less supported it. It proceeded to state:

The consequences of such an alienation are also well established by the above cases, and particularly the Chief Court one, and are supported by the analogy of non-proprietary residents on village sites alienating their houses and parting with their possession to strangers.

I come now to the documents relied upon by the respondents, noting that counsel before us have not attached importance to the oral evidence except in so far as it relates to the transactions to which the documents refer. (His Lordship then discussed the documentary evidence and proceeded.) The Judicial instances are, in my opinion, clearly insufficient to discharge the onus which lay upon the plaintiffs to prove the existence in mohalla Khajurian of the particular custom pleaded, namely, when a tenant mortgages a permanent right of residence without the landlord's permission the right vanishes and the landlord can evict the tenant or the mortgagee in possession without paying the value of the tenant's superstructure. Nor does this evidence support the admission of the defendants' counsel, noted by the learned District Judge, regarding the existence of the custom in other Mohallas, the instances from the other mohallas not being directly to the point. The case decided in *Appeal No. 1898 of 1877*³ relates to another mohalla and the decision was apparently not consistent with the entry in the *wajib-ul-arz* applicable to the site in dispute. We do not know what order was made regarding the superstructure. Although the Chief Court's judgment does refer to the custom found proved as one prevailing in Jullundur City I note that in his report forwarding the local officer's report on the question of custom the learned Additional Commissioner referred to the "custom prevailing in certain Mohallas of the city" and to cases decided about sites in Abli Hardialpura and Jatpura Mohallas. But he excluded from consideration instances from the Bastis adjoining Jullundur. Some of the Bastis are admittedly now mohallas.

Nor did the dispute in *Appeal No. 889 of 1884*⁴ relate to mohalla Khajurian. In that case the mortgagee was awarded compensation. Compensation was also decreed in 75 P R 1897,⁵ the site concerned being in Mohalla Ansarian. The judgment, as already made clear, proceeded largely on the assumption that the custom prevailing

4. *Sondhi v. Hidayat Ullah*, Appeal No. 889 of 1884.

5. *Bug v. Asad Ali*, (1897) 75 P R 1897.

6. *Aman Singh v. Kalla*, (1884) 119 P R 1884.

7. *Teja Singh v. Mahomad Khan*, (1888) 124 P R 1888.

in agricultural village sites was relevant evidence in the case. But this is not in accordance with the present view. Here too the defendant was compensated by payment of the value of the materials of his house. Of the instances sought to be proved by the documents, Nos. 1, 3 and 8 are not of use to us, for the vendee had in these cases denied the existence of the tenancy. Case No. 2 related to a site in a Basti and Case No. 4 came from Mohalla Kot Achhi described as "near" the city of Jullundur. Case No. 5 is not to the point and the decisions in Cases Nos. 6, 7 and 10 were based on contracts creating the leases. No. 9 is the same case as *Civil Appeal No. 889 of 1884*⁴ and in No. 11 the plaintiff-landlords were found to be owners of the houses in the tenants' possession and evicted tenants were awarded compensation. As the plaintiffs have failed to discharge the onus placed upon them it is not necessary to discuss the evidence relied on by the defendants. I would accept the appeal and dismiss the suit with costs throughout.

Bhide, J.—I agree with the conclusions reached by my learned brother, Coldstream, J. So far as the question of the alleged custom is concerned, the first point of importance to be noticed in this case is that the contract of tenancy was reduced to writing. The contract specifically recites that if the landlord evicted the tenant he would compensate him for the building which was to be erected by the tenant, but that if the latter abandoned the house of his own accord, the landlord would be entitled to take the materials. The lease mentions no restrictions on the right of transfer of the tenancy, either customary or otherwise. If there were any restriction on the power of transfer one would have expected to find it in the document itself; but there is no mention of it therein. Under S. 108 (j), T. P. Act, the principles of which are held to be generally applicable in this province, no restriction of the right of transfer exists in the case of a lease, in the absence of any contract or local usage to the contrary. Therefore the only question which requires decision is whether any local usage to the contrary governing this lease has been proved. The house in question is situated in Jullundur City and consequently there is no initial presumption in favour of the custom alleged as there is in the case of houses occupied by

non-proprietors in villages. Such a presumption is not raised even in the case of villages which have definitely grown into Qasbas or towns where the original bond of the village community generally disappears: *vide* para. 236 of Rattigan's Digest of Customary Law and Excep. I thereto. The onus, therefore, clearly lay on the plaintiffs to prove the alleged custom. The oral evidence produced by the parties was of little value. So far as the documentary evidence is concerned, my learned brother has discussed all the instances relied on and pointed out that they are distinguishable for one reason or another and do not support the custom alleged.

As regards decided cases, no case decided by this Court has been cited. The only reported case decided by the Punjab Chief Court which was cited on the question was 75 P R 1897.⁵ This purports to follow *C. A. No. 889 of 1884*,⁴ and the latter in its turn follows *C. A. No. 1898 of 1877*.³ We sent for the records of the last two cases to satisfy ourselves of the relevancy of these decisions for the purposes of the present case. The earliest of these cases, viz: *C. A. No. 1898 of 1877*,³ seems to be the most important. In that case an inquiry was made as regards restrictions on the powers of alienation of tenants in Jullundur City, who held under superior proprietors and were locally known as "ryots". The Tahsildar, who made the inquiry referred to para. 15 of the *wajib-ul-arz* which recited that:

All the residents in possession and owners in this town are owners of the quantities (areas) held and owned by them respectively according to the custom prevailing in towns; none has anything to do with or can interfere with the land held and owned by any other; everyone of whatever caste he be, who holds any place as hereditary tenant or purchaser, has a power of selling, mortgaging or making gift of property held and owned by him.

It would thus appear that the oldest document recording the rights of residents in Jullundur City of which we have any information is opposed to the custom relied upon by the plaintiffs. The Tahsildar found that the plaintiff in that case had failed to prove that he was the proprietor and that it was also not proved that there was any restriction on the power to sell or mortgage. Diwan Ram Nath, E. A. C., through whom the Tahsildar's report was sent, however, held that the plaintiff was a proprietor in the Mohalla and that he was owner of both

the site and the house in dispute in that case. As regards the custom, he stated that reliable witnesses gave the opinion "that there is a custom that if the materials belong to a proprietor, the ryot cannot transfer them". One of the points on which inquiry had been ordered was whether the defendant in that case was a "ryot". The evidence on this point was to the effect that the defendant was only liable to pay petty customary dues on the occasion of marriages, etc. The Additional Commissioner, Jullundur, who reported to the Chief Court on the matter dealt first with the main question, viz., whether the defendant was a "ryot" of the plaintiff. As to this he remarked that the Tahsildar had laid stress on the absence of documentary evidence, but he was of opinion that such evidence was not likely to be available in the case of these tenants who were holding as "ryots". As regards Cl. 15 of the wajib-ul-arz referred to above, he found from the evidence that in the Kazi Mohalla, at any rate,

possession did not necessarily indicate ownership, and mere possession without ownership did not confer the power of disposing of the property.

He further found that there was no doubt that the plaintiff was one of the class to which Kazi Mohalla originally belonged and that members of that class were still landlords of many houses in Mohalla, though in some cases residents had acquired a full proprietary title by purchase or otherwise. The Additional Commissioner also found that the plaintiff was only the owner of the site and not of the house, and that the defendant was liable to pay certain customary dues on the occasion of marriages, etc. As regards the question of alienation, he found that where the materials of the house belonged to the tenant, the proprietor was entitled to the first offer and could prevent a sale or mortgage of the house unless he had such offer. If the tenant sold or mortgaged without making such offer, the sale or mortgage could be set aside, but the tenant could not be ejected so long as he paid the customary dues. It was also found that customary dues in the Kazi Mohalla were "five takkas" and a lump of "gur" on the birth of a son and Rs. 1-4-0 on the birth of a daughter. The learned Judges of the Chief Court concurred in the findings of the Additional Commissioner and held that:

As no offer of the mortgage in the present case was made by the defendant to the plaintiff, a

decree should be passed in favour of the plaintiff setting aside the mortgage.

I have set forth at length the facts and the findings in the above case, because it seems to be the basis of the subsequent decisions. It will appear therefrom that the present case is clearly distinguishable. In the first place, the tenant in the present case is not one paying customary dues as in that case. Secondly, the custom found in that case was that the proprietor was entitled to a first offer of the sale or mortgage and it was only if he did not get such an offer that he was entitled to have the sale or mortgage cancelled. In the present case no such custom appears to have been alleged. Lastly, Cl. 15 of the wajib-ul-arz referred to in the report of the Tahsildar appears to be clearly against the custom relied upon by the plaintiff. The case, *Appeal No. 1898 of 1877*,³ appears to have been really decided on the particular facts relating to Mohalla Kazi. The next case, *C. A. No. 889 of 1884*,⁴ is similarly distinguishable. The tenant Imam Din in that case also merely paid some customary dues. The plaintiffs sued for possession of the mortgaged house on payment of a reasonable sum alleging that the sum stated in the deed of mortgage was fictitious. This also seems to be an assertion of a right of pre-emption and nothing more. It is not clear in what Mohalla the house in dispute in that case was situated. The learned Judges of the Chief Court, in setting aside the mortgage, followed *Appeal No. 1898 of 1877*³ and another decision by the Deputy Commissioner, Jullundur, relating to Mohalla Sayyed Kabir. The learned Judges did not allow compensation for the value of his house to the mortgagee, but this was apparently contrary to the claim set up by the plaintiff and no reasons are given for disallowing compensation, when plaintiff had offered to pay it.

The last case decided by the Chief Court which was the one relied on by the learned counsel for plaintiffs was 75 P R 1897.⁵ This purports to follow *C. A. No. 889 of 1884*,⁴ but as pointed above that case follows *Appeal No. 1898 of 1877*,³ etc., and it is only in the latter case that any exhaustive enquiry was made. In 75 P R 1897⁵ it was remarked that the custom which obtains in villages rendered it probable that such a custom prevails in Jullundur City. But any such presumption seems to be unjustifiable in

view of Cl. 15 of the *wajib-ul-arz* referred to in the report of the Tahsildar in *Appeal No. 1898 of 1877*³ as shown above. There is no warrant in the enquiry made in that case for the assumption that the custom found in Mohalla Kazi prevailed generally in Jullundur City. In fact the Additional Commissioner specifically confined his finding to Mohalla Kazi and the learned Judges of the Chief Court concurred in his findings. In 75 P R 1897⁵ the exact nature of the tenancy is not described, but it was very old and was presumably a customary one of the same type as in *C. A. No. 889 of 1884*⁴ on which the learned Judges of the Chief Court particularly relied. It also appears that a part of the house at any rate was found to have belonged to the proprietors. Only a 'dalan' was held to have been added by the tenant. It is noteworthy that in decreeing the suit the Chief Court allowed Rs. 94.8.6 to the mortgagee by way of compensation. The learned Judges remarked in connection with this point that the cases seemed to establish the obligation of the landlord to pay for the tenants' materials which is the only security the alienee can look to for the realization of his money. This view is not easily intelligible but it looks like a recognition of a mere right of pre-emption.

It will appear from the above, that the Chief Court cases referred to above related to tenants known as 'ryots' paying merely customary dues in respect of houses occupied by them while here we have a tenancy created by a written contract. The contract distinctly says that if the landlord ejected the tenant he would compensate him for the building which seems to imply that the landlord could evict the tenant if he chose to do so provided he was prepared to pay compensation for the building. There is no warrant in the Chief Court rulings for any presumption as to restrictions on the power of alienation in respect of tenancies of the present type. Even as regards 'ryots' paying customary dues there is no justification for any presumption as to restrictions throughout Jullundur city. Cl. 15 of the *wajib-ul-arz* quoted in the Tahsildar's report in the enquiry made in *Appeal No. 1898 of 1877*³ is against such a presumption and the custom found in two or three Mohallas in the Chief Court rulings was in the nature of an exception to that clause. Lastly, the custom alleged

in the Chief Court rulings was akin to pre-emption. According to the custom the landlord was entitled to the first offer, if the tenant wanted to alienate. If the tenant made such an offer and the landlord did not accept it, presumably there was no objection to alienation. In the present instance the custom alleged is that the tenancy or the 'right of residence', as it is described, cannot be alienated at all without the landlord's consent. It will thus appear that the Chief Court rulings proceed on a different set of facts and a different custom and cannot, therefore, help the plaintiffs.

I have already mentioned that the instances of custom relied on by the plaintiffs are distinguishable as pointed out by my learned brother in his judgment and do not help them. In addition to what has been stated, I may point out that in most of the cases relied on, the tenants were 'ryots' paying customary dues: see e. g. Exs. P.8, P.9, P.11, P.12, P.13, P.15, P.16, P.17, P.18, and P.1. On the other hand the judgment of Munshi Imam Din, Munsiff, in C. S. No. 184 of 1901, decided on 31st October 1901, in which the tenancy appears to have been of the present type and on which the defendants relied, shows that the tenants in Mohalla Bucharkhana stand on a different footing to ryots from whom the proprietors receive customary dues. The defendants have produced documentary evidence relating to alienations with respect to the house in question as well as others to support their contention that there is no restriction on alienation; but even if these instances are by themselves not considered to be of great importance, there are two instances in this Mohalla in which the landlords sued for pre-emption of the sales of houses which they could scarcely have done if the custom relied on were applicable. In view of all the facts given above, I agree that the plaintiffs have failed to establish that the custom alleged by them governs the tenancy in dispute and that this suit must, therefore, be dismissed with costs.

R.M./R.K.

Appeal allowed.

A. I. R. 1937 Lahore 367

TEK CHAND, J.

Natha Singh—Plaintiff—Appellant.

v.

Mt. Bachint Kaur — Defendant — Respondent.

Second Appeal No. 1001 of 1936, Decided on 23rd December 1936, from order of Senior Sub-Judge, Amritsar, D/- 30th May 1936.

Jurisdiction—Civil or criminal—Order of maintenance under S. 488, Criminal P. C.—Jagir money of person, against whom order is made, can be taken and attached for realization of amount due under order—Provisions of Civil P. C. as to exemption from attachment do not apply—Civil Court has no jurisdiction to go into matter.

Jagir income of a person, against whom maintenance order had been passed by a Magistrate, when collected by the revenue authorities, can be taken and attached in satisfaction of the amount due under the order. The provisions of the Civil P. C. exempting certain property from attachment and sale do not apply to the criminal Courts. Under Ss. 4 and 9, Criminal P. C., civil Courts have no jurisdiction to go into the matter: 3 P R 1889 Cr and A I R 1928 Lah 562, Rel. on. [P 367 C 2]

Shamair Chand and Prakash Chandra Jain—for Appellant.

Durga Das—for Respondent.

Judgment.—The parties to this litigation are husband and wife. In proceedings under S. 488, Criminal P. C., taken some years ago, an order was passed by a Magistrate, First Class, ordering the husband, Natha Singh, to pay a certain allowance to the wife, Mt. Bachint Kaur. Natha Singh having failed to pay the amount, proceedings were taken in the Magistrate's Court for realization of the amount from certain jagir money which had been collected by the revenue authorities and this amount was duly attached. Thereupon Natha Singh instituted a suit in the civil Court for a declaration that the money attached was not liable to seizure, attachment or sequestration in satisfaction of an order of the criminal Court, and for issue of a perpetual injunction to the defendant, Mt. Bachint Kaur, restraining her from attaching and realizing the jagir money in future. In defence it was pleaded that the suit, as framed, was not maintainable in a civil Court and secondly that the jagir money in question was not a political pension and, therefore, could be attached. The trial Judge found against the plaintiff on both points and

dismissed the suit. On appeal by the plaintiff the learned Senior Subordinate Judge agreed with the Court of first instance that the suit in its present form was not maintainable. He, however, expressed the opinion (though it was not necessary for the decision of the case in view of his finding on the first point) that the jagir in question was a political pension. In the result, he dismissed the suit leaving the parties to bear their own costs throughout.

The plaintiff has come up in second appeal, and it has been urged on his behalf that the suit as brought was maintainable. After hearing counsel I am of opinion that this contention is without force. Under S. 488 (3), if the person ordered by the Magistrate to pay maintenance fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount due in the manner provided for levying fines S. 386 contains the provisions for the levying of fines, and in Cl (a), sub-s. (1) it is laid down that the amount may be levied by attachment and sale of any immoveable property belonging to the offender. No exemptions whatsoever, like those contained in S. 60, Civil P. C., are given in this section. It is not contended that the Magistrate did not follow the correct procedure and it has not been shown that he had no jurisdiction to attach the money in question after it had been collected by the revenue authorities, assuming that it was a political pension. In 3 P R 1889 Cr,¹ a Division Bench of the Chief Court held that jagir income of a person, against whom maintenance order had been passed by a Magistrate, when collected by the revenue authorities can be taken in satisfaction of the arrears due under the order. It was held in that case that the provisions of the Civil Procedure Code, exempting certain property from attachment and sale, do not apply to the criminal Courts. It cannot, therefore, be said that even on the allegations in the plaint the criminal Court acted without jurisdiction. It seems to me, that under Ss. 4 and 9, Criminal P. C., civil Courts had no jurisdiction to go into the matter: cf. 10 Lah 338.² I am, therefore, of opinion that the Courts below rightly decided issue 1 against the plaintiff.

1. Sirdar Raghubir Singh v. Mela Singh, (1889) 3 P R 1889 Cr.

2. Dewa Singh v. Fazl Dad, A I R 1928 Lah 562 =111 I O 508=10 Lah 338.

On issue 2, whether the jagir in question is a political pension, it seems necessary to point out that the finding of the Senior Subordinate Judge which is in nature of an *obiter dictum*, appears to have been given on incomplete data and the learned Judge ought to have been well-advised in not leaving the matter alone. The materials on the record were very meagre and a complete history of the original grant and its subsequent renewals and devolution was not before him. It need hardly be said that the question whether a particular jagir is a political pension within the meaning of S. 11, Pensions Act, is one of considerable difficulty and ought not to have been decided summarily. The appeal fails and is dismissed with costs.

S.C./D.S.

*Appeal dismissed.***A. I. R. 1937 Lahore 368**

JAI LAL, J.

Wasdev — Decree-holder — Appellant.
v.

Kidar Nath and others — Judgment-debtors—Respondents.

Second Appeal No. 709 of 1936, Decided on 7th December 1936, from order of Dist. Judge, Dera Ghazi Khan, D/- 27th February 1936.

Civil P. C. (1908), O. 21, R. 53 (1) (b) (ii) (Lahore amendment) and R. 53 (3) — Both Rules are to be read together—Decree-holder attaching in execution decree obtained by his judgment-debtor in another Court—Consent as required by R. 53 (1) (b) (ii) (Lahore) of attaching decree-holder or of attaching Court in writing is necessary only when judgment-debtor wants to execute his own decree—No consent is necessary for attaching decree-holder to execute attached decree.

Order 21, R. 53 (1) (b) (ii), Civil P. C. (Lahore amendment) and O. 21, R. 53 (3) are to be read together. [P 369 O 1]

Where a decree-holder attaches in execution a decree obtained by his judgment-debtor in another Court such decree-holder becomes the representative of his judgment-debtor under O. 21, R. 53 (3), with respect to the decree obtained by such judgment-debtor and he is entitled to execute the attached decree in any lawful manner. The consent in writing as required by R. 53 (1) (b) (ii) (Lahore), of the attaching decree-holder or of the attaching Court, is necessary when the judgment-debtor whose decree is attached seeks to execute it. Such consent is not necessary when the attaching decree-holder executes the attached decree. [P 369 O 1]

Arjan Dev Bagai — for Appellant.

Judgment.—The appellant Wasdev had a decree against Jagan Nath. It was a money decree. In execution of that decree he attached a decree which had been passed in favour of Jagan Nath against Kidar Nath for sale of mortgaged property. Wasdev's decree had been passed by a Subordinate Judge of the First Class and the attached decree in favour of Jagan Nath was passed by a Subordinate Judge of the Fourth Class. Subsequent to the attachment of the decree, Wasdev made an application in the Court of the Subordinate Judge, Fourth Class, to execute the decree of Jagan Nath against Kidar Nath. This application has been dismissed on two grounds by the District Judge. One is that there was no proof that an order of attachment of Jagan Nath's decree against Kidar Nath was passed in execution of Wasdev's decree. A reference to the record however shows that an application was made by Wasdev on 20th November 1931, and an order was passed on 24th November 1931, by the Senior Subordinate Judge, attaching the decree of Jagan Nath against Kidar Nath, and a warrant of attachment of 2nd December 1931 was served and the attachment order was noted by the proper official of the Subordinate Judge, Fourth Class. It may at the same time be mentioned that the application of Wasdev made on 20th November 1931 was to attach the decree of Jagan Nath before judgment under O. 38, R. 5. The necessity of an application to attach before judgment under the circumstances is not understood because Wasdev had already obtained a decree against Jagan Nath. Still a formal order of attachment was issued by the Court and served on the Subordinate Judge Fourth Class. Even if it be assumed that the attachment was before judgment, a fresh attachment after the decree is not necessary. It is quite sufficient to entitle the decree-holder to proceed with the execution of the decree after the stage of attachment.

The second ground on which the learned District Judge has dismissed the application is that under O. 21, R. 53 the appellant, i. e., Wasdev, has not filed the consent in writing or permission of the attaching Court to enable him to execute the decree of Jagan Nath. Apparently the learned Judge has based his conclusion on O. 21, R. 53 (1) (b) (ii) which is that the Court whose decree has been attached shall stay execution of its

decree unless and until the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute the attached decree with consent of the said decree-holder express or in writing or with the permission of the attaching Court. The last sentence starting "with the consent of the said decree-holder" has been added to the rule as it originally stood by this Court. This clause however has to be read along with O. 21, R. 53 (3) which is :

The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-r. (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

It is obvious therefore that Wasdev, who was the holder of the decree sought to be executed by the attachment of the decree of Jagan Nath against Kidar Nath is a representative of Jagan Nath and is entitled to execute the decree in any lawful manner available to Jagan Nath. The addition made by the Rule Committee to sub-r. (1) (b) (ii) therefore merely means that if Jagan Nath had attempted to execute the decree it would have been necessary for him to obtain the consent in writing of Wasdev or of the attaching Court, that is, the Subordinate Judge of the First Class. No consent in writing is necessary in the case of the decree-holder in execution of whose decree the decree of his judgment-debtor has been attached. I consequently accept this appeal and set aside the order of the District Judge and also of the executing Court and send the case back to the executing Court with direction to proceed with the execution of the decree of Jagan Nath against Kidar Nath on the application of the appellant Wasdev. The respondent has not appeared before me. Therefore, I have not fixed a date for the appearance of the parties in the executing Court. The respondent Kidar Nath shall pay the costs of the appellant in this Court and in the Court of the District Judge.

K.B./A.L.

Case remanded.

A. I. R. 1937 Lahore 369

BEHIDE, J.

Mohindar Singh—Plaintiff—Petitioner.
v.

Kirpal Singh—Defendant — Opposite Party.

Civil Revn. No. 218 of 1936, Decided on 1st July 1936, from decree of Addl. Judge, Small Cause Court, Amritsar, D/. 17th February 1936.

Limitation Act (1908), S. 22 — Bond in favour of A—On A's death suit on it by his father in his personal right as A's heir— Subsequent application for substitution of A's minor son as plaintiff after limitation—Suit falls under S. 22 and is barred.

In a case where the plaintiff as father of the deceased in whose favour the bond was executed, brings a suit for recovery of money due in his personal right as heir but subsequently wants to substitute the name of the minor son of the deceased as plaintiff after limitation period, the case is clearly one of substitution of one plaintiff for another and is barred under S. 22, Limitation Act : *A I R 1932 Lah 314; A I R 1925 Cal 716* and *A I R 1925 Pat 37, Rel. on; A I R 1917 Mad 471; 33 All 735* and *A I R 1925 Cal 419, Disting.* [P 370 C 1]

R. L. Anand I — for Petitioner.

C. L. Aggarwal — for Opposite Party.

Order.—This was a suit for recovery of money due on a bond executed in favour of one Chanan Singh. On the death of Chanan Singh his father Natha Singh brought a suit for recovery of the money due on the bond. But on an objection being raised, that Chanan Singh had left a minor son, he applied for substituting the name of the latter as plaintiff and suing on his behalf. By the date on which this substitution was applied for, the suit had become time-barred. The suit has been accordingly dismissed. The plaintiff has filed a petition for revision of this order. The only argument put forward by the learned counsel for the petitioner before me was that there was only a misdescription of the plaintiff in the original plaint and hence the correction of the description did not raise any question of limitation under S. 22, Limitation Act, as there was no substitution of one plaintiff for another. In support of this argument he has relied on 33 I C 357,¹ 33 All 735,² and 79 I C 403.³ But in all three cases, the original plaintiff still continued

1. *Muthu Krishna Pillai v. Rajam Aiyengar* AIR 1917 Mad 471=33 I C 357=30 M L J 57.

2. *Jodhi Rai v. Basdeo Prasad*, (1911) 33 All 735=11 I C 47=8 A L J 817 (F B).

3. *Naba Kumar v. Higheazany*, A I R 1925 Cal 419=79 I C 403=51 Cal 845.

as a plaintiff and there was only a change in his capacity. In the present case, Natha Singh originally sued in his personal right as heir of Chanan Singh and he then wanted to substitute the name of the minor son of Chanan Singh as plaintiff. The present case appears to me to be clearly one of substitution of one plaintiff for another and would in my opinion be governed by S. 22, Limitation Act. This view receives support from A I R 1932 Lah 314,⁴ 52 Cal 783,⁵ and 3 Pat 230,⁶ which are analogous cases. I dismiss the petition for revision with costs.

V.B.B./R.K.

Petition dismissed.

4. Northern Bank of India, Ltd. v. Ramesh Chandar, A I R 1932 Lah 314=137 I C 89=33 P L R 253.

5. B. N. Ry v. Behari Lal Dutt, A I R 1925 Cal 716=90 I C 426=52 Cal 783=29 C W N 614.

6. E. I. Ry Co. v. Ram Lakhan Ram, A I R 1925 Pat 37=78 I C 312=3 Pat 230=6 P L T 415.

A. I. R. 1937 Lahore 370

TEK CHAND AND DALIP SINGH, JJ.

Hafiz Muhammad Suleman and others
—Plaintiffs — Appellants.
v.

Hari Ram and others — Defendants—
Respondents.

First Appeal No. 1283 of 1930, Decided on 9th April 1936, from decree of Sub-Judge, First Class, Delhi, D/- 30-4-1930.

(a) Civil P. C. (1908), O. 41, R. 27—Application to introduce new evidence in appeal—No adequate reason for non-production at proper time—Evidence having no real bearing on questions involved—Evidence will introduce new and inconsistent claim and cannot be admitted.

Where an application under O. 41, R. 27, Civil P. C., is made to introduce new evidence in appeal without giving adequate reason for its non-production at the proper time, which could be done by the exercise of ordinary diligence, and the evidence sought to be introduced has no real bearing on the questions involved in the appeal, such application should not be granted as admission of evidence at this stage will mean introducing new and inconsistent claim in appeal, which the other party will have no opportunity of meeting. [P 374 C 1]

(b) Lease—Private property attached during Mutiny—Attached property leased out on nominal rent for bazar on assurance that bazar would remain there for ever—Only conditions for dispossession were misconduct of lessee and in case land was required for roads—Lessee could remove building material if bazar removed—Lease held of permanent character, though proclamation did not expressly declare it to be so—Attached property subsequently released to original pro-

prietors—Proprietors held derived title from Government—Proprietors held were bound by intermediate acts of Government, i. e. leases.

Government during Mutiny of 1857 attached certain private properties under 'General Order'. The attached property was leased out on a nominal rent for building purposes for the construction of a proposed bazar for the convenience of the military camp. The lease was on the assurance, that in all likelihood the bazar would remain there for ever. It was also provided that if perchance the bazar was removed from there, the lessee would be competent to remove materials. Further the lessee could sell the shop subject to the permission of the Government. Only conditions on which the lessee could be dispossessed were misconduct of lessee and in case land was required by Government for roads. The attached property was subsequently released to the former proprietors, who proved their innocence :

Held : that though the proclamation did not say in so many words that the lease was permanent, the terms clearly indicated that the grantees were permanent tenants. [P 374 C 2]

Held further : that the attachment before leasing was nothing less than appropriation of such property by Government, who was the *de jure* as well as the *de facto* owner at the time when, after the restoration of peace, as an act of grace, it decided to 'release' the property; the releases were re-grants taking only those rights as were held by the Government, their assignor, and therefore the proprietors were bound by all the intermediate acts (leases of the attached property for the bazar) of the Government in respect of the property assigned : C. A. No. 1080 of 1868 ; 52 P R 188r and 112 P R 1886, Rel. on. [P 375 C 2; P 376 C 1]

(c) Landlord and Tenant—Permanent tenancy — Rent originally fixed subsequently raised by agreement of parties—Permanent nature of tenancy is not changed.

Where a tenancy as originally created is heritable and transferable, not held for a limited term and subject to the payment of a fixed rent, the circumstance that by agreement of parties the rent originally fixed is subsequently raised is not sufficient to lead to an inference of a novation of contract resulting in a tenancy with a fresh start in all respects, so as to affect its transferable or heritable character : A I R 1922 Cal 511, Foll.

[P 377 C 2]

(d) Evidence Act (1872), S. 63 — Abstract translation not 'copy' of or even complete translation of document—Translation merely summary of its terms—It does not come within S. 63.

Section 63, Evidence Act, is exhaustive of the meaning of 'secondary evidence'. An 'abstract translation' which does not purport to be a 'copy' or even a full and complete translation of the document, but is merely a summary of its terms, produced in a case where the point in support of which the document is sought to be produced was of no importance, does not come within the terms of S. 63 and is inadmissible : A I R 1922 Mad 334, Rel. on. [P 379 C 2]

(e) Landlord and Tenant — Permanent tenancy — Clause that failure to pay agreed rent might entail forfeiture of tenancy does not indicate tenancy-at-will.

In a permanent tenancy a clause to the effect that failure to pay the agreed rent might entail forfeiture of tenancy does not necessarily indicate that it is a tenancy-at-will. [P 379 C 2]

(f) Evidence—Secondary—Counterfoils of receipts are admissible only if loss of originals is proved.

Counterfoils of original receipts are admissible in evidence only if proof of the loss of the originals has been given. [P 380 C 1]

Jagan Nath Aggarwal, J. L. Kapur, Bhagwat Dayal and Shamair Chand — for Appellants.

Mehr Chand Mahajan, Vishnu Datta, Nazar Muhammad for *Abdul Haya* and *Abdul Haya* — for Respondents.

Tek Chand, J.—This judgment will dispose of Civil Appeal No. 1283 of 1930 and Civil Appeal No. 1973 of 1930, the contest in which is between the same parties and relates to a block of buildings, consisting of six shops and two houses, situate in Sadar Bazar, Delhi. It is common ground that the site of the shops and houses in dispute belongs to Mohammad Suleman and Abdul Manan, sons of Hafiz Abdul Rab, and Mt. Nazir-ul-Nisa, his widow; and the present owner of the superstructure (amla) is Hari Ram, respondent. The proprietors of the site contend that Hari Ram is a tenant-at-will under them; while he claims to be a permanent tenant, liable to pay a fixed rent. In order to appreciate properly the questions requiring decision in the appeals, it is necessary to set out certain preliminary facts, on which there is no controversy between the parties now.

The site underneath the shops and houses in dispute was a part of an area of 20 bighas and 14 biswas situate in mauza Jahan Numa, outside the walls of the old city of Delhi. In 1849, this area was purchased by Hafiz Karim Bakhsh son of Hafiz Khuda Bakhsh alias Hafiz Banne, and Mohammad Bakhsh, son of Hasnoo, in equal shares by a registered deed (Ex. P. 3). In 1851, Mohammad Bakhsh sold his half-share to Karim Bakhsh, who thus became the sole owner. In 1857, the Mutiny broke out and there was severe fighting between the British on one side and the mutineers and the supporters of the titular Mughal Emperor on the other. For several months the City of Delhi was in the hands of the mutineers, but eventually the British forces succeeded in expelling them. After the capture of the City, it was placed under the command of

a Military Governor appointed. In September 1857, the Military Governor passed a General Order "attaching" the immovable property of all Mohammadan residents of Delhi. In accordance with this order, the land of Hafiz Karim Bakhsh in Mauza Jahan Numa was "attached". In close proximity to this land, the British Military Camp had been established, and after the suppression of the Mutiny, Government decided to construct a regular bazar in that locality and for this purpose it granted small plots of land on a nominal rent to intending builders. The terms of the grant are contained in a proclamation which was issued by the Superintendent of the Sadar Bazar Delhi on 29th September 1858 (Ex. D.1). As the decision of these cases turns largely on the meaning and effect of this proclamation, it is necessary to reproduce it *in extenso*:

The Government has decided that Pakka or Kacha shops should be constructed in the abadi of Sadar Bazar Camp Delhi, outside the Lahori Gate, near Pahari Dhiraj and that all persons who want to construct shops there will be given land by the Government, 15 feet wide and 30 feet long, for each shop on payment of Rs. 5. Every person who wants to take land for two shops shall be given land at the said rate by the Government, and he shall have to pay Rs. 10 or twice the amount. Rent will be charged on the land at the rate of one anna per hundred square feet, that is, the proprietor of a shop shall have to give Rs. 0-4-6 per annum, as the area of every shop will be 450 square feet. *It is likely that the abadi shall continue for ever.* If perchance the Sadar is removed from there or a road is required to be constructed, the owner of the shop, which is included in the road, will not get the cost of the shop from the Government. But owners of the shops shall be competent to remove their materials. The amount paid to the Government in lieu of the land shall not be returned. Whoever agrees to construct shops on these conditions can do so.

If any shop-keeper is expelled from the Sadar Bazar on account of misconduct and he has some property in the Sadar then such orders regarding the value of the said property will be passed by the Superintendent, Sadar Bazar, as he deems proper. Any person, who wants to sell his shop to anybody else, will not be allowed to do so without giving information to the Government.

In accordance with the terms of this proclamation, a number of sites for the construction of shops were granted to various persons, among whom was one Mohan Lal. He was granted an area of 900 square yards out of the land of Hafiz Karim Bakhsh in mauza Jahan Numa which, as already stated, had been 'attached' during the Mutiny and was in possession of Government at the time. On this area, Mohan Lal constructed two shops, which by structural alterations he

subsequently converted into six shops and two houses. It is these shops and houses which are in dispute in the cases before us.

In the meantime, after peace had been restored and civil power firmly established, it was considered desirable to 'release' the property of those Mahomedans of Delhi who were not concerned in the Mutiny. Accordingly proclamations were published calling upon the original owners of 'attached' properties to establish their innocence, after which their properties would be restored. On 16th July 1858, the Deputy Commissioner Delhi issued a robkar (Ex. P-2) to Hafiz Karim Bakhsh, requiring him to appear in person within 15 days and prove that he 'was not a rebel,' and stating that if he did so, his land in mauza Jahan Numa would be released, otherwise it would be confiscated and the claim of no person would be entertained. On 5th August 1858, Karim Bakhsh submitted an application (Ex. P-3) stating that he had not taken any part in the rebellion and had been loyal to the British Government and praying that his property be released. This application was made over by the Deputy Commissioner to the Kotwal for enquiry and report.

On receipt of the Kotwal's report, the Deputy Commissioner at first ordered that the property be not released but should remain under attachment (Ex. P-5), but on appeal the Commissioner ordered further enquiry. In the course of this enquiry it was ascertained that the land of Karim Bakhsh (20 bighas and 14 biswas) consisted of two plots. One of these plots, comprising an area of 12 bighas and 16 biswas, had been included in the abadi of the Sadar Bazar and had been leased to various persons, including Mohan Lal, who had constructed shops in accordance with the terms of the proclamation (Ex. D-1) and were liable to pay malikana at one anna per 100 square feet. The other plot, 7 bighas and 18 biswas in extent, was found to have been attached to the Parao and the Mandi on which stood several buildings which had been constructed by Hafiz Karim Bakhsh before the 'attachment.' After a lengthy enquiry the Deputy Commissioner, with the concurrence of the Commissioner, passed orders on 27th June 1860 granting 'release of the site' in perpetuity. In the robkar (Ex. P-30) which was issued on that date a clear distinction was made with regard to the two plots. It was ordered that Hafiz Karim Bakhsh

be put in possession of the area attached to the Parao and the Mandi and the buildings standing thereon, of which he would receive the rent in full, the Government getting only the Chaukidara dues, but that he be given 'proprietary possession' of the land underneath the shops in the Sadar Bazar in respect of which he would only receive the malikana.

These orders were duly carried out by putting Karim Bakhsh in possession of the Parao and Mandi land and the buildings thereon, and directing the Cantonment Joint Magistrate that the malikana of the site underneath the shops in the Sadar Bazar which was payable to Government be thenceforward paid to him. Ten years later, by a deed executed and registered on 1st August 1870, Mohan Lal sold the superstructure of the two houses and five out of the six shops to Sheikh Hafiz Ullah for Rs. 1,500. No objection to this sale appears to have been taken by Karim Bakhsh or any other member of his family. The vendee, Hafiz Ullah, remained in undisturbed possession of the shops and houses purchased by him until 26th August 1885, when he mortgaged the superstructure to one Sukh Lal. About ten years later, Sukh Lal obtained a decree on foot of this mortgage against Hafiz Ullah. In execution of this decree the superstructure of the mortgaged shops and houses was sold to Haji Khuda Bakhsh and Haji Karam Elahi, to whom the sale certificate was issued by the executing Court on 3rd May 1889 (Ex. D.7).

In the meantime Mohan Lal had died, and his son Bano Mal (or Buta Mal) had inherited the superstructure of the sixth shop which Mohan Lal had retained to himself. On 27th September 1889 Bano Mal sold the superstructure of the sixth shop to Haji Khuda Bakhsh and Haji Karam Elahi by a registered deed (Ex. D-10). Thus Khuda Bakhsh and Karam Elahi became the owners of the superstructure of the entire property built by Mohan Lal under the proclamation Ex. D-1. In 1911, they mortgaged the superstructure of six shops and two houses to Hari Ram, defendant 1. Subsequently Hari Ram brought a suit on foot of this mortgage against the descendants of Haji Khuda Bakhsh and Haji Karam Elahi, both of whom had died in the meantime, and on 29th August 1923 this suit was decreed. In execution of the decree, Hari Ram got the superstructure of the shops

and the houses sold and, with the permission of the Court, purchased it himself for Rs. 18,800. Muhammad Suleman, grandson of Karim Bakhsh, objected to the sale alleging that Khuda Bakhsh and Karam Elahi were tenants-at-will under him and his brother and mother, to whom the site had fallen in a private partition between the descendants of Hafiz Karim Bakhsh, that the tenants had no right to mortgage the superstructure to Hari Ram and that it was not liable to sale in execution of the decree. The objection was disallowed by the executing Court, and the sale in favour of Hari Ram confirmed on 9th May 1926.

On 22nd June 1927, Mohammad Suleman instituted a suit for a declaration that he and his brother Abdul Manan (defendant 14) and mother Mt. Nazir-ul-Nisa (defendant 15) were the owners of the site underneath the shops and houses in question and that the amladar, Hari Ram (defendant 1) was a tenant-at-will under them, the amla or superstructure "not being of a permanent character". In this suit besides Hari Ram the descendants of Hajis Khuda Bakhsh and Karam Elahi were impleaded as defendants 2 to 13 and Abdul Manan and Mt. Nazir-ul-Nisa (who are the co-owners of the site with the plaintiff) were impleaded as defendants 14 and 15. The suit was contested by Hari Ram who raised numerous pleas, of which those material for the purpose of this appeal are that he, like his predecessors-in-title, was a permanent tenant, and that the plaintiff and the other co-owners of the site were estopped from denying the permanent nature of the tenancy. In the course of the trial of the declaratory suit after a good deal of evidence had been recorded, the plaintiff attempted to produce a document (marked Ex. P. 41) which is a rent deed purporting to have been executed on 27th December 1887 by Hafiz Ullah, predecessor-in-interest of defendant 1 in favour of Karim Bakhsh, grandfather of the plaintiff, in respect of the amla of the property in suit. The defendant objected to the production of this document at that stage, and alleged that it was a forgery. The Court disallowed its production in that suit.

Shortly afterwards, on 26th June 1929, Mohammad Suleman, Abdul Manan and their mother Mt. Nazir-ul-Nisa instituted another suit against Hari Ram for recovery of Rs. 1,171-8-0 as arrears of rent and

damages and for ejectment of the defendant from the site, or, in the alternative, for enhancement of rent to Rs. 50 per mensem. Along with the documents on which they relied in support of their claim in this suit, the plaintiffs produced the rent deed (Ex. P. 41), which had not been admitted by the Court in the declaratory suit. By consent of parties the evidence recorded in the first suit was considered as evidence in the ejectment and rent suit also, and the trial of the two suits proceeded together. By two separate judgments delivered on 30th April 1930 the learned Subordinate Judge dismissed the declaratory suit holding that Hari Ram defendant was not a tenant-at-will under the plaintiff and defendants 14 and 15, but that he was a permanent tenant. In the second suit he held that the deed Ex. P. 41 was not genuine and dismissed the claim for ejectment but passed a decree for Rs. 78-6-0 as arrears of rent at Rs. 2-6-0 per mensem. From the decree dismissing the declaratory suit Mohammad Suleman has preferred a first appeal in this Court (Civil Appeal No. 1283 of 1930). From the decree in the ejectment and rent suit the plaintiffs appealed to the District Judge, but by order of a Judge in Chambers that appeal was transferred to this Court (Civil Appeal No. 1973 of 1930). As the two appeals raised common points they have been heard together.

Long after the admission of the appeals, the appellants presented an application under O. 41, R. 27, Civil P. C., for production of additional documentary evidence. This application was ordered by a Judge in Chambers to be placed before the Bench hearing the appeal. The documents, which the appellants wish to produce, have been translated and printed in a supplementary paper-book. Messrs. Jagan Nath and Shamair Chand have addressed us at length in support of the application, but after giving due consideration to their arguments, we see no reason to admit additional evidence at this stage. As already stated, the declaratory suit remained pending in the trial Court for nearly three years. In the meantime, a suit for ejectment and recovery of arrears of rent had been instituted, and documents, which had not been, or could not be produced in the first suit, were relied upon and placed on the record of the latter suit. It has not been shown as to why these documents were not produced in

either of the two suits in the Courts below. They are copies of certain proceedings in a record of 1859, from which copies of other documents had been produced by the plaintiffs at the trial. With the exercise of ordinary diligence, the plaintiffs could have produced these documents also, if they really intended to rely on them. In the affidavit, no adequate reason is given for their non-production at the proper time. It may also be stated, that we allowed counsel to read the documents to us, but did not find that they had any real bearing on the questions involved in the appeals. In the Court below, the trial of the suits had proceeded on the assumption that Mohan Lal had constructed the shops under the proclamation Ex. D.1, issued on 29th September 1858. The additional evidence, now sought to be produced, consists mainly of a robkar of instructions issued by the Superintendent, Sadar Bazar, to the Kotwal on 10th February 1859, but as is clear from the last three lines of the robkar these instructions had reference to other shops, the sites of which it was then in contemplation to allot at a later date. Counsel frankly admitted before us that by relying on this robkar, the appellants intended to show that the terms on which Mohan Lal had built the shops in dispute were contained in this robkar, and not in the proclamation Ex. D.1. It is clear, that the admission of this evidence at this stage would mean introducing a new and inconsistent claim in appeal, which the defendants have had no opportunity of meeting. Obviously this prayer cannot be granted, and the application under O. 41, R. 27 must be dismissed.

On the merits the question argued before us, may conveniently be sub-divided under the following heads: (1) Was the lease of the site in dispute which was granted by the Government to Mohan Lal under the proclamation (Ex. D.1) a permanent building lease? (2) If so, was Government competent to grant such a lease of property, which originally belonged to Hafiz Karim Bakhsh and had been "attached" during the Mutiny? (3) If not, did Karim Bakhsh acquiesce in the arrangement made by Government, and on its "release" did he take back the site subject to the permanent lease of Mohan Lal? (4) If Mohan Lal was a permanent tenant, was the tenancy subsequently converted into a tenancy-at-will by consent of Karim

Bakhsh and Mohan Lal or his successors-in-interest?

The first question does not appear to me to admit of any doubt. Though the proclamation does not say in so many words that the tenancy was of a permanent character, its meaning and purport are quite clear. The locality, where the proposed bazar was to be constructed was not populated at the time. It was on the outskirts of the town, which had lately been the scene of severe fighting and much bloodshed, and had formally passed from the Mughal "Emperor" to the British Government. The land itself had been "attached" by the British Military Governor during the hostilities, and was of little value at the time. A Military Camp had been established in its neighbourhood during the siege and it was under contemplation to keep it there, if not permanently, at least for a considerable time. It was, therefore, considered necessary to construct a regular bazar, and for this purpose the adjoining lands, including a part of the "attached" land of Karim Bakhsh which were in the possession of Government at the time, were considered suitable. In order to induce persons to build shops there, grants of small plots were made on a nominal rent, the lessees being given an assurance that in all likelihood the bazar "shall remain there for ever". This assurance bordered almost on a certainty, the words used in the vernacular being *yaqin hai ki abadi hamesha rahegi*. The only conditions laid down for the dispossession of the lessees were: (1) If a portion of the site underneath a shop was required by Government for construction of roads or; (2) if the lessee was expelled from the Sadar Bazar for misconduct. In this latter case, however, compensation was to be paid to the lessee as assessed by the Superintendent.

It was also provided that if perchance the Sadar Bazar was removed from there, the lessee would be competent to remove the materials. Further, the lessee was given the right to sell the shop subject only to his giving "information" to Government. All these terms clearly indicate that the grantees were permanent tenants, and not merely tenants-at-will. The nature of the tenancies created by the proclamation (Ex. D.1), as also the question raised under the second head, viz., the meaning and legal effect of the

"attachment" of private property during the Mutiny, have been before the Courts on numerous occasions during the last 60 years, and there are several decisions of the Chief Court and Subordinate Courts bearing on the point, to some of which Karim Bakhsh himself was a party. No copy of the order, under which the property of Karim Bakhsh, including the site in dispute, was "attached" has been placed on the records of these cases. But it is clear from the proceedings, for the "release" of the land before the Deputy Commissioner and the Commissioner in 1858-60, including Karim Bakhsh's own application filed in the course of those proceedings, copies of which are on the record, that this property was "attached" in pursuance of the "General Order" passed soon after the capture of the city in September 1857, under which the property of all Mahomedan residents of Delhi was seized. The circumstance in which the order of "attachment" was passed, and how this peculiar name was given to it, are set out in detail in 6 P R 1867¹ and 12 P R 1874² to which reference was made by both counsel in the course of their arguments before us. In the first of these cases, Boulnois, J. at pp. 13 and 14 and Roberts, J. at pp. 18 to 20 of the printed report, and in the latter case Melville, J. at pp. 24 and 25 and Boulnois, J. at pp. 46 and 47 and again at pp. 54 to 58, referred at length to several despatches of the officers posted at Delhi during and immediately following the Mutiny, which were published in the Government Gazette and other contemporary historical records. From these it appears that the British authorities considered at the time that, the disaffection of Mahomedans of Delhi has been so general and the exception so rare as a rule, that they must all be treated as rebels.

In this view, the Military Governor seized the property of all Mahomedans and expelled them from the city. Subsequently, when the Mutiny had been suppressed and the administration made over to the civil authorities in January 1858, one of the first acts of the civil power was to take possession of the immoveable property in Delhi belonging to Mahomedans, of whom the mass remained excluded from the town. This act of possession was called by the Government as "attachment".

The decision given in *Wagentrieber's case*¹ was that a "state of war" having prevailed in Delhi during the Mutiny, "the appropriate character of the seizure of private property under the General Order" above referred to was "that of hostile seizure," that the attachment was a political measure arising out of, and in connexion with, the previous Act of State, unqualified by an expression of its intention,

and that the Municipal Courts had no jurisdiction to inquire into the legality of the original seizure or the attachment. It was accordingly held that "the attachment was nothing less than appropriation of such property by Government", who was the *de jure* as well as the *de facto* owner at the time when, after the restoration of peace, as an act of grace, it decided to "release" these properties to those who proved their innocence. This view was re-affirmed by the majority of the Full Bench in 12 P R 1874² where the subject is more fully discussed. In that case Melville and Boulnois, JJ. held that the "original act of seizure of September 1857 was an Act of State," that the "title of Government based on the confiscation of 1857 was complete," and that the "subsequent restoration of the property seized to the original owners conferred a new title on them". The third Judge, Lindsay, J. appears to have taken a contrary view on this point. He did not think that by the order of 23rd September 1857 all property belonging to Mahomedans was actually confiscated but that it was appropriated for a time for various reasons.

He, however, did not discuss the matter at any length but addressed himself to a consideration of the other points involved in the case. The view of the majority of the Full Bench was in accord with that taken in previous decisions of the Court, and has been followed consistently in several later cases. The first authoritative decision on the interpretation of the proclamation of 29th September 1858 (Ex. D-1) was by a Division Bench of the Chief Court in C. A. 1080 of 1868,³ decided by Boulnois and Plowden, JJ. on 5th March 1868. There, following *Wagentrieber's case*,¹ it was held that the so-called "releases" of properties confiscated under the "General Order" were in reality nothing but re-grants, under which the former proprietors derived their title from

1. Secy. of State v. Wagentrieber, (1867) 6 P R 1867.

2. Hakim Saad-ud-Din v. Secy. of State, (1874) 12 P R 1874 (F B).

3. Karim Bakhsh v. Nainee Ram, C. A. 1080 of 1868.

Government, "taking only such rights as were held by the Government, their assignor, at the time", and therefore, they were "bound by all intermediate acts of the Government in respect of the property assigned". It was further ruled that on a true reading of the proclamation the building tenancies which had been created under it were of a permanent character and that the assignees were not liable to ejectment upon notice. This case is of considerable importance as the plaintiff in that case was Karim Bakhsh, ancestor of the plaintiffs-appellants, and the property then in dispute was a part of his land in Mauza Jahan Numa which had been confiscated by the "General Order" above referred to.

The whole question was re-considered by Plowden and Smyth, JJ. in 52 P R 1881⁴ in which the same view was taken. In 1884 Karim Bakhsh brought another suit against one Balak Ram for recovery of arrears of rent and ejectment from another plot of the same land, which also had been leased under the proclamation (Ex. D.1) to the predecessors-in-interest of the then defendant. In that case the question of the nature of tenancies created under the proclamation and the binding effect of the action of Government upon Karim Bakhsh were again raised, and elaborately discussed in three Courts. The trial Judge, Mr. Clifford, in his judgment dated 26th November 1884 (Ex. D.11) held that the seizure was an Act of State, that Government had full power to create a permanent tenancy that the subsequent release of the site underneath the buildings to Karim Bakhsh was "on the understanding that he was to be paid malikana only", that this arrangement was accepted by Karim Bakhsh and that he was not entitled to eject the defendant. Karim Bakhsh went on appeal and the Divisional Judge, Mr. Stogdon, also came to the conclusion that the release of 27th June 1860 was merely "an act of favour on the part of Government to the plaintiff, that the re-grant was" on the condition that he would not disturb the possession of the tenants to whom leases had been granted", that "Karim Bakhsh accepted the restoration upon the conditions imposed and that he could not now turn round and assert that he was coerced into accepting them". It was accordingly held that the original lessees had a right of permanent occupa-

tion against Government and consequently against plaintiff, to whom the land was restored subject to the rights in it conferred by Government on third persons (Ex. D 12). Against this decision Karim Bakhsh lodged a further appeal in the Chief Court and its decision is printed in 112 P R 1886⁵ where the whole position was again reviewed, and following the decision in C. A. 1080 of 1868³ and 52 P R 1881⁴, it was held that the tenancies created under the proclamation were of permanent nature, and that on the subsequent release of the property, Karim Bakhsh took it subject to the rights which had been created by the Government in the interval.

About the same time Karim Bakhsh had brought another suit against another tenant Shankar Lal and this suit also was dismissed by the Chief Court on 7th June 1886 (Ex. D 13). In 1906, one Inam Ullah, who was the transferee of landlords' rights from the heirs of Karim Bakhsh in a neighbouring plot, brought an action for ejectment against the tenants, Balak Ram, etc. In a lengthy judgment, dated 19th August 1907 (Ex. D 14/a), Mr. Ellis, Divisional Judge, dismissed the suit holding that the tenancies created under the proclamation were of a permanent nature and that the tenants were not liable to ejectment on notice. As against all this, the appellants rely strongly on a decision of the Chief Court in C. A. 1379 of 1866⁶ finally decided by Boulnois, J. on 24th June 1867. In that case the learned Judge, while holding that the original seizure of the property by Government in 1857 amounted to confiscation, and that there was a re-grant to Karim Bakhsh, held that the proclamation (Ex. D 1) conferred only a tenancy-at-will on the tenants. It appears, however, as was explained by Plowden, J. in 52 P R 1881⁴ and 112 P R 1886,⁵ that this decision was based upon a misreading of the terms of the proclamation due to an erroneous English "abstract", which had been prepared for the hearing of the case in the Chief Court by the then registrar of the Court, Mr. J. Smyth, who had inadvertently overlooked certain important clauses in the original. Mr. Smyth

5. Karim Bakhsh v. Balak Ram, (1886) 112 P R 1886.

6. Karim Bakhsh v. Shadee Ram, C. A. 1379 of 1866.

4. Rai Balkishen v. Jasram, (1881) 52 P R 1881.

subsequently became a Judge of the Chief Court and was a member of the Bench which decided 52 P R 1881⁴ in which it was pointed out that the decision in *Karim Bakhsh v. Shadee Ram*⁶ "was founded upon a misapprehension of the actual terms of the proclamation as they are quoted in the judgment of Boulnois, J." and was incorrect. It is also significant that Boulnois, J. was a member of the Bench, which decided C. A. 1080 of 1868³ a year later. In that case, as already stated, the tenancy was held to be permanent, the correct translation of the proclamation being then before the Court. It is clear therefore that the decision in *Karim Bakhsh v. Shadee Ram*⁶ is of no assistance in interpreting the proclamation, having been based on an erroneous reading of its terms.

The appellant's counsel also referred us to some other decisions given about that time by Subordinate Courts at Delhi, which are printed at pp. 135, 138, 139, 141, 142, 145, 146 and 148 of Vol. 2 of the paper-book. Most of these decisions were based on the Chief Court judgment in *Karim Bakhsh v. Shadee Ram*⁶ and are therefore, of no value. The judgments in the other cases are very brief and the facts are not clear. For the reasons given above, it must be held that the site in dispute was granted to Mohan Lal in 1858 on a permanent building lease, that Government was competent to grant such a lease, and that the subsequent "release" of the site to Karim Bakhsh by order of 28th June 1860, was subject to Mohan Lal's tenancy. In any case, even if it be supposed that Government did not have a legal title in the land at the time of the creation of the tenancy, it is abundantly clear that at its restoration Karim Bakhsh had acquiesced in the act of Government in leasing this site permanently, and consequently he asked for, and was put in "proprietary possession thereof, entitled to receive only the malikana": see *inter alia* Ex. P 9 (p. 70, Vol. II of the paper-book, Ex. P 14 (p. 78, Vol. II); Ex. P 30 (p. 82, Vol. II). That he willingly accepted this position, is further clear from his conduct in not objecting to numerous alienations of the superstructure by Mohan Lal and his successors-in-interest. It is also in evidence that the shops have practically been rebuilt at considerable expense at least twice. Hafiz Ullah had bought

them for Rs. 2,015, and subsequently spent Rs. 4,000 on remodelling and improving them: (see Vol. 2, p. 153) and his transferees Haji Khuda Bakhsh and Karam Elahi reconstructed the building, adding a second story at a cost of about Rs. 15,000 (Vol. 1, p. 71). On neither occasion was permission sought for from Karim Bakhsh, who appears to have stood by and raised no objection.

Mr. Jagan Nath referred us to the fact, which is proved on the record that the rent as originally fixed in the proclamation was one anna per square foot or Rs. 1.9.0 per annum for the entire plot which was subsequently raised to Rupees 4.8.0 per annum and there was another enhancement on some date prior to 1870, when the rent admittedly paid was Rupees 2.6.0 per mensem. The exact circumstances in which these two enhancements were made are not known, but it seems likely that this was done by mutual consent of the landlord and the tenant. In 1885 Karim Bakhsh appears to have served a notice on Hafiz Ullah for a further increase of the rent, demanding Rs. 10 per mensem, and on his failure to comply, brought a suit for recovery of arrears at that rate, but the Judge, Small Cause Court, disallowed the claim and decreed rent at the admitted rate holding that the landlord was not entitled to enhanced rent. He accordingly decreed the amount due at the admitted rate. In this decision reliance was placed on the chief Court judgment in 52 P R 1881⁴ where it had been held that the tenancies created under the proclamation were not tenancies-at-will. The fact that there were two enhancements earlier, therefore, does not in any way militate against the tenancy being a permanent one. As observed in 69 I C 992⁷:

Where a tenancy as originally created is heritable and transferable, not held for a limited term and subject to the payment of a fixed rent, the circumstance that by agreement of parties the rent originally fixed is subsequently increased is not sufficient to lead to an inference of a novation of contract resulting in a tenancy with a fresh start in all respects, so as to affect its transferable or heritable character.

The last question for consideration is whether the tenancy, though permanent at its inception, was subsequently converted into a tenancy-at-will by agree-

7. Priyanath Ghose v. Surendra Nath Das, A I R 1922 Cal 511=69 I C 992=26 C W N 657=35 C L J 440.

ment of parties. In this connection, the plaintiffs allege that Hafiz Ullah had on two occasions executed rent deeds in favour of Karim Bakhsh admitting that the ground landlords could eject them after notice. These rent deeds are stated to have been executed on 21st August 1870 and 27th December 1887 respectively. It will be convenient to deal first with the latter document which is marked Ex. P-41, and to which reference has been made in an earlier part of the judgment. In it, it is recited that the alleged executant Hafiz Ullah would remove the superstructure and vacate the land underneath within one month from the date of the notice by the owner of the site, Karim Bakhsh. The learned Subordinate Judge has held that this deed is "to all appearances a forged document and at least its genuineness is doubtful". In coming to this decision he has relied partly on certain remarks in a judgment of the Divisional Judge in a suit brought by Karim Bakhsh against a third party on the basis of another rent deed, which was held to be forgery. These remarks are clearly not relevant in the present case and the learned Subordinate Judge should not have taken them into consideration. The remaining evidence on the record has been considered by us, and after hearing Mr. Jagan Nath I have no doubt that it falls short of proof of the execution of Ex. P-41. The document purports to be signed by Hafiz Ullah, but no attempt has been made to prove these signatures to be his. The scribe and all the attesting witnesses are stated to have died. What purport to be their signatures are in *landa* characters. The plaintiffs have produced witnesses to prove these signatures, but their evidence is of a very unsatisfactory and unconvincing character. They gave evidence more than 40 years after the date of the execution of the deed: they have not brought any documents containing the writings of the deceased persons with which a comparison could have been made. P. W. 1 Mohammad Hussain and P. W. 2, Mohammad Amin have made self-contradictory and discrepant statements, while P. Ws. 3 and 4 are the tenants of the father-in-law of one of the plaintiffs and are not disinterested persons. The plaintiff Mohammad Suleman has not satisfactorily explained as to why he did not produce this important document with the plaint in the declaratory suit, or till 11 months after

the institution of the suit. The explanation given by the appellants as to how they came in possession of it is far from convincing. The document is alleged to have been handed over by Karim Bakhsh to Abdul Khaliq in 1903-04 and to have remained with him till a few days after the institution of the declaratory suit, when he says he handed it over to the plaintiff. Abdul Khaliq is the uncle and father-in-law of Abdul Manan, one of the plaintiffs in the ejectment suit, and it is the plaintiffs' case that the fact of the existence of Ex. P-41 and of its being with Abdul Khaliq was known to Mohammad Suleman at the time when he instituted the declaratory suit. It has been stated already, that in 1885 Hafiz Ullah had successfully resisted Karim Bakhsh's claim for enhancement of rent and had pleaded that he was a permanent tenant. It is most unlikely that two years later he should have executed this deed voluntarily and admitted that he was a tenant-at-will. Hafiz Ullah's son, Mohammad Sadiq (D. W. 4) has been examined by the defendant as a witness in the case, and he has definitely stated that the alleged signatures on Ex. P-41 are not his father's. The document no doubt purports to be more than 30 years old and the plaintiffs' counsel says that its due execution must be presumed under S. 90, Evidence Act, but I do not think that in the circumstances such a presumption could be raised. I accordingly hold that Ex. P-41 has not been proved to be a genuine document.

The other document relied upon is stated to be a rent-deed executed by Hafiz Ullah in favour of Karim Bakhsh on 21st August 1870. A document purporting to bear that date and to have been executed by Hafiz Ullah was got produced by the plaintiffs in the declaratory suit by P. W. 1 Abdul Wahab, one of the sons of Karim Bakhsh, on 1st December 1928 (see p. 14 of Volume 1 of the paper-book) and is marked Exhibit P. W. 1/1. Subsequently, however, the plaintiffs stated that the document actually produced by Abdul Wahab was not genuine but had been forged by him (he, though their uncle, being hostile to them) in collusion with Hari Ram, respondent, and that they did not rely upon this document in proof of the terms of the tenancy. Hari Ram denied that he had anything to do with its preparation or production by Abdul Wahab, and it may be stated that there

is not a tittle of evidence on the record to support the allegation that he was a party to the alleged forgery. He, too, stated that the document was not genuine. As both parties denounce Exhibit P. W. 1/1 as a forgery and none of them relies on it, it is not necessary to discuss it any further.

The plaintiffs, however, allege that the original rent deed of 21st August 1870 is being suppressed by Abdul Wahab, and they seek to prove its contents by secondary evidence. Their case on the point is that the original rent deed, executed by Hafiz Ullah in favour of Karim Bakhsh on 21st August 1870, had been produced in a suit for partition of family properties between Karim Bakhsh and the other descendants of Hafiz Banna which was instituted in the Court of Mr. Clifford, District Judge, Delhi, in 1886 and was ultimately decided by the Chief Court on 29th December 1894 by its judgment printed as 52 P R 1895,⁸ that after the disposal of the appeal in that case the deed had been taken back by Karim Bakhsh, and on his death it came into the possession of one of his sons, Abdul Wahab, who has withheld the original and has produced a substituted document Exhibit P. W. 1/1, on which the signatures of Hafiz Ullah and the alleged witnesses, as also the endorsement of the District Judge, Mr. Clifford, have been forged. In the paper-book printed for the hearing of that appeal, 52 P R 1895,⁸ in the Chief Court, an 'abstract translation' of the rent deed had been prepared. The plaintiffs produced the paper-book in that case and relied upon the "abstract translation" as proof of its contents. This "abstract translation" has been reprinted at p. 193 of Vol. II of the paper-book of the appeals before us. Counsel for the respondent objects to the admissibility of this 'abstract translation' and urges that it does not conform to the definition of 'secondary evidence' as given in S. 63, Evidence Act. This objection, in my opinion, has force and must prevail. S. 63 reads as follows:

Secondary evidence means and includes: (1) certified copies given under the provisions hereinafter contained; (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies; (3) copies made from or compared with the original; (4) counterparts of documents as against the parties who did not

execute them; (5) oral accounts of the contents of a document given by some person who has himself seen it.

This section is exhaustive of the meaning of 'secondary evidence', and there is little doubt that the 'abstract translation' does not come within its terms. It does not purport to be a 'copy' or even a full and complete translation of the document then produced, but is merely a summary of its terms prepared for reference at the hearing of the appeal in the partition suit between the members of the family of the landlord, in which the conditions on which the tenancy was held by Hafiz Ullah were of no importance. It is, therefore, not a copy 'made from or compared with the original' and does not fall within Cl. (3) of the section. In this connection reference may be made to A I R 1922 Mad 334,⁹ where it was held that:

Where the terms of a document were sought to be proved by a judgment containing a translation thereof in a suit which was not between the same parties or their representatives in interest, neither the translation of the document nor the statement in the judgment was secondary evidence of the contents of the document.

Apart from this technical objection there is no proof on the record of the execution of a rent deed by Hafiz Ullah in favour of Karim Bakhsh in 1870 in respect of the property in dispute. Further, taking the abstract as it stands, it does not show that the tenancy was a permanent one. The plaintiffs rely on the last sentence which states that in default of payment of rent the tenant would remove his materials from the site. It is conceded by counsel for the appellants that in a permanent tenancy, a clause to the effect that failure to pay the agreed rent might entail forfeiture of the tenancy does not necessarily indicate that it is a tenancy-at-will. Admittedly, the "abstract" does not contain any term that the landlord was entitled at his option to eject the amladar after notice. This document therefore does not in any way support the plaintiffs' case. The plaintiffs also referred to counterfoils of a number of receipts which are printed as pp. 162 to 186 of Vol. II of the paper-book. These are of various dates subsequent to 1912. They too were attempted to be produced in the declaratory suit at a late stage but were not admitted on the objection of the defen-

⁸ Hafiz Karim Bakhsh v. Mt. Begam Jan, (1895) 52 P R 1895.

⁹ Jagannath Naidu v. Secy. of State, A I R 1922 Mad 334=70 I C 107=43 M L J 37.

dant. Later on, they were produced in the subsequently instituted suit for ejectment and rent. These counterfoils were admittedly in possession of the plaintiffs and no reason for their non-production in the declaratory suit was given. Further, these counterfoils would be admissible in evidence only if proof of the loss of the original receipts had been given. This, however, has not been done. The original receipts, if any were actually given, must have been with defendants 3 to 13 (descendants of Karam Elahi and Khuda Bakhsh), but they were not called upon to produce them. Moreover, the plaintiffs admittedly kept regular accounts, but the relative entries were not produced. Apart from these objections, however, the counterfoils, even if genuine, do not throw any real light on the nature of the tenancy.

After a review of the whole of the evidence, I have no doubt that the tenancy was of a permanent nature, and that the plaintiffs have failed to prove that it was subsequently converted into a tenancy-at-will. This disposes of all the main points argued before us. There is, however, one subsidiary matter to which reference may be made before concluding. The learned counsel for the appellants urged that his clients had been prejudiced by the order of the lower Court in not allowing them to produce evidence in rebuttal of the issues of which the onus had been placed on the defendant. This objection has no force so far as the declaratory suit is concerned; for in that case a clear statement was made by the plaintiffs' counsel closing his case. In the ejectment and rent suit, however, it appears that the plaintiffs did make a request to produce evidence on issue 6, but after a great deal of verbal fencing between counsel, the defendant's counsel made a statement that issue 6 did not arise on the pleadings and might be struck off, and the Court passed orders accordingly. Technically, perhaps counsel for the defendant was right in the position which he took up, but having regard to the manner in which the suit had proceeded, it was not proper to have this issue struck off. There has, however, been no real prejudice to the plaintiffs in this matter. This issue had in another form been tried in the declaratory suit, which was proceeding side by side and in which all the evidence on which the plaintiffs relied had been led. In order to see that the plaintiffs had any real evidence

to produce in rebuttal in their case, we asked counsel to name the witnesses whom they would have produced, if the issue had been struck off. Counsel admitted that most of these persons held building tenancies in the Sadar Bazar under written regular rent deeds, showing that they were tenants-at-will. Obviously their evidence would not be relevant as to the nature of the tenancy in the present suit. The other witnesses, which the plaintiffs wanted to summon were to produce some documents, which, however, had not been included in the list of documents filed by the plaintiffs at the proper stage showing the documents on which they intended to rely. These documents, therefore, could not have been produced in rebuttal. On this statement of counsel we declined to allow the plaintiffs to produce further evidence. The appeals fail and are dismissed with costs.

Dalip Singh, J.—I agree.

V.B.B./D.S.

Appeals dismissed.

A. I. R. 1937 Lahore 380

COLDSTREAM, J.

Bashesar Nath Goela — Defendant —
Appellant.

v.

Bidhi Chand, Plaintiff and others —
Defendants — Respondents.

First Appeal No. 92 of 1936, Decided on 3rd July 1936, from order of Dist. Judge, Delhi, D/- 8th January 1936.

(a) Civil P. C. (1908), O. 7, R. 11; O. 41, R. 23 and O. 43, R. 1 (u)—Appeal—Order of appellate Court setting aside order of trial Court rejecting plaint under O. 7, R. 11 and directing trial Court to proceed with the trial of suit — Such order is not an order under O. 41, R. 23 and is not appealable under O. 43, R. 1 (u).

An appeal does not lie against the order of appellate Court setting aside an order of Court of first instance rejecting a plaint under O. 7, R. 11, Civil P. C., and directing the trial Court to proceed with the trial of the suit. Such order is not an order under O. 41, R. 23 and is not appealable under O. 43, R. 1 (u): *6 C L J 214; A I R 1915 Lah 8* and *A I R 1929 Lah 83, Foll.* [P 381 C 2]

Where in a suit by the sons of a deceased insolvent against the Official Receiver for partition of their share in the property, no notice under S. 80, Civil P. O., was given to the Official Receiver, and the trial Court rejected the plaint under O. 7, R. 11 and the appellate Court set aside the order and directed the trial Court to proceed with the trial of the suit:

Held: the order of the appellate Court was not appealable. [P 381 C 2]

(b) Receiver — Son of deceased insolvent suing Official Receiver for partition of his share—Notice under S. 80, Civil P. C. held necessary (*Obiter*).

Obiter.— Where the son of a deceased insolvent brought a suit against the Official Receiver, for partition of his share in the joint family property, but no notice was given to the Official Receiver of this as required by S. 80, Civil P. C. :

Held: S. 80, Civil P. C., was applicable to any form of suit against the Official Receiver and more so when it was stated in the plaint that it was the proposed sale of the joint family property by the Receiver that made him (son) file the suit. Notice was necessary even if there was only a threat of action to be taken by the public servant concerned: *A I R 1927 P C 176* and *A I R 1931 Lah 703, Rel. on.* [P 382 C 1]

Hem Raj — for Appellant.

Bishen Narain — for Respondent
(Plaintiff).

Judgment.—Bhondu Mal, the father of Bidhi Chand the present insolvent, having been declared insolvent, the Official Receiver, Delhi, in whom Bhondu Mal's estate had vested, proposed to sell Bhondu Mal's share in his undivided family property. Bidhi Chand thereupon instituted a suit in the Court of the Subordinate Judge, Fourth Class, Delhi, for possession by partition of one-sixth of the family property joining the Official Receiver as a defendant. Of this suit Bidhi Chand had given the Official Receiver notice under Section 80, Civil P. C. The suit was dismissed on the ground that Bidhi Chand was not entitled to seek for partition during his father's lifetime. Bhondu Mal died and Bidhi Chand instituted another suit for one-fifth of the property, again joining the Official Receiver but without giving him notice under S. 80, Civil P. C.

The Subordinate Judge rejected the plaint under the provisions of O. 7, R. 11 (d), Civil P. C., holding that the suit was barred as S. 80 had not been complied with. Bidhi Chand appealed to the District Judge who reversed this decision holding that no notice was necessary as the suit had not been instituted against the Official Receiver in respect of any act purporting to have been done by him in his official capacity. He remanded the case under O. 41, R. 23, Civil P. C., for decision on its merits. I may mention that in the trial Court the plea that notice was not necessary had not been taken, the plaintiff's contention being that the notice of the previous suit was sufficient. The Official Receiver has appealed to this

Court and it is argued on his behalf that the District Judge erred in holding that notice was not necessary and that in any case he ought not to have accepted the appeal on a plea not set up at the trial. For the plaintiff-respondent it is contended that no appeal lies as the order of the District Judge is not a decree, for it merely admits the plaint, nor is it an order under O. 41, R. 23, Civil P. C., nor any other order against which an appeal is allowed. It is further contended that the learned District Judge was right in holding that the suit was not one in which notice was required by S. 80.

That an order of an appellate Court setting aside an order of the Court of first instance rejecting a plaint, and directing the Court to proceed with the trial of a suit on its merits is not an order under O. 41, R. 23 and is not appealable under O. 43, R. 1 (u) is now well settled: see 6 C L J 214,¹ which appears to have been consistently followed in this Province, *e. g.*, in 26 I C 519² and *A I R 1929 Lah 83*.³ The trial Court's order purported to be one under O. 7, R. 11 and that is the provision of the Code applicable, as laid down in 25 All 187.⁴ Appellant's counsel has not referred me to any authority in support of his contention that when a plaint has been rejected for want of compliance with S. 80 the order of rejection is to be regarded not as one passed under O. 7, R. 11, but as a judgment disposing of a suit on a preliminary point, the reversal of which by an appellate Court must be regarded as a proceeding under O. 41, R. 23 against which an appeal lies under O. 43, R. 1 (u). My conclusion is that the order of the District Judge is not appealable and that this appeal must therefore be dismissed. The question whether the District Judge was correct in his view that the suit was not one of which notice to the Official Receiver was required is not free from difficulty. It is true that the Official Receiver had not notified his intention to sell the plaintiff's property but the plaint itself makes it clear that the proposed

1. *Braja Lal Mitra v. Upendra Krishna*, (1907) 6 C L J 214.

2. *Tirath Singh v. Ramchand*, *A I R 1915 Lah 8*=26 I C 519=133 P L R 1915.

3. *Cotton Trading Syndicate Commission Agency v. Malawa Mal Shiv Ram Das*, *A I R 1929 Lah 83*=108 I C 597.

4. *Bachchu Singh v. Secy. of State*, (1903) 25 All 187.

sale was the reason why the suit was instituted. It is now settled that S. 80 is applicable to any form of suit, (51 Bom 725⁵) and notice is necessary even if there is only a threat of action to be taken by the public servant concerned (12 Lah 260⁶) and the property which the Official Receiver proposed to sell was apparently joint family property. In view of the dismissal of the appeal on the first ground taken, this question however does not require decision and I express no opinion upon it.

A.L./R.K.

Appeal dismissed.

5. Bhagchand Dagdusa v. Secy. of State, A I R 1927 P C 176=104 I C 257=54 I A 338=51 Bom 725 (P C).

6. Dulichand v. Kalyan Singh, A I R 1931 Lah 703=132 I C 4=31 P L R 865=12 Lah 260.

A. I. R. 1937 Lahore 382

TEK CHAND AND DALIP SINGH, JJ.

Firm Chela Ram-Sant Ram —

Appellant.

v.

Official Receiver — Respondent.

Second Appeal No. 9 of 1936, Decided on 26th June 1936, from order of Dist. Judge, Rawalpindi, D/- 21st December 1935.

Contract Act (1872), S. 25 (3)—Promise to pay time-barred debt must be in writing—Only such promise constitutes fresh cause of action—Mention of debts in schedule of creditors is mere acknowledgment and not promise to pay.

Section 25 (3), Contract Act, clearly lays down that the promise to pay must be in writing and that some words which do not by themselves amount to a promise but in which the law implies a promise, shall not be sufficient to constitute a fresh cause of action. The mere mention of a debt in the schedule of creditors cannot amount to any thing more than a mere acknowledgment. It cannot by any stretch of language be held to contain in itself a promise to pay: *Case law referred; 33 Cal 1047, Disting.* [P 383 C 2]

S. N. Bali for Dev Raj Sawhney —

for Appellant.

Nawal Kishore — for Respondent.

Dalip Singh, J. — On 3rd November 1924, the firm Chela Ram-Sant Ram got a decree against Nanak Chand. On 21st March 1933 Nanak Chand applied to be declared an insolvent. In the schedule of creditors attached to the plaint he mentioned the judgment debt of Chela Ram-Sant Ram. It is conceded that at this time the said judgment debt could no longer be executed, as no proceedings had been taken within three years of the last

step-in-aid of execution. Nanak Chand was adjudged an insolvent on 28th December 1934 and the Official Receiver rejected the claim of Chela Ram-Sant Ram to figure as creditors on 30th May 1935 holding that the debt claimed by them was barred by limitation. The order was confirmed by the Insolvency Judge on 24th October 1935, and the District Judge dismissed the appeal on 21st December 1935. The appellant has come in appeal to this Court and his case was referred to a Division Bench by an order of the learned Single Bench dated the 24th instant. The question that really arises for decision in this appeal is: "Does the mention of the debt in the schedule of creditors filed on 21st March 1933 constitute a fresh cause of action under S. 25 (3), Contract Act?"

The learned counsel for the appellant among other contentions argues something as follows: He contends that the mention of the debt in the list is clearly an acknowledgment in the handwriting of the debtor and is signed by him, and that the Privy Council ruling, 33 Cal 1047,¹ supports the view, that an unconditional acknowledgment implies a promise to pay. He contends that there is nothing in S. 25 (3), Contract Act, which shows that the promise to pay must be in express words and hence he contends that the said acknowledgment constitutes a fresh cause of action. He has cited a number of rulings but so far as I have been able to see they do not support the proposition at all. The learned counsel for the respondent has cited 52 All 480,² 53 All 963,³ 57 Cal 394,⁴ 52 Bom 521,⁵ 8 Pat 706,⁶ 12 Lah 239,⁷ A I R 1933 Lah 209⁸

1. Mani Ram v. Seth Rupchand, (1906) 33 Cal 1047=33 I A 165=2 N L R 130 (P C).

2. Raj Narain Rao v. Ram Sarup, A I R 1930 All 467 = 123 I C 820 = 52 All 480 = 1930 A L J 552.

3. Abdul Rafiq v. Bhajan, A I R 1932 All 199=137 I C 243=53 All 963=1932 A L J 77.

4. Sasi Kanta Acharjee v. Sonaula Munshi, A I R 1929 Cal 444=121 I C 412=33 O W N 965=57 Cal 394.

5. Maganlal Harjibhai v. Amichand Gulabji, A I R 1928 Bom 319=112 I C 24=52 Bom 521=30 Bom L R 733.

6. Deoraj Tewari v. Indrasan Tewari, A I R 1929 Pat 258=120 I C 470=8 Pat 706=10 P L T 169.

7. Davindar Singh v. Lachhmi Devi, A I R 1930 Lah 985=129 I C 281=12 Lah 239=32 P L R 976.

8. Mukhi Lal Chand v. Gul Mahomed, A I R 1933 Lah 209=141 I C 617=34 P L R 430.

and A I R 1936 Lah 164⁹ which support his contention that there should be an express promise to pay under the terms of S. 25 (3), Contract Act.

I do not think it is necessary to enter into any detailed analysis of these rulings. I L R 12 Lah 239⁷ is a Division Bench ruling and the view stated by the learned counsel is supported by the remarks there, but the remarks themselves are *obiter dicta*. A I R 1936 Lah 164⁹ is a Single Bench ruling which supports the learned counsel, and so does A I R 1933 Lah 209.⁸ To my mind the matter is really quite simple. Some confusion has arisen by reason of the different meanings which might be attached to the word "express." There can be no doubt that under the Privy Council ruling 33 Cal 1047,¹ every acknowledgment implies a promise to pay and therefore but for the statute might form a cause of action. But the statute has laid down that such an agreement is void, unless the agreement is a promise which is made in writing and signed by the debtor. Whatever might have been the reasons which induced the Legislature to make this distinction, it is clear to my mind that the distinction exists. Where a debt is not time-barred, an unconditional acknowledgment implying as it does a promise to pay may both serve to extend limitation under S. 19, Limitation Act, or may be the basis for a suit as giving a fresh cause of action. But where a debt is already time-barred, then the Legislature lays down that the agreement or promise must be in writing. Now, as I understand the words of the section, this means not that the words "I promise to pay" should occur in writing, but it does mean that the words read as a whole should by themselves express a promise to pay. When they do this there is a fresh cause of action within S. 25 (3), Contract Act. But it cannot be held that a mere acknowledgment, however unconditional, amounts to an express promise to pay. If the writing is merely an acknowledgment, *ex hypothesi* it shows that the words by themselves do not amount to a promise to pay. The mere fact that the law implies a promise to pay in an unconditional acknowledgment is not the same thing as saying that the words by themselves amount to a promise to pay. S. 25 (3), in my opinion, clearly

lays down that the promise must be in writing, not that some words which do not by themselves amount to a promise but in which the law implies a promise, shall be sufficient to constitute a fresh cause of action. In this case there can be no doubt that the mere mention of a debt in the schedule of creditors cannot amount to anything more than a mere acknowledgment. It cannot by any stretch of language be held to contain in itself a promise to pay. This being the case I consider that the order of the learned District Judge was correct and I would dismiss the appeal with costs.

Tek Chand, J. — I agree.

R.W./R.K.

Appeal dismissed.

* A. I. R. 1937 Lahore 383

TEK CHAND AND DALIP SINGH, JJ.

Badar Din — Defendant — Appellant.

v.

Mt. Allah Rakhi — Plaintiff —

Respondent.

Second Appeal No. 105 of 1936, Decided on 22nd June 1936, from decree of Dist. Judge, Gurdaspur, D/. 9th December 1935.

* (a) Mahomedan Law — Divorce — Suit by wife on ground of impotence of husband — Rule of Mahomedan law to adjourn case for one year is not mere rule of procedure but is substantive right of husband — Waiver of such right can be given effect to and is not against spirit of Mahomedan law.

The rule of Mahomedan law as to adjournment of a suit for divorce by the wife on the ground of impotence of her husband for one year is not a mere rule of procedure but is a substantive right of the husband and a husband for whose benefit the condition as to adjournment is imposed has a right to waive the condition.

[P 385 C 1, 2]

A Mahomedan marriage is not a sacrament, but is a contractual relationship, and a Mahomedan husband has got an almost unrestricted right to divorce the wife. If, therefore, in cases in which a judicial divorce is permissible, a certain condition is laid down to his advantage postponing the divorce for a period, and he does not wish to avail himself of this condition, it is not against the spirit of Mahomedan law to allow him to give up the benefit of that condition. [P 385 C 2]

In a suit by a wife for the dissolution of marriage on the ground of her husband's impotence, the Court decreed the suit with direction that it was to remain suspended for one year but the appellate Court deleted this condition on waiver of his right by the husband :

Held: that the husband had the right to waive his right and the order of the lower Court cancelling adjournment for one year was not illegal : A I R 1925 All 24 and A I R 1936 Lah 501, *Rel. on.* [P 385 C 2]

9. Baru Mal v. Daulat Ram, A I R 1936 Lah 164=161 I C 703.

(b) Waiver — Right once validly waived cannot be revived again in absence of provision to contrary.

A right once validly waived cannot be revived, in the absence of a clear provision of law to the contrary. [P 385 C 2]

Charanjiva Lal — for Appellant.

Bashir Ahmad — for Respondent.

Tek Chand, J.—The facts of the case and the questions of law involved are given in the referring order. The parties are Mahomedan Arains of Batala Tahsil, Gurdaspur District. The plaintiff sued her husband for dissolution of marriage on the ground of his impotence. The trial Judge found that the impotence existed at the time of marriage, that the wife did not then know of it, and that in spite of treatment the defect had not since been removed. He accordingly granted the plaintiff the decree prayed for, but directed that it was to remain suspended for one year "during which the defendant had the right to have the defect removed". This decree was passed on 17th July 1935. The plaintiff appealed to the District Judge praying that the aforesaid direction be removed and the decree made unconditional. The District Judge, after examining the evidence, came to the conclusion that the defendant was suffering from an incurable form of impotence and that there was no likelihood of his being cured in one year. He also noted in his judgment that the defendant, who was present in person in Court, had stated that he had no objection to the appeal being accepted and the marriage dissolved forthwith. He accordingly deleted the condition from the trial Court's decree and directed that it would take effect immediately.

In this Court the defendant filed an affidavit, averring that he had not stated before the District Judge that he had no objection to the plaintiff's appeal being accepted and the condition deleted, and that the District Judge appeared to have stated so in his judgment under a misapprehension. The father of the plaintiff-respondent has filed a counter-affidavit stating that he was present in the District Court at the hearing of the appeal, that the defendant clearly stated that he was still impotent and that he had no objection to the condition suspending the decree for one year being deleted. After examining the affidavits and hearing the defendant and the plaintiff's father, who were

both present before us, we see no reason to doubt the correctness of the statement in the judgment of the learned District Judge and hold that the defendant had clearly stated before him that he had no objection to the plaintiff's appeal being accepted and a decree for dissolution of marriage passed forthwith. It seems to us that the defendant has gone back on his statement with a view to blackmail, as after the decree of the District Judge dissolving the marriage, the plaintiff, Mt. Fatima (?), has married a cousin of hers, and is stated to be pregnant from him.

It is not disputed that under Mahomedan law a wife has the right to claim a judicial divorce on the ground of her husband's impotence, provided it is proved: (1) that the impotence existed at the time; (2) that the wife had no knowledge of it at the time of marriage, and (3) that the defect had not since been removed. If these facts are established, the wife is entitled to get a decree for divorce, but the divorce must remain suspended for one year, in order that it may be ascertained whether the defect is removable: see Wilson's Mahomedan Law, p. 149, para. 73; Mulla's Mahomedan Law, para. 239; Tyabji's Mahomedan Law, p. 251; Ameer Ali's Mahomedan law Vol. 2, p. 531; Hamilton's Hidaya, p. 354 and Bailie's Digest, p. 347. On the facts as found in this case, the three conditions mentioned above are fulfilled. Strictly speaking, the Subordinate Judge should not have framed a decree and directed suspension of its operation for one year. He should have adjourned the proceedings for one year, and at the expiry of that period passed a final decree dissolving the marriage. However, the decree, as framed by the Subordinate Judge, was in the nature of a decree nisi, and may be taken to be substantially in accordance with the rule of Mahomedan law as enunciated above. On appeal the learned District Judge, however, made the decree unconditional and absolute, before the expiry of the year, on the defendant's own statement waiving the condition, the Judge being satisfied that there was no likelihood of the infirmity being removed during the succeeding seven months.

The question arises whether the rule of Mahomedan law, that the final order dissolving the marriage should not be passed until after the expiry of one year from the date when the necessary facts

are established, is one of substantive law which it is obligatory on Courts of this country to follow, or is merely one of procedure which may be taken to have been superseded by British Indian procedural law. After hearing counsel and referring to the books on Mahomedan law bearing on the subject, we find that the position has been stated correctly in 47 All 243.¹ In that case, Sulaiman, C.J. and Mukerji, J. held that the "rule as to adjournment of the case for one year is not a mere rule of procedure but is a substantial right of the husband". This case was followed by Bhide, J. sitting in Single Bench in a case recently decided in this Court which has since been reported in A I R 1936 Lah 501.² There are certain observations by Boys, J. in A I R 1927 All 100,³ in which a contrary view appears to have been taken. There is, however, no discussion of the matter in the judgment, and if I may say so with all respect, the remarks of the learned Judge are based on a misreading of a passage in Tyabji's Mahomedan Law. As stated above, the correct view of the law appears to be that the rule as to adjournment for a year is a "substantive right of the husband", and as laid down in Bailie's Digest "the Judge is to adjourn the case, whether the man requires it or not".

The question still remains, whether the Judge is bound to adjourn the case, even if the husband definitely waives the condition and asks the Court to pass a decree forthwith, the Judge being satisfied that there is no collusion between the parties and the infirmity is really such that there is no likelihood of its being removed within one year. No original text bearing on the point has been cited before us, nor is there anything in the works on Mahomedan law available to us, which throws any light on the point. Mr. Bashir Ahmad, the learned counsel for the respondent, has argued that the rule as to adjournment being a 'substantive right of the husband', there is no reason why he should not be allowed to waive it if he voluntarily and in good faith wishes to do so. He urges that the provision really exists for the

benefit of the husband, the intention being (as pointed out by Sulaiman, C. J. in the ruling cited) "to give him opportunity, after he has once been challenged, to prove that he is not impotent". Counsel points out that there may be cases, where the husband, having lived in the company of his wife for years and undergone a long course of treatment, finds his infirmity incurable, and being convinced that no useful purpose would be served by his availing himself of the further opportunity allowable by the adjournment of the proceedings, expressly asks the Court to put an end to the marital tie immediately; in such cases there is nothing in the letter or spirit of Mahomedan law which makes it obligatory on the Court to postpone final orders. In my opinion, these arguments are well founded and must prevail. We do not see why a husband, for whose benefit the condition as to adjournment is imposed, should not have the right to waive it. It must be borne in mind that a Mahomedan marriage is not a sacrament, but is a contractual relationship, and a Mahomedan husband has got an almost unrestricted right to divorce the wife. If, therefore, in cases in which a judicial divorce is permissible a certain condition is laid down to his advantage, postponing the divorce for a period, and he does not wish to avail himself of this condition, it does not seem to be against the spirit of Mahomedan law to allow him to give up the benefit of that condition.

We hold, therefore, that the defendant validly gave up the benefit of the condition, and the order of the District Judge, cancelling the clause in the trial Court's decree, suspending its operation for a year, is not illegal. The defendant, of course, has now attempted to resile from the position taken up by him before the District Judge, but a right once validly waived cannot be revived, in the absence of a clear provision of law to the contrary. It may also be mentioned that the defendant stated before us that, as a matter of fact, there had been no improvement in his condition and that he was still impotent. The decree of the trial Court was passed on 17th July 1935. More than 11 months have passed since and the lunar year (354 days) will expire on 7th July 1936, before which date there seems to be no likelihood of the appellant being cured of the defect. For the foregoing reasons we

1. Mahomed Ibrahim v. Mt. Altafan, A I R 1925 All 24=83 I O 27=47 All 243=22 A L J 1045.

2. Mt. Fatima v. Jalal Din, A I R 1936 Lah 501=163 I O 751=38 P L R 828.

3. Pir Baksh v. Muhammad Unnissa, A I R 1927 All 100=98 I O 514.

uphold the decree of the District Judge and dismiss the appeal, but having regard to all the circumstances we leave the parties to bear their own costs in all Courts.

S.C./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 386

JAI LAL AND ABDUL RASHID, JJ.

Haveli Ram alias *Haveli Shah* —
Defendant — Appellant.

v.

Jagan Nath and *another*, Defendants
and *others*, Plaintiffs — Respondents.

Letters Patent Appeal No. 70 of 1936,
Decided on 18th June 1936, from order of
Agha Haidar, J., D/- 18th March 1935.

Civil P. C. (1908), S. 80 — Suit attacking
sale by Official Receiver—Official Receiver
impleaded as defendant—Suit is not main-
tainable against him without notice.

Where the plaintiffs instituted a suit for decla-
ration that the sale carried out by the Official
Receiver was invalid and ineffective as against
them and impleaded him as a defendant :

Held : that the Official Receiver was a neces-
sary party to a suit of that nature and that the
suit was not maintainable against him without
notice under S. 80, Civil P. C.: 21 Bom 229 ;
A I R 1922 Pat 352 and *A I R 1934 Cal 187*,
Disting.; *A I R 1926 Lah 696* ; *A I R 1930 Lah*
708 and *A I R 1931 Lah 703, Rel. on.*

[P 387 C 1, 2]

Ibqal Singh and *S. L. Puri*—

for Appellant.

M. L. Sethi—for Respondents

(Plaintiffs).

Jai Lal, J. — One Jagan Nath was
adjudicated insolvent and his estate vested
in the Official Receiver of Sialkot. The
Official Receiver sold a house to Haveli
Shah. It was claimed by him to be vested
in him as forming part of the estate of
Jagan Nath. The respondents, the three
sons of Jagan Nath, thereupon instituted a
suit for a declaration that the sale of the
house to Haveli Shah by the Official
Receiver was invalid and would not affect
their rights. They claimed to be the
owners of the house. The Official Recei-
ver was impleaded as a defendant in this
suit as well as Haveli Shah, the purchaser
of the house. The trial Court dismissed
the suit on the ground that it was not
maintainable against the Official Receiver
in the absence of a notice under S. 80,
Civil P. C.

The plaintiffs thereupon preferred an
appeal to the District Judge and before

the appeal was disposed of, presented an
application that the Official Receiver was
not a necessary party to the suit and
prayed that his name be struck off from
the list of the defendants. The District
Judge after remanding an issue to the
trial Court on the question of the necessity
of impleading the Official Receiver came to
the conclusion that he was not a necessary
party to the suit and, therefore, held that
the suit could not be defeated merely on
account of the absence of a notice to the
Official Receiver, and remanded the case
to the trial Court for decision on the
merits after striking off the Official Recei-
ver's name from the list of the defendants.
Against this order of remand an appeal
was preferred to this Court which was
heard by a learned Judge in Chambers
who dismissed the appeal thus agreeing
with the conclusion of the learned District
Judge that the Official Receiver was not a
necessary party to the suit. In coming to
this conclusion the learned Judge relied
upon and followed a judgment of the Chief
Court of the Punjab in 55 P R 1917.¹
That judgment appears to support the con-
clusion of the learned Judge, but on this
appeal under the Letters Patent of this
Court it is urged that the judgment of the
Chief Court of the Punjab does not lay
down correct law and has been dissented
from, though not expressly, in a number
of cases subsequently decided in this
Court. Among others reference is made
to 12 Lah 260,² *A I R 1926 Lah 696*³ and
A I R 1930 Lah 708.⁴

The first of these cases was heard and
decided by a Division Bench consisting of
Addison and Bhide, JJ. It was however,
conceded before them that the suit could
not proceed without notice under S. 80
with regard to property which had
actually been sold by the Official Receiver,
but it was contended that it could proceed
without notice as regards houses which
had not yet been sold by the Official
Receiver. The learned Judges held that
the suit was properly dismissed as a whole
and that notice under S. 80 was necessary
whether the property had been sold by

1. *Kundan Lal v. Shadi Ram*, *A I R 1917 Lah*
360=41 I C 809=55 P R 1917=134 P L R
1917.

2. *Duli Ohand v. Kalyan Singh*, *A I R 1931 Lah*
703=132 I C 4=12 Lah 260=31 P L R 865.

3. *Chiranji Lal v. Munshi*, *A I R 1926 Lah 696*
=94 I C 660.

4. *Rura v. Official Receiver, Amritsar*, *A I R*
1930 Lah 708=125 I C 625.

the Official Receiver or was merely threatened to be sold. This case indirectly supports the conclusion of the appellant. In A I R 1926 Lah 696,³ Addison, J. sitting alone held that in a suit for declaration of title to property which had been already sold by the Official Receiver the latter was a necessary party and that the suit in his absence was not competent. In A I R 1930 Lah 708,⁴ it was held by the learned Chief Justice and Abdul Qadir, J. that when property has been disposed of by the Official Receiver and a suit is brought by a person claiming the property to be his against the Official Receiver the suit cannot proceed if no notice under S. 80 has been given to the Official Receiver.

On behalf of the respondents reliance is placed on 21 Bom 229,⁵ and 67 I C 597,⁶ a decision of the Patna High Court, and A I R 1934 Cal 187,⁷ a judgment of the Calcutta High Court. All these cases, however, were by the respective title-holders for possession of properties or for ejectment of the persons in possession thereof, who, it was alleged, were trespassers; the defendants had pleaded in each case that they held the property under third persons who it was claimed should have been made parties to the suits. The contention of the defendants was negatived and it was held that the plaintiff in each case was entitled to succeed on proof of his title and that a person under whom the defendant alleged to be holding the property in dispute was not a necessary party to the suit. It is clear that these cases have no application to the facts of the present case.

It is to be observed that the relief claimed by the plaintiffs in the present case is that it may be declared that the sale carried out by the Official Receiver is invalid and is ineffective as against the plaintiffs. On the pleadings of the plaintiffs themselves, therefore, it is the action of the Official Receiver that is attacked, and it is clear to me that no final decision can be given in this case in the absence of the Official Receiver. In any case the Official Receiver having been impleaded as a defendant it is not now open to the plaintiffs to say that he was not a neces-

sary party and that in any case the suit was maintainable against him without notice under S. 80, Civil P. C. The sole ground for the dismissal of the suit by the trial Court was that the suit against the Official Receiver was not maintainable without a notice under S. 80 and it is not contended that that ground is erroneous. What is now urged is that the Official Receiver was not a necessary party to the suit. This contention was raised for the first time before the appellate Court, but in my opinion having regard to the pleadings of the plaintiffs and the fact that the Official Receiver was impleaded as a defendant the suit was not maintainable without a notice under S. 80. I would hold that the Official Receiver is a necessary party in a suit of this nature, and that it is not maintainable without notice to him under S. 80, Civil P. C. I would, therefore, accept this appeal with costs throughout, and would set aside the decrees of the District Judge and the learned Judge in Chambers of this Court and restore that of the trial Judge.

Abdul Rashid, J.—I agree.

P.R./R.K.

Appeal accepted.

*** A. I. R. 1937 Lahore 387**

SKEMP, J.

Kanshi Ram and others —

Decree-holders — Appellants.
v.

Firm Gohra Shah-Hari Chand —

Judgment-debtor — Respondent.

Misc. Second Appeal No. 108 of 1936,
Decided on 12th June 1936.

(a) Second Appeal — Whether repayment alleged is made or not is question of fact—Finding on such question cannot be challenged.

Question as to whether certain alleged repayment was made or not is a question of fact and a finding on it cannot be challenged in second appeal. [P 388 C 2]

(b) Minor—Minor party to suit—Guardian and next friend are subject to control of Court in respect of that suit—Next friend accepting money on behalf of minor from judgment-debtor without obtaining leave of Court—Certification cannot be made.

Where a minor is party to a suit and a next friend or guardian has been appointed to look after the rights and interests of the infant in and concerning the suit, the acts of such next friend or guardian are subject to the control of the Court. [P 388 C 2]

So, where on a decree obtained in favour of a minor, his next friend accepts money from the judgment-debtor on behalf of the minor

5. Kashi v. Sadashiv, (1897) 21 Bom 229.

6. Bhagwati Kuer v. Jagdam Sahay, A I R 1922 Pat 352=67 I C 597=3 P L T 429.

7. Secretary of State v. Dharendra Nath Roy, A I R 1934 Cal 187=151 I C 1076=59 C L J 295=38 C W N 409.

and the judgment-debtor wants to get such repayment out of Court certified, the certification cannot be made as leave of Court was not taken in order to accept the payment on behalf of the minor: 36 *Mad* 295 (P C) and *A I R* 1925 *Mad* 230, *Rel. on*; 35 *Cal* 561; *A I R* 1915 *Lah* 155 and *A I R* 1927 *Pat* 329, *Not foll.*

[P 389 C 2]

* (c) Minor—Next friend alleged to have received some payment on behalf of minor—Payment received without leave of Court under O. 32, R. 6, Civil P. C. — First appellate Court reversing finding of lower Court and finding that next friend had actually received payment — Next friend can raise objection under O. 32, R. 6, to certification.

One *K* who was the next friend of a minor in a suit was alleged to have received some amount in favour of the minor without obtaining leave of Court under O. 32, R. 6, Civil P. C. Three Courts found that *K* had not received the amount but the finding of the first appellate Court was that he had received the amount. Then *K* brought an objection on behalf of the minor that as provisions of O. 32, R. 6, Civil P. C., were not complied with there could be no certification:

Held: in the circumstances *K* was not precluded from taking the point that the minors were not bound by the payment received by him on their behalf without the leave of the Court.

[P 389 C 1, 2]

* (d) Practice—New plea — Acts declared as void cannot be enforced as valid — Objection to such enforcement can be raised at any stage.

No Court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties or by a failure to plead or to argue the point at the outset. Such a point can be raised at any stage: *A I R* 1925 *P C* 83, *Rel. on.*

[P 389 C 2]

J. G. Sethi — for Appellants.

M. C. Mahajan and *Bhagwat Dayal* — for Respondent.

Judgment. — Kanshi Ram, Ram Das, sons of Duni Chand, Uttam Chand minor son of Ram Das, and Ram Nath minor son of Kanshi Ram, brought a suit against Gohra Shah and Hari Chand for recovery of Rs. 715. The plaint stated that the four plaintiffs were members of a joint Hindu family of which Kanshi Ram was the manager; he was named as the next friend of the two minors, his son Ram Nath and his nephew Uttam Chand. The plaint was signed and verified by Kanshi Ram as the manager of the family.

The suit was compromised on 18th November 1930 for Rs. 300, costs being given up. If the amount were not paid in two months, the amount should bear interest at 12 annas per cent. per mensem. Permission to enter into this compromise

was sought and granted by the Court in accordance with O. 32, R. 7, Civil P. C. In January 1931 execution was taken out and proceedings in execution continued, but on 21st October 1931 the judgment-debtors made an application under O. 21, R. 2, Civil P. C., for certification of a payment out of Court. The payment was alleged to have been made in Campbellpur on 22nd July 1931 and attested by a receipt signed by four witnesses. Kanshi Ram, to whom it was alleged payment had been made, denied the payment and after taking evidence the Subordinate Judge found that in fact payment had not been made. The learned District Judge maintained this on appeal, but on second appeal to this Court, Agha Haider, J. remanded the case in order that the evidence of the judgment-debtor Hari Chand might be taken as well as of a hand-writing expert desired by the judgment-debtors. This was done and another Subordinate Judge found that the payment had not been made. On appeal, however, another learned District Judge found in favour of the judgment-debtors that payment had been made. There is no doubt that this is a finding of fact based upon evidence and that it cannot be contested on second appeal. Mr. Sethi has now raised a point, on which Dalip Singh, J. issued notice, that the certification is bad because the leave of the Court was not obtained as required by O. 32, R. 6, Civil P. C., which runs as follows:

A next friend or guardian for the suit shall not without the leave of the Court, receive any money or other moveable property on behalf of a minor under a decree or order in favour of the minor.

He contends that the certification offends against this express statutory rule and cites a Privy Council ruling, 36 *Mad* 295.¹ Their Lordships said (p. 303):

No doubt a father or managing member of a joint Hindu family may, under certain circumstances and subject to certain conditions, enter into agreements which may be binding on the minor members of the family. But where a minor is party to a suit and next friend or guardian has been appointed to look after the rights and interests of the infant in and concerning the suit, the acts of such next friend or guardian are subject to the control of the Court.

This was followed by the Madras High Court in 82 *I C* 588,² a case of certification

1. *Ganesha Row v. Tuljaram Row*, (1919) 36 *Mad* 295 = 19 *I C* 515 = 40 *I A* 132 (P C).

2. *Pichchakkuttiya Pillai v. Doraiswami Moopannar*, *A I R* 1925 *Mad* 230 = 82 *I C* 588 = 47 *M L J* 498.

out of Court where the payment had been made to the manager of the family. The objection was taken that a minor member of the family under the guardianship of the manager was not bound and Wallace, J. said :

After full consideration I am of opinion, although with considerable reluctance, that the Privy Council case concludes the matter and that the payment, although made and certified, cannot be recognized by the Court executing the decree, since the leave of the Court was not obtained under O. 32, R. 6. I have come to this conclusion with reluctance because the first plaintiff at least thus secures at present a double payment of the decree amount by means of his own laches.

Mr. Mehr Chand Mahajan quoted several rulings in which the contrary view had been taken, notably 35 Cal 561,³ which, however, is previous to the Privy Council ruling and as pointed out in the 10th Edition of Mulla's Code of Civil Procedure, p. 952, is not in accordance with it. Mr. Mehr Chand also quoted 60 P L R 1915,⁴ which was apparently published before the Privy Council ruling and follows 35 Cal 561,³ and A I R 1927 Pat 329⁵ which does not refer to the Privy Council ruling. I think that I am bound to follow the Privy Council ruling.

Mr. Mehr Chand Mahajan on behalf of the respondents argued that under Hindu law a karta may bring a suit on behalf of the entire family, but this argument is covered by the passage from 36 Mad 295¹ already quoted. He further urged that leave had already been given, but there again the payment has not been sanctioned for the minors. The argument with which I was most impressed was that it was not open to Mr. Sethi, whose power-of-attorney is signed by Kanshi Ram and Ram Das on their own behalf, only, to take this objection on behalf of the minors. I would accept this argument if Kanshi Ram had actually received payment himself. But he contends strenuously that he never received payment, that three Courts found that he did not receive payment, that although by process of law he is bound by the finding of the fourth and cannot get it set aside, he would if he could. In the circumstances I do not think that Kanshi Ram is pre-

cluded from taking the point that the minors are not bound by the payment made on their behalf without the leave of the Court. No doubt this point might have been but was not taken at an earlier stage, but in the words of their Lordships of the Privy Council in 52 Cal 408:⁶

The suggestion may be at once dismissed that it is too late now to raise the section as an answer to the claim. No Court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties or by a failure to plead or to argue the point at the outset.

I therefore accept this second appeal and declare that the minor petitioners Uttam Chand and Ram Nath are not bound by the payment out of Court and therefore that it cannot be certified. Mr. Mehr Chand urges that as it is res judicata that the payment was made to Kanshi Ram, Kanshi Ram is liable for repayment of the money under S. 151, Civil P. C. If he will put in a written application to this effect I will consider the matter. The parties are to bear their own costs throughout. The legal point was raised at the eleventh hour.

B.D./D.S.

Appeal allowed.

6. Surajmull Nagoremull v. Triton Insurance Co., Ltd., A I R 1925 P C 83=86 I C 545=52 I A 126=52 Cal 408 (P C).

A. I. R. 1937 Lahore 389

ABDUL RASHID AND ADDISON, JJ.

F. Gopal Das Parmanand —

Defendant — Appellant.
v.

L. Mul Raj — Plaintiff — Respondent.

Second Appeal No. 237 of 1936, Decided on 2nd June 1936, from order of Addl. Dist. Judge, Lahore, D/- 7th November 1935.

(a) Principal and Agent—Pacca arhatia—Relation—Pacca arhatia is agent of his constituent only for purpose of quoting prices—For other purposes contract between him and constituent is contract between principal and principal—If he covers himself by contract with third parties, he can deal with it as he pleases.

A pacca arhatia is an agent of his constituent only up to a certain point. It is the duty of the pacca arhatia to give a correct quotation of the price and for the purposes of quoting the price the pacca arhatia is an agent of his constituent. If however the rate quoted by the pacca arhatia is not incorrect and a transaction takes place between the pacca arhatia and the constituent, the

3. Harihar Pershad Singh v. Mathura Lal, (1908) 35 Cal 561=8 C L J 256=12 C W N 598.

4. Ram Singh v. Nanak Chand, A I R 1915 Lah 155=27 I C 603=60 P L R 1915.

5. Jhakhri Gope v. Phagu Mahto, A I R 19 Pat 329=103 I C 75=8 P L T 708.

transaction must be regarded as a contract between a principal and a principal. In the case of *pacca arhatia* there is no privity between the constituent and the third party with whom a *pacca arhatia* deals. The *pacca arhatia* can make contracts with such parties or not as he pleases. If he makes contracts he can cancel them just as it suits him. The *pacca arhatia* can cover himself by contract with the third parties and he can deal with the covering contract as he pleases. So where a *pacca arhatia* after truly stating the price of cotton prevailing at Bombay on a certain date, accepts the order of his constituent, he is not bound to buy cotton at Bombay: *A I R 1921 Bom 238*; *20 I C 882*; *32 Bom 205* and *37 Bom 347, Rel. on.* [P 391 C 1, 2]

(b) Specific Relief Act (1877), S. 42—Suit for declaration that sum deposited by plaintiff as margin money is accountable by defendant—Declaration cannot be granted as it affects only pecuniary relationship between parties to contract.

A declaration that certain sum deposited by the plaintiff with the defendant as margin money is accountable by the defendant to the plaintiff cannot be granted under S. 42, Specific Relief Act as it affects only the pecuniary relationship between the parties to the contract: *A I R 1930 Bom 331*; *A I R 1915 Mad 584* and *A I R 1922 Pat 392, Rel. on.* [P 392 C 1]

J. G. Sethi — for Appellant.

L. Ichhru Ram and Mehr Chand Mahajan — for Respondent.

Abdul Rashid, J. — The facts of the case, bearing on the questions of law involved in this appeal, may be shortly stated. On 19th August 1932, R. B. L. Mul Raj, plaintiff, instructed the firm Gopal Das Parmanand, defendants, to sell 100 bales of Broach Cotton April-May 1933 delivery at Rs. 227 per candy. Rs. 1,400 were deposited as margin money on account of this transaction. On 25th August 1932, the plaintiff again instructed the defendants to sell 100 bales of Broach Cotton April-May 1933 delivery at Rs. 242 per candy. Rs. 1,800 were deposited as margin money. On 28th August 1932, the defendants informed the plaintiff that they were sending a telegram to Bombay, and enquired if the plaintiff wanted to do any business which could be mentioned in the same telegram. The plaintiff informed the defendants to purchase for him 200 bales of Broach Cotton April-May 1933 delivery and to settle accounts of 200 bales sold by them. The defendants informed him the same day that they had received a wire from their Bombay friends that they had purchased 200 bales at Bombay at Rs. 267 per candy. On 30th August 1932, the defendants

asked the plaintiff to pay Rs. 22-0-9 to settle the three transactions taking into consideration the margin money belonging to the plaintiff in the hands of the defendants. The plaintiff paid up the amount of Rs. 22-0-9 and the transactions were adjusted. After the adjustment, the plaintiff found out that the defendants had in fact not made any purchases for him at Bombay but that the purchase of 200 bales of cotton had been made at Lahore. The plaintiff thereupon instituted the present suit for a declaration that the contracts of sale dated 19th and 25th August 1932, respectively of 200 bales of Broach Cotton April-May 1933 delivery were valid and should stand, and that the alleged purchase of 200 bales was void because the ratification of the transaction or purchase was obtained by fraudulent misrepresentation. A declaration was also sought to be the effect that the sum of Rs. 3,200 deposited by the plaintiff with defendants as margin money was accountable by defendants to the plaintiff as this amount together with Rs. 22-0-9 had been received by the defendants from the plaintiff by fraudulent misrepresentation on 30th August 1932.

The defendants pleaded, *inter alia*, that the suit as framed was not maintainable, that the defendants were *pacca arhatias* and that the transactions between them and the plaintiff were in full conformity with the *pacca arhatia* system. The case for the defendants was that they were agents of the plaintiff only for the purpose of supplying correct quotations of the price of cotton and that for all other purposes, the contracts between them and the plaintiff were contracts between principal and principal, that they were not bound to buy any cotton at Bombay and that it was open to them either to buy at Bombay or at Lahore or not to buy at all. They were only bound to deliver the goods to the plaintiff on the due date at Bombay, if delivery was asked for. The trial Court gave the plaintiff the declaration asked for, on the ground that the plaintiff was induced to enter into the contract of the purchase of 200 bales of cotton at Bombay by means of a misrepresentation. The defendants preferred an appeal to the learned Additional District Judge. The learned Additional District Judge held that though the incidents of the contract between the parties were the same as if the defendants had

been *pacca arhatias*, the plaintiff was entitled to the declaration asked for as a *pacca arhatia* had no right of misrepresentation. On the question of the maintainability of the suit, the learned Additional District Judge made the following observations :

The suit, however, did not take the matter very far as the declaration merely wiped out the adjustment and a settlement brought about by fraud could be ignored by the plaintiff and he could after the due date of delivery bring a suit for recovery of money due from defendants or damages for non-acceptance of delivery. Courts refuse to make futile declarations and if the matter had been left to me as an original Court I would not have granted the declaration.

But a declaration having been granted and the discretion used not been shown to be perverse or arbitrary, it is not proper to reverse the decree.

Against this decision the defendants have preferred a second appeal to this Court. The proposition of law is firmly established that a *pacca arhatia* is an agent of his constituent only up to a certain point. It is the duty of the *pacca arhatia* to give a correct quotation of the price and for the purposes of quoting the price the *pacca arhatia* is an agent of his constituent. If, however, the rate quoted by the *pacca arhatia* is not incorrect and a transaction takes place between the *pacca arhatia* and the constituent, the transaction must be regarded as a contract between a principal and a principal. Reference may be made in this connexion to 45 Bom 386.¹ At p. 410 of this ruling certain observations of Jenkins, C. J. are quoted and they are to the following effect:

I do not say that there is no relation of principal and agent between the parties at any stage ; there may be up to a point, and that this is legally possible is shown by Mellish, L. J. in *Ex parte White*,² where he speaks of a 'person who is an agent up to a certain point'. So here there may have been that relationship in its common meaning for the purpose of ascertaining the price at which the order was to be completed, and to this point of the transaction all the obligations of that relation perhaps apply. But when that stage is passed, I think the relation is not that of principal and agent but of the nature I have indicated.

It was further observed in this ruling that in the case of a *pacca arhatia* there is no privity between the constituent and the third party with whom a *pacca arhatia* deals. The *pacca arhatia* can make con-

tracts with such parties or not as he pleases. If he makes contracts he can cancel them just as it suits him. The *pacca arhatia* can cover himself by contract with the third parties; he can deal with the covering contract as he pleases and sell back the cotton if it suits him. There is an absolutely distinct dividing line between the dealings as between the *arhatia* and his constituent on the one hand, and his covering dealings, if any, on the other. Reference may also be made in this connexion to 20 I C 882,³ 32 Bom 205⁴ and 37 Bom 347.⁵

In the present case there is no allegation that the defendants made any misrepresentation regarding the price prevailing at Bombay on 28th August 1932, with respect to Broach Cotton April-May 1933 delivery. When the defendants accepted the order of the plaintiff, it was open to them not to buy any cotton at all or if they wanted to cover themselves to buy cotton either at Bombay or at Lahore. They were bound to deliver to the plaintiff 200 bales of cotton at the rate at which they accepted the order on the due date at Bombay. If the delivery to the plaintiff of the required amount of cotton on the due date entailed any loss, the defendants were bound to bear the loss themselves. If, however, it resulted in any profit, they would be entitled to retain it. In other words the defendants could allocate the contract to themselves, and they were not bound to buy 200 bales of cotton at Bombay at all. In this view of the matter it is not open to the plaintiff to raise any objection if the defendants purchased the required amount of cotton at Lahore and not at Bombay. The alleged misrepresentation that the defendants had bought 200 bales of cotton at Bombay on 28th August 1932, does not in any way affect the present case.

The learned Additional District Judge while holding that the declaration granted to the plaintiff in the present case was a futile declaration, and that he would not have granted it himself, has still maintained the declaration. It was observed in AIR 1930 Bom 331,⁶ that a declaration

3. Chhogmal v. Jainarayan, (1913) 15 Bom L R 750=20 I C 882.

4. Nathu Bai Motilal v. Bai Ujjam, (1908) 32 Bom 205=10 Bom L R 274.

5. Bhagwan Das v. Burjorji, (1913) 37 Bom 347=17 I C 152=14 Bom L R 807.

6. Shripatrao v. Shankarrao, A I R 1930 Bom 331=127 I C 330=32 Bom L R 207.

1. Manilal Raghunath v. Radhakisan Ramjiwan, A I R 1921 Bom 239=62 I C 361=45 Bom 386=22 Bom L R 1018.

2. (1871) 6 Ch 397=24 L T 45=40 L J B K 73=19 W R 488.

that the defendant is liable to pay the plaintiff all monies which the plaintiff as the defendant's guarantor is liable to pay under or in respect of a decree, cannot be granted under S. 42, Specific Relief Act, as it affects only the pecuniary relationship between the parties to the contract. To the same effect are 39 Mad 80⁷ and 1 Pat 1.⁸ We are, therefore, of the opinion that the present case does not fall within the purview of S. 42, Specific Relief Act.

The learned counsel for the respondent urged that the plaintiff was entitled to the declaration prayed for under the provisions of S. 39, Specific Relief Act. We think that this argument is devoid of all force. S. 39 lays down that any person against whom a written instrument is void or voidable, and who has a reasonable apprehension that such instrument, if left outstanding, may cause serious injury, may sue to have the instrument adjudged void or voidable. In the present case no question of the cancellation of any instrument arises as the contracts which formed the subject matter of the present litigation were not entered into by means of any written instrument. Moreover, there is no reasonable apprehension in the present case that if any written instrument is left outstanding it will cause any serious injury to the plaintiff. We therefore, hold that the suit as framed is not maintainable. For the reasons given above we accept this appeal set aside the judgments and the decrees of the Courts below, and dismiss the plaintiff's suit with costs throughout.

D.S./R.K.

Appeal accepted.

7. Ramakrishna Pattar v. Narayana Pattar, A I R 1915 Mad 584=26 I C 883=39 Mad 80=27 M L J 634.

8. Rafiquddin v. Asgar Ali, A I R 1922 Pat 392=63 I C 38=1 Pat 1=3 P L T 793.

A. I. R. 1937 Lahore 392

BHIDE, J.

Jagat Ram — Defendant — Appellant.
v.

Misar Kharaiti Ram and others —
Plaintiffs — Respondents.

First Appeal No. 227 of 1936, Decided on 4th January 1937, from order of Dist. Judge, Jullundur, D/- 29th July 1936.

Civil P. C. (1908), S. 149 and O. 7, R. 11 —
Insufficient court-fee—Extension of time—
Suit presented to Senior Sub-Judge, being

officer for distributing plaints—Plaint being insufficiently stamped he called upon plaintiff to make up deficiency within certain time—Deficiency made up but at such time when suit was barred by time and plaint then sent to proper Court—Suit having reached trial Court properly stamped, fact of Senior Subordinate Judge extending time to make up deficiency, though not authorized to do so held was immaterial—Suit held to be in time.

Plaintiff presented the plaint to the Senior Subordinate Judge, the officer for distributing the plaints. The Judge finding that the plaint was not properly stamped, called upon the plaintiff to make up the deficiency within a certain time. The plaintiff did pay the court-fee within the time fixed but at a time when the suit became barred by time. The plaint was then sent to the proper Court. It was contended by the defendant that the Senior Subordinate Judge being a ministerial officer, had no authority to extend time to make up the deficiency :

Held : that even if the plaint had been sent to the trial Court with insufficient stamp, the Court would have been bound to ask the plaintiff under O. 7, R. 11, Civil P. C., to make up the court-fee within a period to be fixed by it and the plaint could only be rejected if the deficiency in the court-fee was not made up within the period. The deficiency in the court-fee having already been made up before the plaint reached the trial Court, the mere fact that the deficiency had been made up on the requisition by the Senior Subordinate Judge who was not authorized under S. 149 to extend any time for the deficiency in the court-fee being made up, was not material. The suit therefore was in time : *Case law referred.* [P 393 C 1, 2]

J. L. Kapur, R. L. Anand I —

for Appellant.

D. N. Aggarwal and Achhru Ram —

for Respondents.

Judgment.—The material facts bearing on the question of limitation which arise in this second appeal are briefly as follows : The plaint was presented to the Senior Subordinate Judge of Jullundur on 14th January 1935 on a court-fee stamp of Re. 1 only. The court-fee being insufficient the Senior Subordinate Judge ordered the plaintiff to make up the court-fee which was done on 16th January 1935. The plaint was then sent to Lala Pars Ram, Subordinate Judge, 2nd Class, at Jullundur. An objection was raised before him that the Senior Subordinate Judge had no authority to extend time for making up the deficiency in the court-fee as he was only acting ministerially in distributing plaints. This objection was upheld by the Subordinate Judge, and he was further of opinion that the plaintiff had not acted bona fide in presenting the plaint in the first instance on a court-fee

stamp of Re. 1 only, and there was no good reason for giving an extension of time for making up the court-fee. He accordingly held the suit to be barred by time as the period of limitation had expired before 16th January 1936 when the deficiency in the court-fee had been made up. On appeal the learned District Judge differed from the trial Court and held that the Senior Subordinate Judge was competent to grant an extension of time for making up the court-fee, and remanded the case under O. 41, R. 23, Civil P. C., for decision on merits. From this decision the present appeal has been preferred.

The view of the trial Court, that the Senior Subordinate Judge was acting ministerially in distributing plaints and did not constitute a Court for the purpose of extension of time under S. 149, Civil P. C., receives support from a Division Bench ruling of this Court reported in A I R 1928 Lah 484¹ and has not been seriously challenged by the learned counsel for the respondents. The learned counsel for the respondents contended however, that even if the Senior Subordinate Judge was not authorized to grant any extension of time under S. 149, Civil P. C., the provisions of O. 7, R. 11, Civil P. C., require that when a plaint is insufficiently stamped, time should be given to the plaintiff to make up the court-fee and it is only if the order of the Court in this respect is not complied with that the plaint can be rejected. In support of this contention the learned counsel cited 3 P R 1893,² 39 I C 766,³ A I R 1928 Lah 221,⁴ 32 Mad 305⁵ and 49 Cal 880⁶ at p. 884. In view of these rulings it would appear that even if the plaint had been sent to the trial Court with Re. 1 stamp, the Court would have been bound to ask the plaintiff to make up the court-fee within a period to be fixed by it and the plaint could only be rejected if the deficiency in the court-fee was not made up within the

period. It is true that the action of the plaintiff in instituting the plaint on a court-fee stamp of Re. 1 only in the present case does not appear to be bona fide, but the worst that the trial Court could do was to ask the plaintiff to make up the court-fee on the very day on which the plaint was presented. As it was, the deficiency in the court-fee had already been made up before the plaint reached the trial Court. In these circumstances the mere fact that the deficiency had been made up on the requisition by the Senior Subordinate Judge who was not authorized to extend any time for the deficiency in the court-fee being made up, does not appear to me to be material. I, therefore, uphold the order of the learned District Judge and dismiss the appeal, but in view of all the circumstances leave the parties to bear their own costs of this appeal. On request by counsel, the case is certified as fit for further appeal.

W.D./A.L.

Appeal dismissed.

A. I. R. 1937 Lahore 393

AGHA HAIDER, J.

*Qurban Hussain Shah and another —
Decree-holders—Appellants.
v.*

*Fazal Shah—Judgment-debtor —
Respondent.*

Misc. First Appeal No. 10 of 1936,
Decided on 8th April 1936, from order of
Senior Sub-Judge, Sargodha, D/. 9th
November 1935.

(a) *Res judicata*—Even wrong decision on issue of law operates as *res judicata*—Execution proceedings—Judge passing order for attachment and sale of certain crops of judgment-debtor — Objection to attachment by judgment-debtor under S. 18, Punjab Colonization of Government Lands Act—Judge cannot revise his previous order.

Under S. 11, Civil P. C., which also applies to execution proceedings, even a wrong decision on an issue of law operates as *res judicata*, inasmuch as S. 11, makes no distinction between an issue of fact and an issue of law, especially when there is identity of the matter in issue and also of the cause of action. So where a Judge, in execution proceedings, passed an order for attachment and sale of certain crops of the judgment-debtor and subsequently objection to attachment under S. 18, Punjab Colonization of Government Lands Act, is brought by the judgment-debtor, he is barred under S. 11, Civil P. C., from revising the previous order: A I R 1933 Lah 3; A I R 1933 Lah 325; A I R 1931 Bom 570 and A I R 1932 Bom 257, Rel. on. [P 394 C 2]

(b) Punjab Colonization of Government Lands Act (5 of 1912), S. 18 — "Rights on

1. Sharam Singh v. Sadhu Singh, A I R 1928 Lah 484=110 I C 293.

2. Janda Khan v. Bahadur Ali, (1893) 3 P R 1893.

3. Jiwan Das v. Khushabi Ram, A I R 1917 Lah 377=39 I C 766=27 P L R 1917.

4. Mt. Jantan v. Ahmad, A I R 1928 Lah 221=106 I C 817.

5. Gavaranga Sahu v. Botakrishna Patro, (1909) 32 Mad 305=4 I C 503=19 M L J 340 (F B).

6. Radha Kanta Saha v. Debendra Narayan Saha, A I R 1922 Cal 506=70 I C 101=38 C L J 74=49 Cal 880=27 C W N 566.

interests vested in a tenant" does not include crops growing on land (*Obiter*).

Obiter.—The expression "rights or interests vested in a tenant" in S. 18, Punjab Colonization of Government Lands Act, does not include crops growing on the land: *A I R 1936 Lah 313*, *Rel. on.* [P 395 C 1]

Mahbub Ilahi—for Appellants.

Jalal-ud-Din Mirza—for Respondent.

Judgment.—This is a decree-holders' appeal arising out of certain execution proceedings. A suit was brought by the present decree-holders against Fazal Shah, the son and legal representative of Gohar Shah, the original debtor, for a sum of Rs. 10,000. This suit was dismissed by the trial Court. The plaintiffs went up in appeal, and this Court, on 7th November 1932, passed a decree against the estate of Gohar Shah deceased for a sum of Rs. 5,000. In the course of certain proceedings, to which it is not necessary to refer in detail, an order was passed on 3rd August 1934, that Fazal Shah, the legal representative of his father Gohar Shah was personally liable for the payment of Rs. 2,437 out of the total decretal amount. This order was not appealed against and became final. The present proceedings relate to the execution of the decree in respect of the sum of Rs. 2,437 against Fazal Shah, who has been held to be personally liable for the sum. The Senior Subordinate Judge by an order dated 13th July 1935 allowed execution to proceed against certain crops and the papers were sent to the Collector to carry out attachment and sale, in accordance with the provisions of the High Court Rules and Orders, Vol. 1, Chap. 12. It appears that subsequently an application was made on behalf of Fazal Shah, judgment-debtor, in which he raised the plea that the crops of which attachment had been ordered by the Subordinate Judge were not liable to attachment and sale in view of the provisions of S. 18, Colonization of Government Lands Act (Punjab Act 5 of 1912). The learned Subordinate Judge gave effect to this objection, cancelling the attachment and releasing the property from the process of the Court. He further directed that his order releasing the produce from attachment should be communicated to the Collector.

The decree-holders have come up to this Court in appeal. Mr. Mahbub Elahi, the learned counsel for the decree-holders appellants, has argued that under the rule

of constructive res judicata as embodied in Explan. 4, to S. 11, Civil P. C., coupled with the general doctrine of res judicata, it was not open to the learned Subordinate Judge to revise his order and to give effect to the belated objection raised by the judgment-debtor in his application dated 12th October 1935. He has quoted a Single Bench decision of this Court in *A I R 1933 Lah 3¹* where it has been held that Explan. 4, to S. 11, applies to execution proceedings. This case seems to me to have laid down the law correctly. It was open to the judgment-debtor to raise this objection before the order dated 13th July 1935 had been made by the Subordinate Judge and not having raised it, he cannot be allowed to ask the Court to revise its order on the strength of the plea raised under S. 18, Colonization of Government Lands Act. The learned Subordinate Judge seems to be under the impression that a decision on a question of law cannot be res judicata and that, if a Judge has given a wrong decision on a legal point on a previous occasion, it is open to him to set it aside subsequently in order to rectify the mistake of law that he had made. This is a wholly erroneous view and it is surprising that a Senior Subordinate Judge should seriously lay down such an astonishing proposition. The essence of the rule of res judicata is finality. Litigation must come to an end and the rights of the parties should be settled once and for all. If it were to be laid down that a Court can set aside its previous decisions merely because they were decided on a wrong view of the law, the practical result would be that the rule of res judicata would lose all its utility and cease to have any effect.

There are a number of decisions in which it has been laid down that even a wrong decision on an issue of law operates as res judicata, inasmuch as S. 11, Civil P. C., makes no distinction between an issue of fact and an issue of law, especially when there is identity of the matter in issue and also of the cause of action. In the present case the matter in issue and the cause of action are undoubtedly identical: *vide A I R 1931 Bom 570²*; *A I R*

1. *Kidar Nath v. Taj Mohammad Khan*, *A I R 1933 Lah 3*=144 *I O 259*=34 *P L R 685*=15 *Lah 203*.

2. *Keshav Jagannath v. Gangadhar Yedneshwar*, *A I R 1931 Bom 570*=135 *I O 470*=33 *Bom L R 1443*.

1932 Bom 257³ and A I R 1933 Lah 325.⁴ Under the circumstances the order of the Court on this part of the case is wholly erroneous. It is not necessary to decide the question of the applicability of S. 18, Colonization of Government Lands Act; but, on a perusal of the section I do not think that the crops growing on the land can be included in the expression "rights or interests vested in a tenant". There is some support for this view in 33 I C 741.⁵ The decision of this question, however, is not necessary for the disposal of this appeal. I would, therefore, allow the appeal and set aside the order of the learned Senior Subordinate Judge, dated 19th November 1935. The result, therefore, is that the order dated 13th July 1935 is resuscitated. The appellants shall get their costs.

D.S./R.K.

Appeal allowed.

3. Savitri Ramayya v. Holebasappa Murgeppa, A I R 1932 Bom 257=137 I C 600=34 Bom L R 198.

4. Barkat Ali v. Karim Bakhsh, A I R 1933 Lah 325=143 I C 90=34 P L R 452=14 Lah 442.

5. Kidar Nath v. Ganesha Mal, A I R 1916 Lah 313=33 I C 741.

A. I. R. 1937 Lahore 395

ADDISON AND DIN MOHAMMAD, JJ.

Mr. Robert Burrowes — Appellant.

v.

Mrs. Enid Burrowes — Respondent.

First Appeal Nos. 135 and 139 of 1936, Decided on 22nd January 1937, from decree of Dist. Judge, Rawalpindi, D/-31st January 1936.

Divorce Act (1869), S. 22—Application for judicial separation—Allegation of adultery—Direct proof is difficult—Circumstantial evidence enabling reasonable inference of adultery is enough.

In an application for judicial separation under S. 22, Divorce Act, where adultery is alleged, it is difficult to produce evidence of witnesses who may have seen the guilty party *in flagrante delicto* and at most circumstantial evidence can be led from which a reasonable inference may be drawn of the guilty party having committed adultery: A I R 1928 Oudh 114; A I R 1928 All 338 and A I R 1923 Bom 284, *Disting.*; A I R 1933 All 427, *Foll.* [P 395 C 2]

Amar Nath Chona — for Appellant.

Harcharan Singh — for Respondent.

Din Mohammad, J. — This judgment will dispose of Civil Appeals Nos. 135 and 139 of 1936, which have been preferred by Mr. Robert Burrowes from a consoli-

dated judgment of the District Judge, Rawalpindi, granting Mrs. Enid Burrowes, wife of Mr. Robert Burrowes, a decree for judicial separation and alimony and dismissing Mr. Robert Burrowes' petition for the dissolution of his marriage and damages against the co-respondent, Mr. Wallace. The petition for judicial separation and alimony was presented by Mrs. Burrowes on 2nd August 1935 while the petition for dissolution of marriage was put in by Mr. Burrowes on 21st August 1935. Under S. 22, Divorce Act (4 of 1869), a decree for judicial separation can be obtained by a wife on the ground, among others, of adultery, or cruelty, and a decree for dissolution of marriage can be granted to a husband under S. 10 of the same Act on proof of adultery. The questions that arise for determination in this case therefore are: (a) whether it has been proved by Mrs. Enid Burrowes that Mr. Burrowes has been guilty of adultery or cruelty, and (b) whether Mr. Burrowes has established that Mrs. Enid Burrowes has been guilty of adultery.

We take up the petition of Mrs. Enid Burrowes first. She examined a large number of witnesses to prove her husband's illicit connexion with one Mrs. Wallace, and the District Judge relying upon their evidence has come to the conclusion that the allegations made by her have been fully established. We have been taken through the record by counsel on both sides and have no hesitation in endorsing the conclusion arrived at by the District Judge. In such cases it is difficult to produce evidence of witnesses who may have seen the guilty party *in flagrante delicto* and at most circumstantial evidence can be led from which a reasonable inference may be drawn of the guilty party having committed adultery. The evidence on the present record is of the nature described above and the circumstances brought on the record, taken together, lead to the irresistible conclusion that Mr. Burrowes' adulterous intercourse with Mrs. Wallace has been fully proved. Reference in this connexion may be made to the statements of Mr. J. Burrowes, his wife Dr. Wadia Burrowes, Lala Karam Chand, Mr. Thomas, Mr. Collins, Muhammad Zaman and Suraj Mal. Standing by itself, the evidence of some of these witnesses, like that of Muhammad Zaman and Suraj Mal, may not carry conviction, but read in the light of the statements of

those witnesses whose testimony is not open to attack on any ground whatever, it lends a good deal of support to the case of Mrs. Enid Burrowes. The Judge who recorded the statements of these witnesses has been impressed by their veracity, and sitting as an appellate Court, we do not find any justification for differing from his conclusion in the absence of any serious objection. Counsel for the appellant has referred to A I R 1928 Oudh 114,¹ A I R 1928 All 338² and 47 Bom 657,³ but none of these authorities is of any relevancy in this matter; in fact these authorities go against the appellant.

In A I R 1928 Oudh 114¹ it was remarked by Pullan J.:

It is easy for a wife, who has some grievance against her husband, to say that she would rather take an allowance and live apart from him, but it is not the object of the law to make such separations easy. They are merely a short road to prostitution and there are certain things which a wife must put up with. Where the husband has shown himself to be suspicious, jealous and occasionally violent, but it is not proved that he is unfaithful or that he has failed to support her or her children in decency or that he is habitually cruel, it is neither for her advantage nor in the interest of justice that she should be given a separation from her husband under such circumstances.

It would be obvious from this quotation that this judgment is of no help to the appellant. In the present case what has been mainly alleged and proved is the unfaithfulness of the husband and that makes the whole difference. From all the attendant circumstances brought on the present record, we are inclined to believe that the object of Mrs. Burrowes is not to obtain an easy riddance from her husband with a view to lead a life of unchastity with impunity, but to pursue her legal remedies in the face of unavoidable circumstances. In A I R 1928 All 338² three learned Judges of the Allahabad High Court remarked:

The Court while exercising its discretion in matrimonial cases, must have regard not only to the rights and liabilities of the matrimonial person wronged, and of the wrongdoer respectively *inter se*, but also to the interests of society and public morality. The Court should endeavour to promote virtue and morality and to discourage vice and immorality.

1. G. C. Foster v. A. B. Foster, A I R 1928 Oudh 114=107 I O 184.

2. James Peter Sherring v. Shahzadi Sherring Jackson, A I R 1928 All 338=108 I O 117=50 All 464=26 A L J 153.

3. Mrs. Rose Hill v. Mr. Luke C. Hill, A I R 1923 Bom 284=73 I O 304=47 Bom 657=25 Bom L R 289.

This may be true, but we fail to understand how these remarks apply to the present case. The decree in this case is being passed to redress the wrong done to the wife by the husband and to penalise the husband for the matrimonial sin that he has committed, and it can under no circumstances be considered that the order of the Court in this respect would in any way lead to vice or immorality. In 47 Bom 657,³ Marten, J. held that generally, a guilty party in a matrimonial suit cannot obtain relief either by way of judicial separation or by way of divorce. With this principle of law we are in entire agreement but we do not think that Mr. Burrowes has been able to substantiate his allegation of adultery against Mrs. Burrowes. Counsel for the respondent has relied on A I R 1933 All 427,⁴ where the present Chief Justice of this Court sitting as a Single Judge of the Allahabad High Court referred with approval to the following remarks of Sir William Scott:

It is a fundamental rule, that it is not necessary to prove the direct fact of adultery; because if it were otherwise, there is not one case in a hundred in which that proof would be attainable. It is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were held, no protection whatever could be given to marital rights. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.

With all respect, we are in entire agreement with the principle laid down above, and applying this test to the facts of the case before us, we have no hesitation in holding that the petitioner, Mrs. Enid Burrowes, has established beyond any reasonable doubt that Mr. Burrowes has on several occasions committed adultery with Mrs. Wallace and that on these grounds she is entitled to the decree granted to her by the District Judge. In this view of the case, it is not necessary to go into the allegation of cruelty advanced by Mrs. Enid Burrowes. We accordingly affirm the decision of the District Judge and dismiss Civil Appeal No. 135 of 1936 with costs. Adverting now to Civil Appeal No. 139 of 1936, the only statement relied on to prove the adulterous

4. O. R. Gibbs v. Mrs. E. M. Gibbs, A I R 1933 All 427=143 I O 890=1933 A L J 1108=55 All 597.

connexion between Mr. Wallace and Mrs. Enid Burrowes is that of a boy Lakshmi Chand. After giving due consideration to this statement and scrutinizing it in the light of the undisputed circumstances of Mrs. Burrowes' physical condition in December 1934 and January 1935, we are driven to the irresistible conclusion that it is but a tissue of lies. In the face of the unimpeachable evidence that Mrs. Burrowes had undergone a major operation in those days for the removal of her gall bladder and a kidney and that she had been advised by all her medical attendants to abstain from sexual intercourse on the pain of death, we cannot believe that she would have run the risk of a carnal intercourse with a paramour of hers in spite of all these admonitions. The only ground, therefore, on which Mr. Burrowes could obtain a decree for dissolution of marriage fails, and this being so, even if Mrs. Burrowes' previous adultery with Mr. Wallace in 1929 be held to have been established, it would not be sufficient for dissolution of Mr. Burrowes' marriage with her inasmuch as it had long before been condoned and it could not be revived unless the allegation of subsequent adultery was substantiated. This appeal, therefore, cannot succeed. We accordingly dismiss Civil Appeal No. 139 of 1936, but as we have already allowed costs against Mr. Burrowes in Civil Appeal No. 135 of 1936, we make no order as to costs in this appeal.

B.D./D.S. *Appeals dismissed.*

A. I. R. 1937 Lahore 397

ADDISON AND DIN MOHAMMAD, JJ.

Ganga Ram-Balmokand — Assessee—
Petitioner.

v.

*Commissioner of Income-Tax, Punjab,
N. W. F. and Delhi Provinces,
Lahore* — Opposite Party.

Civil Misc. No. 273 of 1936, Decided on
25th November 1936.

**Income-Tax Act (1922), S. 23 (3)—Flat rate
—Objection by assessee—Assessee's account
books rejected — Case held proper for
reference under S. 66.**

Where the account books of the assessee were rejected by the Income-tax Officer and he proceeded to assess him at a flat rate to which method of assessment, the assessee objected throughout the proceedings :

Held : the case was a proper one for reference under S. 66 of the Act : *A I R 1933 P C 198, Expl.* [P 399 O 1]

Kirpa Ram Bajaj—for Petitioner.

J. N. Aggarwal and S. M. Sikri —
for Opposite Party.

Addison, J. — The firm Ganga Ram-Balmokand has applied to this Court under the provisions of S. 66 (3), Income-tax Act, for a mandamus to issue on the Commissioner of Income-tax, requiring him to state the case of the assessee for the year 1933-34 and to refer it for the orders of this Court. The assessee has a head office and four factories. From 1928-29 to 1932-33, the trading accounts of the assessee were accepted and they disclosed the following flat rates of profit, namely :

1928-29	... 8'6 per cent.
1929-30	... 8'9 per cent.
1930-31	... 5'7 per cent.
1931-32	... 4'65 per cent.
1932-33	... 5'8 per cent.

In the 1933-34 assessment, which is in dispute, the rate disclosed was 3 per cent., and the books were scrutinized, the reason given for this being that the rate per cent. of profit was out of all proportion to the average rates of profits made by other persons in the same trade.

The Income-tax Officer then found that the trading account was not supported by a stock book but was based on the inventory system, under which the quantity and valuation of opening and closing stocks could easily be manipulated, directly affecting the net profits, and that in such an account a portion of the sales could be kept out of the books without leaving any chance for their detection and that in this way profit could be very easily concealed. During the investigation the assessee alleged that the balance-sheets were prepared every year on pieces of paper which were destroyed, no copy being retained and that though he had four factories for the manufacture of soap, he kept no accounts showing their individual activities, that no record was maintained of the raw material supplied to each factory or of the manufactured goods received therefrom. It was further alleged that all purchases and sales were made by the head office and that each factory drew raw material without any record and the head office sent a man with each purchaser to the factory, the goods being delivered without any record at the factory. These allegations were not believed and they are certainly unusual.

The Income-tax Officer, therefore, on the facts before him, rejected the evidence of the books, holding them to be false and cooked and not representing in fact a true and complete version of both sides of the transactions as they actually occurred in the course of business. He, therefore, increased the sales shown in the books from Rs. 3,14,456 to Rs. 3,50,000 which he estimated would account for the concealed transactions. He further applied a flat rate on these sales of 7 per cent. to arrive at the profit. The assessee objected to the Commissioner that this was not a proper method for assessment under S. 23 (3) of the Act, and asked that the case be referred to this Court. The Commissioner refused this application and the assessee has come here with a request that he be required to state the case. The Commissioner has made it quite clear that the proviso to S. 13 was not applied in this case. This proviso runs as follows :

Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine.

Possibly it may be the case that on the facts found by the Income-tax authorities the second part of this proviso may apply but that matter does not appear to arise in this case as the Commissioner has unequivocally stated that it has not been applied and that the decision was a decision under S. 23 (3) of the Act on the merits. According to S. 23 (1) if the Income-tax Officer is satisfied that a return made under S. 22 is correct and complete, he shall assess the total income of the assessee and shall determine the sum payable by him on the basis of such return. According to S. 23 (2) if the Income-tax Officer has reason to believe that a return is incorrect or incomplete he shall serve on the person who made it a notice requiring him either to attend at the Income-tax Officer's office or to produce or to cause to be there produced any evidence on which such person may rely in support of the return. Then comes S. 23 (3) to the effect that on the day specified in the notice or later the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, shall by an order in writing,

assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment. We are not here concerned with S. 23 (4).

It was contended before us that, this being an assessment under S. 23 (3), the Income-tax authorities had to come to a decision on evidence and that this was not done in the present case. It was assumed for the purposes of the argument that the books were properly rejected though they had been accepted for the five preceding years. It was argued, however, that there was no evidence, on which the Income-tax authorities could raise the amount shown in the books from Rs. 3,14,456 to Rs. 3,50,000 or on which they could apply a flat rate of 7 per cent. on the sales to arrive at the profit. It was contended that the addition to the sales and the flat rate applied were merely estimates or conjectures of the Income-tax authorities, not based on any evidence before them. If, of course, the books had been rejected under the second part of the proviso to S. 13, the Income-tax Officer had power to assess in such manner as he could determine, and this would certainly allow an estimate to be made; but this is not the case of the Income-tax authorities, the Commissioner clearly stating that it was a case of action under S. 23 (3), that is, a decision on the merits.

We were referred to a Privy Council case, 7 I T C 25.¹ There the first question was whether a sum of Rs. 90,618, being credit sales for which cash was said not to have been received during the account year should have been included in the assessment for the year in question or in the next year and it was held that there was evidence for the finding of the Income-tax authorities that the objected item was excluded from the accounts out of ordinary course and for reasons not to be justified. In these circumstances it followed that the decision of the Income-tax authorities was final. The second question before their Lordships in that case was whether a flat rate in the absence of profit and loss account was justified and it was held that, where the principle of assessment at a flat rate in the absence of profit and loss account was not contested, its amount would be for the Income-tax

1. Mian Feroze Shah v. Commr. of Income-tax, Punjab & N. W. F. Provinces, A I R 1933 P C 198=144 I C 686=60 I A 325=14 Lab 682=7 I T C 25 (P C).

Officer to determine as a question of fact. This is undoubtedly a correct exposition of the law, but in the present case the assessee appears to have objected to the method of assessment at a flat rate throughout the proceedings. His books have been rejected by the Income-tax authorities, but it is contended that there is no evidence by which a flat rate can be held established or in accordance with which the amount shown in the books could be raised to the figure estimated by the Income-tax Officer. It seems to us that this is therefore a case which should be referred to us and we require the Commissioner to state the case of the assessee for the assessment year 1933-34, and to refer the following question namely,

"Whether there was no material for the finding of the Income-tax authorities, arrived at under S. 23 (3) of the Act, that the sales should be raised from the figure shown in the books to Rs. 3,50,000 and that the correct flat rate for the calculation of profit was 7 per cent. on the sales?"

There will be no costs of this petition.

B.D./A.L.

Order accordingly.

A. I. R. 1937 Lahore 399

YOUNG, C. J. AND MONROE, J.

Gian Chand—Convict—Appellant.

v.

Emperor.

Criminal Appeal No. 1211 of 1936, Decided on 13th January 1937, from order of Sess. Judge, Sargodha, D/- 15th October 1936.

(a) Criminal Trial—Confession—Magistrate asking accused to 'make detailed statement'—Statement made thereon does not become involuntary or inadmissible.

Where the Magistrate while recording a confession asked the accused to 'make a detailed statement', it does not make the statement resulting from that question any the less voluntary. The confession as made is admissible in evidence. Such a question cannot be construed as a threat.

[P 400 C 2]

(b) Criminal Trial—Sentence — Murder — Accused 18 years old—That by itself is no reason to reduce sentence of death.

That accused is a young boy aged 18 is not by itself a sufficient reason to reduce the sentence of death to transportation for life.

[P 401 C 1]

Ram Lal Anand II — for Appellant.

D. R. Sawhney — for the Crown.

Young, C. J.—*Gian Chand* has been sentenced to death by the learned Sessions

Judge of Shahpur at Sargodha for the murder of Sant Ram, a boy between 15 and 16. Diwan Chand, a banker and money-lender of village Bhabra, had in his house an almirah and a safe. In the safe, he had some jewellery. This jewellery had been transferred to the safe some 20 days before the murder of Sant Ram. On 19th June 1936 Diwan Chand discovered that the jewellery in the safe amounting to some Rs. 2,000 in value and a note of Rs. 100 had been stolen. Diwan Chand suspected his nephew, Sant Ram, who has been murdered. Suspicion fell on Sant Ram as previously small sums had been found to be stolen from the safe. Diwan Chand and Har Bhagwan, father of Sant Ram, closely questioned Sant Ram and as a result obtained a confession from him that he had stolen the jewellery and the money at the instigation of Gian Chand and that he had handed the jewellery to Gian Chand. Sant Ram agreed to go and see Gian Chand and get the jewellery back. On the morning of 20th June Sant Ram left his father's house and after that day was never seen again alive. The relatives of Sant Ram made inquiries on the 20th as Sant Ram had not returned and it was discovered by them that three persons had seen Sant Ram walking with Gian Chand on the 20th. Gian Chand was approached and it is in evidence that he said that Sant Ram had gone to a village called Waryam. Har Bhagwan, Sant Ram's father, went to Waryam with no result. On 22nd June a report was made to the police. Suspicion very naturally under the circumstances fell upon Gian Chand who on the night of the 22nd was subjected to questions by persons who had joined the investigation with the result that on the morning of the 23rd he took a witness Beli Ram to some reeds near the well of his father and from there produced the missing jewellery wrapped up in a cloth. He also pointed out a turban and shoes which are alleged to belong to Sant Ram. The jewellery was then taken and handed over to the police. Gian Chand also showed the police where the body was lying. On 25th Gian Chand was taken to a Magistrate, First Class, who recorded a confession in which Gian Chand admitted that he had murdered Sant Ram.

This is the whole evidence against the accused. Mr. Ram Lal Anand, who appears for the appellant, argues that circumstances of the recovery of the jewellery

are suspicious. We see nothing suspicious about it. We have examined the evidence of Beli Ram and we see no reason to doubt his evidence that Gian Chand did in fact take Beli Ram to the reeds where the jewellery was discovered. The only argument advanced on this point is that Gian Chand, if he was ever in possession of the jewellery, would not have placed it in these reeds. We have not seen the reeds but we imagine they must have made a useful hiding place. Counsel then urges that the statement of Sant Ram to his relatives as to the theft of the jewellery and the complicity of Gian Chand is inadmissible, as his evidence is hearsay. Reference, however, to S. 32, Evidence Act, and in particular to sub-ss. (1) and (3) would appear to make it clear that this statement is clearly admissible. It certainly is a statement which would have exposed Sant Ram, who could not be called, to a criminal prosecution, and in our view it is also a statement as to the circumstances of the transaction which resulted in the death of Sant Ram.

The evidence of the three witnesses who saw Gian Chand and Sant Ram together on the 20th has also been attacked. They have been described as *waj takkar* witnesses. It is quite clear as regards Harnam Das at any rate that he would normally be expected to be at the brick-kiln where he said he was, and from which he saw Gian Chand and Sant Ram. Equally Kartar Singh was at his well and he gives evidence that at that well he had land of which he was the lessee. He, therefore, too would have every reason to be in that particular spot. These two witnesses, therefore, at any rate cannot be described as *waj takkar* and on examination of their evidence no attempt has been made to show that they have any reason whatever falsely to implicate Gian Chand or to give evidence against him. We are therefore satisfied that Kartar Singh and Harnam Das did see these two together on the day when Sant Ram was undoubtedly murdered. Further, evidence has been called which purports to show that Gian Chand was later on seen alone, but we pay no attention to this evidence as the witnesses cannot be sure that the day when they saw Gian Chand was the same day when he had been seen with Sant Ram. The confession of Gian Chand to the First Class Magistrate has not been relied upon by the learned Judge. The

reason given by the learned Judge is that Gian Chand, when asked, made a short statement: "On the 17th of this month a theft took place. A murder took place on the 20th."

The learned Magistrate then addressed a question to Gian Chand as follows: "Make a detailed statement?" Thereupon Gian Chand gave a detailed statement about the murder of Sant Ram. The learned Judge says that the use of the words "Make a detailed statement" was equivalent to inducing or threatening Gian Chand and that therefore this statement was inadmissible. In our opinion, it is impossible to attach any such meaning to this question. That the Magistrate under the circumstances asked the accused to make a detailed statement does not make the statement resulting from that question any the less voluntary. The accused could easily have said, "No. I will not." It is a misuse of words to suggest that such a question could be construed as a threat. We, therefore, hold that the confession of Gian Chand is admissible in evidence. The evidence against Gian Chand, therefore, is that he had a strong motive to murder Sant Ram. We are satisfied that Sant Ram and Gian Chand conspired together to steal this jewellery; that Sant Ram handed the jewellery to Gian Chand, and that Sant Ram went on the morning of the 20th to attempt to get the jewellery back. It is clear that Gian Chand then realized that if he wished to keep the jewellery or to escape a criminal prosecution, he would have to get rid of Sant Ram. No stronger motive could exist. It is on the ground of motive therefore that the discovery of the jewellery by Gian Chand is important. We are satisfied that Gian Chand did produce jewellery from the reeds of his father's well. We are satisfied too that Gian Chand pointed out the place where the body was lying; but we place no reliance on this, as it is almost certain that the police had discovered the body before Gian Chand took the police to the spot. Finally, the confession of Gian Chand makes the matter beyond dispute. Even, however, without the confession there is enough evidence to satisfy us that Gian Chand is guilty of the offence with which he is charged.

On the question of sentence counsel presses us to reduce the sentence from death to that of transportation for life on the ground that his client is aged 18.

While it appears to be quite clear that Gian Chand is not more than eighteen, we do not think that this by itself in this case is sufficient ground for us to reduce his sentence. This will be a matter for the Local Government when the case comes before them. We dismiss the appeal and confirm the sentence of death.

B.D./D.S. *Appeal dismissed.*

A. I. R. 1937 Lahore 401

TEK CHAND, J.

Sohna Mal—Decree-holder—Petitioner.
v.

Official Receiver, Sheikhpura and another, Surety — Defendants —
Opposite Parties.

Civil Revn. No. 686 of 1936, Decided on 3rd February 1937, from order of Addl. Dist. Judge, Sheikhpura, D/- 15th May 1936.

Jurisdiction—Consent or acquiescence of parties cannot give jurisdiction to Court which it does not possess—Appeal presented to and decided by Court having no jurisdiction to entertain it—Appeal held was wrongly presented and that Court had no jurisdiction to decide it—Decision of appellate Court could be set aside in revision and appeal should be returned to be presented to proper Court.

The consent or acquiescence of the parties cannot give jurisdiction to the Court to entertain and decide a case which it has no jurisdiction to entertain and decide. [P 401 C 2]

By virtue of the High Court notification under S. 39 (3), Punjab Courts Act, an appeal from the Court of the first instance was directed to the Senior Subordinate Judge and not to the District Judge. An appeal from the Court of first instance was filed in the Court of District Judge and he decided it. On revision:

Held: that it was a defect of jurisdiction that the District Judge entertained such an appeal. The appeal was wrongly presented and the District Judge had no jurisdiction to decide it. The decision of the District Judge could therefore be set aside in revision and the appeal should be returned for presentation to proper Court: *A I R 1936 Lah 575, Rel. on.* [P 401 C 2]

Sardar Hazara Singh—for Petitioner.

Mohsin Shah—for Opposite Parties.

Order.—The petitioner Sohnna Mal had obtained a decree for Rs. 365 and costs against Sardara. In execution of the decree he applied for the arrest of the judgment-debtor who, when brought before the Court, asked for an adjournment to enable him to apply for his adjudication as insolvent. The adjournment was grant-

ed on condition of his furnishing security. Mohammad Shah furnished the requisite security on 6th July 1934. Subsequently the decree-holder applied that the judgment-debtor had committed default and that the surety be called upon to pay the decretal amount. The executing Court granted the application, holding that the surety bond had stood forfeited and that the surety was personally liable to the decree-holder for the amount of the decree.

From this order the surety Mohammad Shah preferred an appeal to the District Court, on 17th June 1936, which was heard and accepted by Khan Sahib Mirza Abdul Rab, Additional District Judge. The decree-holder has come up in revision, and the first contention raised on his behalf is that in view of the High Court Notification No. 170-G/XXI-C.6, issued under the provisions of S. 39 (3), Punjab Courts Act on 16th May 1935, the appeal lay to the Senior Subordinate Judge, Sheikhpura, and not to the District Court, and that the learned Additional District Judge acted without jurisdiction in entertaining and deciding the appeal. This identical point has recently been decided by a Division Bench of this Court in *A I R 1936 Lah 575*,¹ where it has been held that it is a defect of jurisdiction if the District Judge entertains an appeal from the Court of first instance which under the aforesaid Notification lay to a Senior Subordinate Judge and that the consent and acquiescence of the parties to the appeal cannot give jurisdiction to the Court in which the appeal did not lie. Following the aforesaid ruling I hold that the appeal was wrongly presented in the District Court and that the Additional District Judge had no jurisdiction to decide it.

I accept the petition for revision, set aside the order of the learned Additional District Judge and direct that the memorandum of appeal presented by Mohammad Shah in the District Court be returned to him for presentation in the proper Court. As the question of jurisdiction was not raised before the Additional District Judge, I leave the parties to bear their own costs of this revision.

W.D./A.L.

Petition allowed.

1. *Jiwan v. Sant Singh*, *A I R 1936 Lah 575* = 164 I O 440 = 38 P L R 990.

* A. I. R. 1937 Lahore 402

ADDISON AND DIN MOHAMMAD, JJ.

Punjab National Bank, Ltd. —

Plaintiffs — Appellants.

v.

Mt. Champo and others — Defendants
— Respondents.

First Appeal No. 226 of 1936, Decided on 29th January 1937, from decree of Senior Sub-Judge, Delhi, D/- 26th February 1936.

* Insolvency — Joint Hindu family firm having only one adult member and karta adjudged insolvent—Property of firm vesting in Official Receiver — Suit by mortgagee against firm only, without impleading Official Receiver as defendant, even though mortgagee aware of insolvency—Karta dying before preliminary decree and none to represent minor members in suit—Mortgage decree and subsequent proceedings held, null and void as Official Receiver though necessary party to suit was not so made and as there was none to represent minors' interest in suit subsequent to death of karta—Purchase of mortgaged property in execution of mortgage decree, by mortgagee — Sale held, did not pass title to mortgagee so as to entitle him to sue for possession thereof.

When a mortgaged property vests in a Receiver the mortgagee cannot bring or continue a suit for foreclosure without making the Receiver the defendant and a decree obtained in his absence is not res judicata against him. [P 403 C 2]

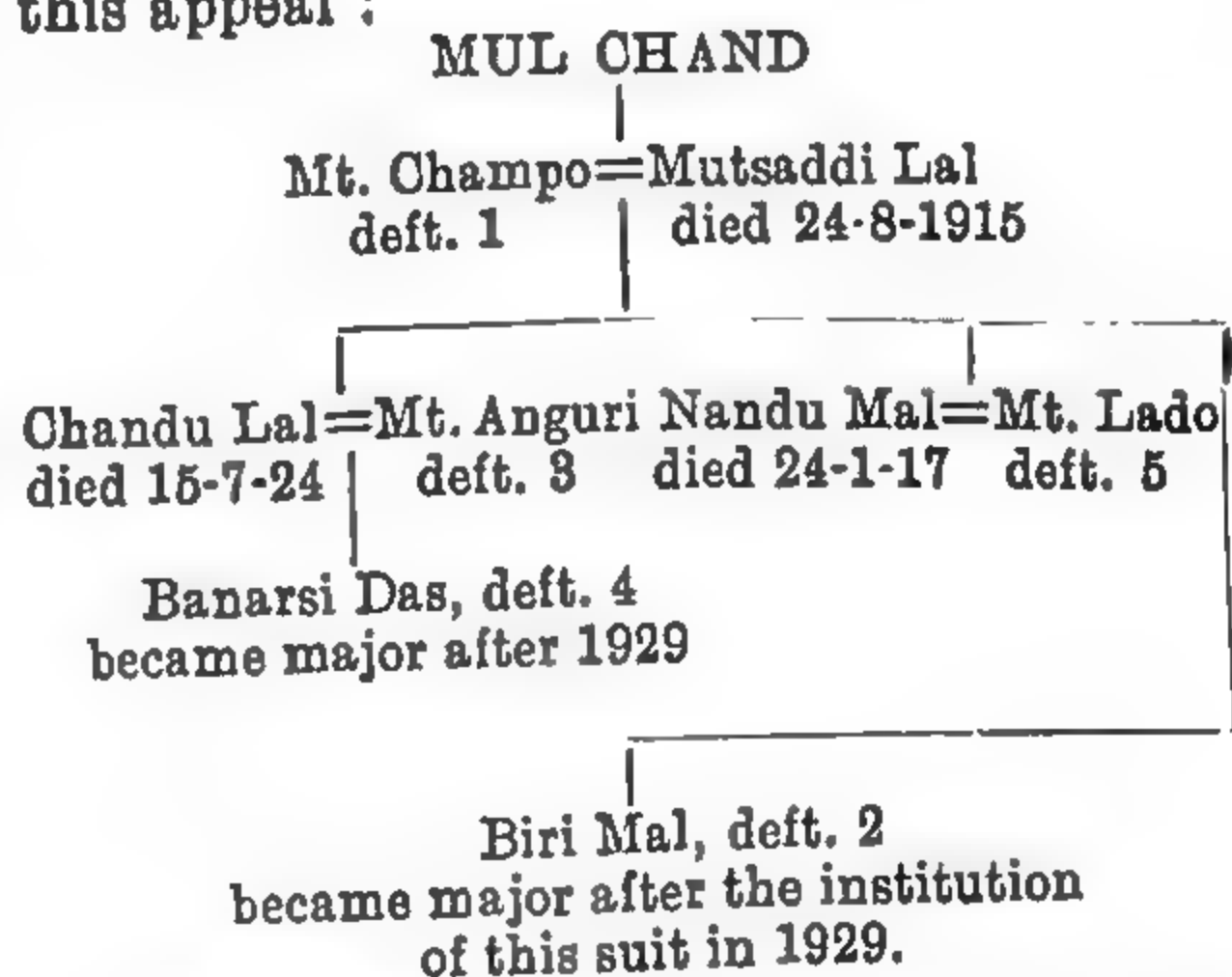
The mortgagee brought a suit on his mortgage against the joint family firm of which the manager was the only adult member of the family and karta thereof. The mortgagee knew before the institution of the suit that the karta and the family firm were adjudged insolvent but he did not implead as defendant the Official Receiver in whom the property of the firm vested on the insolvency of the firm. The karta died before the preliminary decree and there was none on the record to represent the interest of the minor members of the family in the suit subsequent to the death of the karta. In execution of his mortgage decree, the mortgagee purchased the mortgaged property and as he was not able to take possession of the same in execution proceedings and as his objection under O. 21, R. 99, Civil P. O. was dismissed, he brought a suit for possession impleading the Official Receiver as defendant:

Held: that the mortgage decree and the proceedings subsequent to it were null and void as the Official Receiver, in whom the property of the firm vested on the insolvency of the firm, though necessary party to the mortgage suit, was not made a defendant in the mortgage suit, though the mortgagee was aware of insolvency of the firm before he filed his suit on the mortgage and as the interest of the minor members of the family was not represented in the suit subsequent to the death of the karta. The sale therefore did not pass such title to the mortgagee in the property purchased by him as would entitle him to sue for possession of the same: *A I R 1927 P C 108, Rel. on.* [P 403 C 2]

J. L. Kapur, Hargopal and S. M. Sikri
— for Appellants.

Dev Raj Sawhney and Bishen Narain
—for Respondents Nos. 1 and 2.

Addison, J. — The following pedigree table is necessary in order to understand this appeal:



This family carried on a well known family business called Mul Chand-Mutsaddi Lal in Delhi. It was commenced by Mul Chand, was carried on after his death by his son Mutsaddi Lal and after him by Chandu Lal, the only adult son of Mutsaddi Lal. In October 1919 at a time when Chandu Lal was the only adult member of the family he, as manager of the family and of the business, borrowed two lacs of rupees from the plaintiff Bank to pay off trade debts and to carry on the business. The money was advanced on an equitable mortgage of various properties, including the house in dispute, the various title deeds being deposited with the Bank. The family and business became insolvent and an application was made in the Delhi Courts on 3rd March 1922 to have Chandu Lal, the sole adult member of the family, declared insolvent: he was adjudicated an insolvent there on 15th June 1922. Another application was made before the Karachi Judicial Commissioner by James Finlay and Co. on 30th March 1922 to have the joint family firm, Mul Chand-Mutsaddi Lal, adjudicated insolvent and this was done on 10th August 1922.

On 1st December 1922 the plaintiff Bank instituted a suit in the Delhi Court on the foot of the advance covered by the equitable mortgage, impleading as defendant the firm Mul Chand-Mutsaddi Lal. On 14th February 1923, Chandu Lal, the sole adult member of the family and business, appeared before the Court and stated that both he and the firm had been

adjudicated insolvent, that, therefore, neither he nor it had any right to defend the suit and that the Official Assignee of Karachi and the Official Receiver of Delhi should be impleaded as the only proper defendants. These facts were not disputed but the plaintiff Bank resisted this application and the Judge, hearing the case, repelled Chandu Lal's plea. Chandu Lal died on 15th July 1924 before the preliminary decree was passed in the mortgage suit. This preliminary decree is dated 18th July 1924. At the time it was passed, there was no adult male member in the business or in the family, and the firm had been adjudicated insolvent. A final decree was passed on 23rd April 1925. In execution of this final decree various properties were sold but only one of those properties is now in suit. It was sold on 12th February 1926 and the sale certificate is dated 25th March 1926. Some time before it was granted the Official Assignee, Karachi, objected to the execution on the ground that there was no decree to execute as he was the person in whom the equity of redemption vested. This objection was also repelled and the Bank attempted to take possession of the suit property. They were resisted by Mt. Champo, defendant 1, and the other defendants. The application of the Bank under O. 21, R. 99, Civil P. C., was rejected on 8th February 1928. Accordingly the present suit was brought under O. 21, R. 103, Civil P. C., to obtain possession of the house in suit. It was resisted by the defendants who pleaded, amongst other things, that there was no title in the Bank, the decree being a nullity.

The trial Judge has held that the Official Receiver and assignee were necessary parties in the mortgage suit, that their absence from the suit vitiated the whole proceedings and that this plea, raised on behalf of the defendants, was open to them and was not barred by S. 11 or S. 47, Civil P. C., or by the general principles of res judicata. This amounted to a finding that there was no title in the plaintiff Bank. The suit was accordingly dismissed, the parties being left to bear their own costs. Against this decision the Bank has appealed. There have been decisions such as A I R 1930 Lah 791¹ and A I R 1925

Cal 785² to the effect that an Official Receiver is not a necessary party in a suit by the mortgagee of an insolvent mortgagor to enforce his mortgage, but this question has been set at rest by the decision of their Lordships of the Privy Council in 54 Cal 595.³ It was held there that when mortgaged property has vested in a receiver the mortgagee cannot bring or continue a suit for foreclosure without making the receiver the defendant and that a decree obtained in his absence is not res judicata against him. In the present case it can be said that there was never a defendant before the Court. By the time the Bank brought their mortgage suit the only adult male member of the family who was the karta, had been adjudicated insolvent and so had the firm against whom the suit was brought. The interest therefore of the firm and of the whole family vested in the Official Assignee and the Official Receiver, and this the plaintiff Bank knew. Further, before even the preliminary decree was passed the only adult member of the family had died and the minors were not represented. There cannot be an action in which there is merely a plaintiff but no defendant. The proceedings were therefore null and void and anything done in pursuance thereof was also null and void. It follows that no title passed to the plaintiff Bank by reason of the sale certificate while the defendants are in possession. The suit was thus properly dismissed and we dismiss the appeal with costs.

It may be noted that grounds 3 and 6 of the appeal were not argued. Ground 4 is met by the fact that it was for the plaintiff Bank to establish its title to dispossess the defendants. As regards ground 5 it may be true that in a suit under O. 30, R. 1, Civil P. C., the representatives of the deceased Chandu Lal need not be impleaded but the fact remains that on his death there was nobody to represent the firm, except minors, while the firm as such had been declared insolvent, its assets vesting in the Official Assignee of Karachi. There was thus at no time any defendant representing the family or firm (ground 7).

K.B./A.L. *Appeal dismissed.*

2. Jagannath Marwari v. Kalachand Banerjee, A I R 1925 Cal 785=86 I C 1042=29 O W N 771=41 O L J 290.

3. Kalachand Banerjee v. Jagannath Marwari, A I R 1927 P C 108=101 I C 442=54 I A 190=54 Cal 595 (P C).

1. Khazanchi Shah v. Nizam Din, A I R 1930 Lah 791=126 I C 174=31 P L R 506.

A. I. R. 1937 Lahore 404

AGHA HAIDER, J.

Jodh Singh — Judgment-debtor —
Appellant.

v.

Bhagwan Das-Nanak Chand —
Decree-holder—Respondent.

Misc. First Appeal No. 75 of 1936,
Decided on 25th May 1936, from order of
Senior Sub-Judge, Jhelum, D/- 1st February 1936.

(a) Limitation Act (1908), Art. 182 (5)—
Suit on mortgage — Final decree already
passed — Decree-holder in execution applica-
tion wrongly applying for final decree under
O. 34, R. 5 (3), Civil P. C., but otherwise duly
praying for execution — Application held
made in accordance with law to the proper
Court for execution or at least a step-in-aid
of execution.

In a suit on a mortgage a final decree was
already passed by the Court. But the decree-
holder being under misapprehension wrongly
applied to the Court for a final decree under
O. 34, R. 5 (3), Civil P. C., but otherwise duly
prayed for the execution of the decree. The
Court having already passed a final decree rejected
this application :

Held : that the application, though irregular
and rejected, was made in accordance with law to
the proper Court for execution or was at least a
step-in-aid of execution within the meaning of
Art. 182 (5) Lim. Act and a formal application for
execution brought within three years from the
date of this application was in time : *A I R 1926*
Cal 1077 ; *A I R 1933 Mad 872* ; *A I R 1922 Cal*
44 ; *A I R 1922 Bom 118* and *A I R 1928 Mad*
38, Rel. on. [P 406 C 1,2]

(b) Execution—Limitation—Duty of Court.

Courts while keeping the provisions of the law
of Limitation in their mind, should put a large
and generous interpretation upon the proceedings
taken by the decree-holders as would advance
substantial justice and not defeat the just rights
of people who perhaps after years of protracted
litigation, sometimes in three or four Courts, have
at last obtained a decree. [P 407 C 1]

(c) Limitation Act (1908), Art. 182 (5)—
“Step-in-aid of execution”—Implication of.

Anything done by the decree-holder through
the machinery of the Court or any proceeding
taken by the executing Court which is calculated
to advance the case of the decree-holder in the
direction of his ultimate object of reaping the
fruits of his decree, can be treated as a step-in-aid
of execution and save the running of limitation
against him. [P 407 C 1]

(d) Practice—Mistake of official of Court
—Litigant should not be allowed to suffer
through it.

A litigant should not be allowed to suffer
through the mistake of any official of the Court
who is at all connected with the administration
of justice : *A I R 1922 P C 269, Rel. on.*

[P 407 C 2]

(e) Civil P. C. (1908), S. 11, Expl. 4—Con-
structive res judicata — There must be deci-
sion by Court either in express terms or by
necessary implication.

In order to invoke in aid the doctrine of
constructive res judicata, there must be a decision
by the Court either in express terms or by neces-
sary implication. [P 407 C 2 ; P 408 C 1]

So where in an application, the decree-holder
wrongly applied for a final decree under O. 34,
R. 5 (3), Civil P. C., and also prayed for execution
and the Court made an order that, “as final
decree has already been passed, the present appli-
cation is rejected”, but passed no order on the
prayer for execution :

Held : that there was no decision given by the
Court either in express words or by necessary
implication on the matter of execution and the
order could not operate constructively as res
judicata against the subsequent application for
execution : *A I R 1933 Lah 3* and *A I R 1933*
Lah 697, Ref. [P 408 C 1]

Achhru Ram and Hira Lal Bhagat —
for Appellant.

M. L. Puri and Qabul Chand —
for Respondent.

Judgment. — This is a judgment-deb-
tor's appeal arising out of certain execu-
tion proceedings. The facts leading up to
the present appeal are as follows : On
12th March 1929, the decree-holder
obtained an ex parte preliminary decree
against the judgment-debtor on the foot of
a mortgage, for a sum of Rs. 14,000 plus
costs and future interest. Under this
decree the judgment-debtor was directed
to deposit the decretal amount on or before
12th April 1929, and it was provided that,
in case of default, a final decree would be
passed. It appears that 12th April 1929
was a public holiday. On 15th March
1929, in the absence of the parties it was
ordered that the case should come up for
hearing on 16th April 1929. Notice of the
altered date was given to the parties. On
16th April 1929, the parties appeared in
Court. The judgment-debtor, instead of
depositing the decretal amount put in an
application asking the Court to set aside
the ex parte decree which had been passed
against him. This application was rejec-
ted after the examination of the judg-
ment-debtor regarding his reasons for
remaining absent on the date of the hear-
ing. On the same date, namely, 16th
April 1929, without any application by
the decree-holder, as required by O. 34,
R. 5, sub-r. (3), Civil P. C., the Court made
an order for the preparation of a final
decree in the presence of the parties.
Accordingly on the same date a final
decree was drawn up.

On 23rd February 1932, an application bearing the heading "application under O. 34, R. 5, Civil P. C." was made by the decree-holder asking the Court that, inasmuch as the judgment-debtor had not paid the decretal amount, a final decree under O. 34, R. 5, may be passed and the decretal amount may be realised by sale of the mortgaged property and, in case the whole of the amount due under the decree with costs, interest, etc., is not thus satisfied, the outstanding balance may be realised from the person and other property of the judgment-debtor. On this application the Ahlmad of the Court made the usual report on 23rd February 1932, but he omitted to mention that a final decree had already been passed. In fact, after particularising the amount due under the decree and other matters, he finished off the report by stating that the applicant applied for the preparation of a final decree. On this application notice was issued to the judgment-debtor and the matter came up before the executing Court on 19th May 1932. A perusal of the record showed to the Court that the final decree had already been passed on 16th April 1929, and the report of the Ahlmad was incorrect, inasmuch as it did not mention the fact that the final decree had already been passed. The Court accordingly on 19th May 1932, made an order that, "as final decree has already been passed, the present application is rejected".

On the same date, i. e., 19th May 1932, another application was made by the decree-holder for the execution of the decree. This application was in the prescribed form and, after giving the history of the case up to date, it went on to say that, on account of the wrong report of the Ahlmad, the decree-holder was prevented from making an application for execution on 23rd February 1932. The application concluded with the prayer that the decretal amount may be realized from the sale of the mortgaged property and the balance, if any, may be satisfied from the person and other property of the judgment-debtor. On 20th May 1932, the Court made an order that the application, which was dismissed the day before was for the preparation of the final decree and, inasmuch as such a decree had already been passed, the application had been dismissed. The question of limitation was left open and it was ordered that the matter should come up on 27th

May 1932, for arguments. On 27th May 1932, the Court made an order that "prima facie the application appears to be barred by time". The Court referred to the case reported as 31 Mad 68,¹ but refrained from expressing any opinion as to its applicability at that stage. It also noted that the decree-holder sought to take advantage of the provisions of S. 14, Lim. Act. It was ordered that notice should issue to the judgment-debtor and the matter should come up on 21st July 1932. Service could not be effected upon the judgment-debtor, and at the request of the decree-holder, the application was dismissed on 25th August 1932, the question of limitation being left open. On 7th February 1935, another application for execution was made, but it was dismissed for default on 10th May 1935, though the Court again remarked that the question of limitation was left open. On the same date the present application for execution was made.

It is admitted on all hands that if the application dated 23rd February 1932, did not save limitation, counting the period of three years from 16th April 1929, the application dated 19th May 1932, would be clearly time barred and the subsequent applications would not be of any avail to the decree-holder. The decree-holder however contended that the application dated 23rd February 1932, was according to law and a valid application for execution or was, at any rate, a step-in-aid of execution within the meaning of Art. 182, Cl. (5), Lim. Act, and saved limitation. He further alleged that the provisions of S. 14, Lim. Act, applied, inasmuch as he was misled by the erroneous report submitted by the Ahlmad on 23rd February 1932 and was thus prevented from making a fresh application on the same date, and therefore, he should be allowed to deduct the period between 23rd February 1932, to 19th May 1932. It was admitted that if this period were to be deducted, the application dated 19th May 1932, would be within time. The judgment-debtor raised the point that the rule of constructive res judicata, as embodied in S. 11, Explan. 4, Civil P. C., applied to execution proceedings and that, inasmuch as no order for execution of the decree was made upon the application dated 23rd February

1. Ramayyan v. Kadir Bacha Sahib, (1908) 31 Mad 68=17 M L J 596.

1932, the subsequent application would be barred under the principle of constructive res judicata.

All these points were decided against the judgment-debtor by the executing Court and the application for execution dated 10th May 1935, was held to be within time. The judgment-debtor has now come up to this Court in appeal through counsel. In my opinion the application dated 23rd February 1932, though irregular, was an application made in accordance with law to the proper Court for execution or was at least an application to take some step-in-aid of the execution of the decree. As already mentioned, the final decree under O. 34, R. 5, Civil P. C., was not passed in pursuance of a formal application by the decree-holder, though the Court had passed an order on 16th April 1929, in the presence of the parties, for the drawing up of such a decree and the decree was in fact drawn up on that date. The decree-holder therefore not having made an application under O. 34, R. 5 (3), Civil P. C., might have been under some misapprehension when he asked the Court in his application dated 23rd February 1932, for the preparation of the final decree. There was also a prayer for the execution of the decree in the application dated 23rd February 1932. O. 21, R. 11, Civil P. C., gives details of matters which ought to be incorporated in a properly drawn up application for execution. The application in question contained in the form of a narrative most of the particulars which are required to be mentioned in an application drawn up strictly in accordance with O. 21, R. 11, Civil P. C. Putting the case for the judgment-debtor at its highest, it was an irregular application, but it was an application for execution all the same. It was laid down by Page, J. in 53 Cal 664,² that:

Where an application for execution in substantial compliance with the law is preferred to the Court, such an application will be effectual to stay the progress of limitation whether the Court admits, or rejects, or returns the application, or allows such application to be amended.

In the present case all that can be said for the judgment-debtor is that the application was rejected. But all the same it would be sufficient to prevent the efflux of time against the decree-holder. In the same case Suhrawardy, J. observed that

the expression "in accordance with law" in Art. 182 (5) should be taken to mean that the application, though defective in some particulars, was one upon which execution could lawfully be ordered. To the same effect is the judgment in A I R 1933 Mad 872.³ This was a case of an application drawn up under O. 21, R. 11, Civil P. C., in which the particulars required under Cls. (d) and (g) of O. 21, R. 11 were omitted. The learned Judge observed that this omission did not mean that the application was not in accordance with law. In any event the application dated 23rd February 1932, is an application to take a step-in-aid of execution and was as such capable of saving the period of limitation. It was laid down in A I R 1922 Cal 44,⁴ that :

An application to take a step-in-aid of execution, in order that it may be in accordance with law within the meaning of Art. 182, of the Schedule to the Limitation Act, must be one praying for some relief which the Court is competent to grant.

The application dated 23rd February 1932, with the prayer for the execution of the decree asked for some relief which the Court was competent to grant. The learned Judges further observed that even though an application was defective, it may still be regarded as an application made to the proper Court in accordance with the law to take some step-in-aid of execution. In 46 Bom 269⁵ the plaintiff wrongly made an application to the Court for a final decree on 7th October 1912. This application was dismissed for non-payment of process fees. A similar application was made on 7th November 1913, but was withdrawn before any notice was served upon the defendants. It was held that these applications were steps-in-aid of execution, although they contained an erroneous prayer as regards the granting of a final decree. This judgment has a direct bearing upon the point involved in the present appeal since the present decree-holder had also made an application for the preparation of a final decree under the erroneous impression that no such decree had been passed. Similarly in A I R 1928 Mad 38,⁶ the decree-holder by applying

2. Pitambar Jana v. Damodar Gachait, A I R 1926 Cal 1077=98 I O 166=53 Cal 664=30 C W N 918=45 C L J 86.

3. Vittala Hedge v. Sheenappa Shetty, A I R 1933 Mad 872=147 I O 386.

4. Sadaya Chandra Jana v. Pares Nath Ghose, A I R 1922 Cal 44=64 I O 571=35 C L J 82.

5. Gulappa Rudrappa v. Erava Basangowda, A I R 1922 Bom 118=63 I O 844=46 Bom 269=23 Bom L R 1013.

6. Kunhammad Hajee v. Kozhuvammal, A I R 1928 Mad 38=106 I O 395.

for a final decree was endeavouring to get an order which he thought at the time was necessary before executing his decree. He subsequently made an application for the execution of the decree without obtaining a final decree which was considered unnecessary. It was held that, although the decree-holder was mistaken in applying for a final decree, that application, though not an application for execution, was, at any rate, a step-in-aid of execution. The learned Judges pointed out that, as the ultimate object of these petitions was to hasten the realization of the decretal amount, they should be treated as steps-in-aid of execution in spite of the fact that the first application, though styled as an application for a final decree, was incompetent, inasmuch as, in the special circumstances of the case, such a decree was not required.

On the authorities quoted above I am satisfied in my mind that the application dated 23rd February 1932 was an application made in accordance with law for execution or, at any rate, it was an application to take a step-in-aid of execution. In the face of these authorities and numerous other cases to be found in the law reports, it would be an act of supererogation to attempt to lay down any general proposition of law bearing upon these questions which frequently arises out of execution proceedings but as a matter of common sense, I may be permitted to observe that the Courts while keeping the provisions of the law of limitation in their mind, should put a large and generous interpretation upon the proceedings taken by the decree-holders as would advance substantial justice and not defeat the just rights of people who, perhaps after years of protracted litigation, sometimes in three or four Courts, have at last obtained a decree. There is no magic in the phrase "step-in-aid of execution" as used in Art. 182 (5), Limitation Act. Speaking generally, anything done by the decree-holder through the machinery of the Court or any proceeding taken by the executing Court, which is calculated to advance the case of the decree-holder in the direction of his ultimate object of reaping the fruits of his decree, can be treated as a step-in-aid of execution and save the running of limitation against him. Each case, of course, would depend upon its own facts and circumstances and no hard and fast rule can be laid down to

meet every possible contingency which might arise in the course of execution proceeding; but, it is submitted, the general rule, which I have tried to enunciate, would be helpful in arriving at a just decision in most of the cases in which the question of limitation arises in this form.

In this view of the case it is not necessary to enter into the question of the applicability of S. 14, Limitation Act, to the present case, though I fully realise that, owing to the negligent manner in which the Ahlmad prepared the report on 23rd February 1932, the decree-holder was misled. If the report had been correctly made and the decree-holder had been apprised of the fact that the final decree had, as a matter of fact, been already drawn up, he would have, in all probability, made an application there and then for the execution of the decree. It has been laid down by their Lordships of the Privy Council that no litigant should be allowed to suffer through the mistake of any official of the Court who is at all connected with the administration of justice. As an illustration I quote the case reported as A I R 1922 P C 269.⁷ On the point of constructive res judicata raised on behalf of the judgment-debtor, I am against him. The learned counsel for the appellant argued that the doctrine of constructive res judicata, as embodied in Explan. 4 to S. 11, Civil P. C., is applicable to execution proceedings: *vide* 15 Lah 869.⁸ With this proposition of law I entirely agree. He, however, relied upon two cases reported as A I R 1933 Lah 3⁹ and A I R 1933 Lah 697.¹⁰ In support of the proposition that since the executing Court passed no order on the prayer for execution contained in the application dated 23rd February 1932, it must be held that it had decided the point against the decree-holder. This is not correct. In order to invoke in aid the doctrine of constructive res judicata, as embodied in Explan. 4 to S. 11, Civil P. C., there must be a decision by the Court

7. Jai Berham v. Kedar Nath, A I R 1922 P C 269=69 I C 278=49 I A 351=2 Pat 10 (P C).

8. Prabhu Dayal v. Dewat Ram, A I R 1935 Lah 200=155 I C 286=35 P L R 429=15 Lah 869.

9. Kidar Nath v. Taj Muhammad Khan, A I R 1933 Lah 3=144 I C 259=34 P L R 685=15 Lah 208.

10. Madan Gopal v. Jaswant Rai, A I R 1933 Lah 697=144 I C 488=34 P L R 489.

either in express terms or by necessary implication. In the present case, having regard to the orders dated the 20th May and 27th May 1932, I am satisfied that there was no decision given by the Court either in express words or by necessary implication. Therefore, these orders cannot operate constructively as *res judicata* against the decree-holder in his present application for execution of the decree. For the foregoing reasons I affirm the order of the Court below and dismiss with costs the appeal preferred by the judgment-debtor.

D.S/K.S.

Appeal dismissed.

A. I. R. 1937 Lahore 408

ADDISON, J.

Deputy Commissioner, Gujrat —
Petitioner.
v.

Allah Dad and others —
Opposite Parties.

Civil Ref. No. 16 of 1936, Decided on 9th February 1937, made by Deputy Commissioner, Gujrat, D/- 8th April 1936.

Punjab Alienation of Land Act (13 of 1900), S. 14—Sale of land by member of agricultural tribe to person not belonging to agricultural tribe without necessary sanction of Deputy Commissioner under S. 3—Vendee's application for sanction for sale rejected by Deputy Commissioner—Vendee on date of such order in possession of area sold to him, for 23 years since sale — Vendee's possession held could be deemed to be that of usufructuary mortgagee under S. 14, for maximum period of 20 years automatically from date of sale on refusal to sanction sale—His possession for three years after this period of 20 years held was that of trespasser—Vendee's claim to property by adverse possession held could not therefore succeed.

The vendor, a member of an agricultural tribe, sold a piece of agricultural land to the vendee without taking the sanction of the Deputy Commissioner as required under S. 3 of the Act. Some years after, it transpired that the vendee was not a member of an agricultural tribe. The vendee therefore applied to the Deputy Commissioner for the necessary sanction but the sanction was refused. By the time the order refusing the sanction was passed the vendee was in possession for 23 years since the date of sale. When the Deputy Commissioner refused sanction, he did not fix any period less than 20 years as the period of the vendee's possession as usufructuary mortgagee under S. 14 of the Act, as by then the maximum period of 20 years had already expired, the vendee being in possession for 23 years since the date of sale. The vendee brought a suit claiming the land by adverse possession :

Held: that under S. 14, for want of sanction of the Deputy Commissioner, the sale took effect automatically as a usufructuary mortgage for the term of 20 years but it ceased to be a mortgage at the end of that period and the vendee became a trespasser after expiration of that period. The vendee being then in possession only for three years after such period, his claim to property by adverse possession could not succeed: A I R 1933 Lah 650, Rel. on. [P 409 C 2]

*Dewan Ram Lal — for Petitioner.**Madan Lal — for Opposite Parties.*

Order.—On 28th April 1909, Allah Dad and two others purchased a certain area of agricultural land from Alam Sher, a member of an agricultural tribe. It was discovered in 1915 that Allah Dad and his associates did not appear to be Awans and thus members of an agricultural tribe, but Mallahs who were not members of an agricultural tribe. An inquiry was, therefore, commenced by the Deputy Commissioner and on 26th October 1919 he came to the conclusion that they were Mallahs. On this finding the alienation of 28th April 1909 required the sanction of the Deputy Commissioner under the provisions of S. 3, Punjab Alienation of Land Act. On 26th October 1920, Allah Dad, etc., applied to the Deputy Commissioner to sanction the sale, as required by the provisions of the Punjab Alienation of Land Act. Unfortunately, this application was not decided till May 1932, when sanction was refused. By this time Allah Dad, etc., had been in possession of the land for 23 years. Following this decision, Allah Dad, etc., were dispossessed and they thereupon brought a suit for possession against Alam Sher and certain transferees from the latter. This suit was decreed on 23rd October 1933 by a Subordinate Judge, 4th Class, and the appeal was dismissed by the District Judge on 27th April 1934. On 20th March 1935, the Deputy Commissioner, alleging that he had come to know about the matter seven days before, applied to the District Judge under S. 21-A, Punjab Alienation of Land Act, for revision of the order of the Subordinate Judge. It is clear that even then he did not know that there had been an appeal to the District Judge, which was dismissed on 27th April 1934. This revision petition under S. 21-A to the District Judge was dismissed on 25th February 1936 on the ground that the petition lay under the provisions of S. 21-A (2) to the High Court. Accordingly, the High Court was moved under

the provisions of S. 21-A on 8th April 1936. It is this petition which is before me.

One further circumstance has to be set out: While Allah Dad, etc., were waiting for the sanction of the Deputy Commissioner or for his refusal to sanction in this case, they instituted a suit on 4th May 1922 for a declaration that they were Awans and thus members of an agricultural tribe, this suit being against the Secretary of State for India in Council and another person Izzat Beg. The suit was decreed by the trial Court on 18th August 1924, but on appeal to the District Judge the suit was dismissed on 18th April 1925. A second appeal to the High Court was dismissed on 16th December 1925, so that in that suit the declaration asked for was refused. Coming now to the revision petition before me, it must be held that on 20th March 1935 the Deputy Commissioner had only knowledge of the decree passed by the Subordinate Judge and he only asked for that decree to be modified. As that was the extent of his knowledge at the time, he was right under the provisions of S. 21-A (2) to apply to the District Judge. His application was within two months of the date of his knowledge and was within time. He has come to this Court well within two months of the date of the District Judge's order, pointing out that the decree of the Subordinate Judge had been confirmed on appeal by the District Judge and that thus the application lay to this Court. This revision petition is, therefore, within time while in the circumstances mentioned, I would have no hesitation in extending the time under the provisions of S. 5, Lim. Act, seeing that both the Subordinate Judge, 4th Class and the District Judge on appeal failed to comply with the provisions of S. 21-A (1), which enacts that every civil Court, which passes a decree or order, involving the permanent alienation of his land by a member of an agricultural tribe, shall send to the Deputy Commissioner a copy of such decree or order. It would also have been open to me to treat the petition before the District Judge as a petition to this Court. No question of limitation, therefore, arises. The merits also present no difficulties. The Courts below have held that Allah Dad, etc., have become owners by adverse possession. This, however, is not so, for it is enacted by S. 14, Punjab Alienation of Land Act, that :

Any permanent alienation, which under S. 3 is not to take effect as such until the sanction of a Deputy Commissioner is given thereto, shall, until such sanction has been refused, take effect as a usufructuary mortgage in form (a) permitted by S. 6 for such term not exceeding twenty years and on such conditions as the Deputy Commissioner deems to be reasonable.

It has already been held by me in A I R 1933 Lah 650¹ that, in these circumstances the alienation takes effect automatically as a usufructuary mortgage in form (a) permitted by S. 6 for such term not exceeding twenty years and on such conditions as the Deputy Commissioner considers reasonable. When the Deputy Commissioner refused sanction in 1932, he did not fix a term of less than twenty years as the maximum period of twenty years had already been expired by three years. That was why Allah Dad, etc., were evicted immediately after the passing of that order. They had been trespassers by that time for three years as the maximum period of twenty years had expired in 1929. The wording of S. 14 of the Act admits of no doubt and the sale took effect automatically as a usufructuary mortgage for the term of twenty years, but it ceased to be a mortgage at the end of that period and the alienees became trespassers. Adverse possession commenced to run in 1929, but no title had obviously been acquired by adverse possession as it takes twelve years for this to happen. The decisions of the Courts below were undoubtedly erroneous. I accept this petition, set aside the decrees and orders of the Courts below and dismiss the plaintiffs' suit for possession. In view of the laches displayed in the office of the Deputy Commissioner I direct that all parties shall bear their own costs in this Court and in the Courts below.

W.D./A.L.

Petition allowed.

1. Mt. Nandi v. Pala Singh, A I R 1933 Lah 650=144 I C 13.

A. I. R. 1937 Lahore 409

BRIDE, J.

Fatu and another — Plaintiffs —

Appellants.

v.

Mt. Pali and others — Defendants —

Respondents.

Second Appeal No. 1099 of 1936, Decided on 4th January 1937, from order of Senior Sub-Judge, Hoshiarpur, D/. 10th June 1936.

Appeal—Lower appellate Court rejecting documents giving reasons—High Court will not interfere.

Where lower appellate Court rejected certain documents produced at the stage of appeal and gave reasons for doing so :

Held : that the High Court would not interfere with the discretion exercised by the lower appellate Court in the absence of sufficient reason to do so. [P 410 C 1]

Mehr Chand Sud — for Appellants.

Krishna Swarup for *Achhru Ram* —
for Respondents.

Judgment.—The plaintiffs sued for possession of certain land on the grounds that it was ancestral and that it was liable to revert to them on the extinction of the line of certain persons to whom it had been gifted. The learned Senior Sub-Judge has held on appeal that the custom relied on by the plaintiff has not been proved and confirmed the decision of the trial Court dismissing the suit. From this decision plaintiffs have preferred a second appeal. A preliminary objection is raised that no second appeal is competent without a certificate as required by the Punjab Courts Act on the point of custom. The learned counsel for the appellant urged that no certificate was required as he was only contending that the *Riwaj-i-am* was misinterpreted. He referred to A I R 1931 Lah 433,¹ and 33 P L R 416.² The point is not free from doubt. But assuming that a certificate is not necessary, I am of opinion that there is no force in the argument that the *Riwaj-i-am* has been misinterpreted. Neither Q. 90 nor Q. 48 support the appellants' contention that the gifts in question were permissible according to custom. The learned counsel wanted next to refer to the oral evidence. But there is nothing to show that this was relied on before the District Judge, and it cannot be examined in second appeal. Another point urged was that the learned Senior Sub-Judge was wrong in rejecting certain documents produced at the stage of appeal. He has, however, given his reasons for doing so and I see no reason to interfere with the discretion exercised by him. I dismiss the appeal with costs.

S.C./D.S.

Appeal dismissed.

1. *Sohnu v. Babga*, A I R 1931 Lah 433=135 I C 54.

2. *Ghafur v. Shahabuddin*, A I R 1932 Lah 397 =138 I C 680=33 P L R 416.

A. I. R. 1937 Lahore 410

SKEMP, J.

Secretary of State—Defendant—
Appellant.

v.

Ghulam Mohd. and others—Plaintiffs—
Respondents.

Second Appeal No. 295 of 1936, Decided on 12th February 1937, from decree of Dist. Judge, Jhelum, D/- 12th February 1936.

Evidence Act (1872), Ss. 35 and 114—Settlement records—Later settlement records are to be preferred to previous ones—Change in revenue record surviving over long period—Presumption is change is not made without good reason—Presumption is rebuttable.

The proposition that when settlements differ the record of the later settlement should be preferred is based on the well known fact that the later settlements were carried out more carefully. This is so because of the maxim *omni præsumentur rite esse acta* and in the absence of any evidence to the contrary a presumption arises that a change in the revenue records is not made without good reason, especially if the change survives over a long period of years. This presumption may be rebutted if, for example, the records of an enquiry are produced and show no satisfactory reason, or even if a plausible explanation is suggested : A I R 1932 Lah 278 and A I R 1927 Lah 607, *Rel. on.* [P 411 C 1, 2]

Nazir Hussain—for Appellant.

Khurshaid Zaman—for Respondents.

Judgment.—The plaintiffs who are now entered in the revenue records as Sheikh Dadds brought a suit against the Secretary of State for a declaration that in reality they were Jat Dadds and not Sheikh Dadds. The trial Judge dismissed the suit but the learned District Judge accepted the appeal and granted the plaintiffs a decree. The Secretary of State has lodged a second appeal argued by Mr. Nazir Hussain, Assistant Legal Remembrancer. A preliminary objection is taken by Mr. Khurshaid Zaman for the respondents that the matter is concluded by findings of fact. *Prima facie* this is so, but, in my opinion, the District Judge has disregarded certain legal presumptions and a second appeal is competent. In the Settlements of 1860 and 1880 the plaintiffs' predecessors were described as Jat Dadds but in the revenue records of 1900 and ever since they have been described as Sheikh Dadds. The plaintiffs produced three Jat witnesses who said that the plaintiffs were their near relatives and that they intermarried with each other. The defendant placed on the

record fourteen documents in which the plaintiffs or their predecessors had described themselves as Sheikh Dadds. This is all the material evidence. The trial Judge thought, though he gave no reasons, that the later revenue records must prevail against the older ones, that the oral evidence was of no great value and that the documents produced by the defendant finally settled the matter. He also pointed out that two of the documents showed that they had mortgaged their land to statutory non-agriculturists without any objection. The District Judge said :

That in seven documents mortgage deeds or sale deeds produced by Prem Chand, D. W. 1, the plaintiffs and their predecessors described themselves as Sheikh Dadds. Jodh Singh, D. W. 2, also produced seven similar documents. I do not regard this evidence as at all conclusive as naturally the defence witnesses who are money-lenders would insist on the persons with whom they dealt being described as anything but members of a statutory agricultural tribe, and instead of saying that the plaintiffs or their predecessors described themselves as Sheikh Dadds, the lower Court ought to have said that the plaintiffs had been described as Sheikh Dadds by the money-lenders concerned.

This is not the correct way of approaching the matter. The documents produced by D. W. 1 and D. W. 2 prove admissions in documents executed by the plaintiffs or their predecessors. These admissions are not conclusive but it was for the plaintiffs to take away their weight by producing some evidence rather than relying on a mere presumption. Secondly, the presumption cannot possibly be correct in all the cases. The Punjab Alienation of Land Act, 13 of 1900, was passed in that year and came into force on the 8th June 1901. Six of these documents, namely, D. Ws. 2/1 to 6 were executed between the years 1892 and 1896. These documents were executed when there could have been no possible question of money-lenders wanting their clients to describe themselves as non-agriculturists. Further, in his discussion the learned District Judge did not consider whether greater weight should be attached to the earlier or the later Settlements. He apparently took both as of the same value. There is authority, however, that when Settlements differ the records of the later Settlement should be preferred. Mr. Nazir Hussain cited 138 I C 502,¹ and 103 I C 266.² In the former

case a Division Bench of this Court relied on continuous records from 1904-05 for over twenty years before the suit rather than on earlier records. In 103 I C 266,² the Settlement of 1892-93 was preferred to 1857. There is also older authority that the later Settlements should be preferred to the earlier Settlements when these Settlements were of the earlier part of the British occupation. This is based on the well known fact that the later Settlements were carried out more carefully. Settlements of the last fifty years or so have all been very careful, but on the maxim *omni præsumentur rite esse acta*, it must be held, in the absence of any evidence to the contrary, that a change in the revenue records is not made without good reason, especially if the change survives over a long period of years. This presumption may be rebutted if, for example, the records of an enquiry are produced and show no satisfactory reason, or even if a plausible explanation is suggested, but there is nothing of the kind here. I am therefore of opinion that the later records should be preferred. I do not know a single reported case in which earlier records have been preferred to later. The learned District Judge also referred to Rose's Glossary of the Tribes and Castes. This gives Dadds "as an agricultural clan found in Shahpur": Vol. 2, p. 215. It does not give Dadds under the heading of either Sheikh or Jat. The article on Sheikhs, Vol. 3, p. 399 points out that in the Punjab Sheikhs are not a true tribe but a group name given to converts to Islam. In my opinion the conclusions of the District Judge as to fact are vitiated by the wrong presumption he gave to the admissions of the plaintiffs and by his treating the earlier and later revenue records as entitled to exactly equal weight. I accept this appeal, set aside the judgment and the decree of the learned District Judge and restore that of the trial Court with costs throughout.

K.B./A.L.

Order accordingly.

* A. I. R. 1937 Lahore 411

DIN MOHAMMAD, J.

K. L. Gauba—Petitioner.

v.

Emperor

Cr. Misc. Appn. No. 246 of 1936, Decided on 29th September 1936, for transfer of case from Addl. Dist. Magistrate, Lahore.

1. Dost Mohammad v. Bahadar, A I R 1932 Lah 278=138 I C 502=33 P L R 220.

2. Mt. Alo v. Sher, A I R 1927 Lah 607=103 I C 266.

* (a) Criminal Trial—Transfer—Mere passing of illegal order does not justify inference against honesty or impartiality of Magistrate as to entitle accused to apply for transfer of case—Magistrate honestly believing that sufficiency of security given by accused is to be judged only by amount of moveable property owned by sureties—His action in insisting on such security alone is not such as should raise apprehension of partiality in mind of accused as to entitle him to ask for transfer.

Courts may pass orders which may either be legal or illegal, but the mere passing of an illegal order will not justify an inference against their honesty or impartiality as to entitle a party to apply for a transfer of his case. [P 414 C 2]

Where a Magistrate honestly holds a belief that it is his duty to ascertain that the security tendered by an accused is sufficient and that the sufficiency of the security is to be judged only on the amount of moveable property owned by the sureties, he cannot be said to be committing an illegality in insisting that in the light of the provisions of S. 514, Criminal P. C., that security alone can be termed sufficient which is backed by moveable property of the value of the amount secured, more specially so, when the law on the subject of the nature of the security to be tendered is not clear; the action taken by the Magistrate does not so completely disregard the legal provisions that the accused can reasonably apprehend that he is not proceeding impartially or is making an invidious distinction between him and other co-accused whose sureties he has accepted, so as to entitle the accused to ask for a transfer of his case. [P 414 C 2]

(b) Legal Practitioner—Affidavit—Affidavit should not be taken from member of English bar appearing in a case in connexion with which affidavit is required.

An affidavit should not be taken from those members of the English Bar who are appearing professionally in a case in connexion with which the affidavit is required: *A I R 1928 Lah 276, Rel. on.* [P 415 C 1]

* (c) Criminal Trial—Transfer—Accused is not entitled to have case transferred merely because he chooses to place sinister interpretation on innocent act of Magistrate.

An accused is not entitled to have his case transferred from the Court of a Magistrate, who is seised of it, merely because he chooses to place a sinister interpretation on an innocent act of the Magistrate. Otherwise, an accused person endowed with a suspicious nature, will make the administration of justice impossible. [P 415 C 1, 2]

* (d) Criminal P. C. (1898), S. 173—Accused is not entitled as of right to insist on production by prosecution before case starts, of such documents on which reliance is to be placed—He is not hampered in his defence in absence of such documents.

Neither in section 173, Criminal P. C., nor in the form prescribed by the Local Government on which police reports are to be submitted is it provided that the prosecution should produce along with the challan all the documents on which reliance is to be placed in the trial or which have to be produced by the witnesses tendered for the prosecution. An accused person

is not, consequently, entitled, as of right, to insist upon the production by prosecution, before the case starts, of such documents on which reliance is to be placed in the trial. He does not run the risk of being hampered in his defence as the law clearly entitles him to cross-examine the witnesses even after the charge. [P 415 C 2]

* (e) Penal Code (1860), Ss. 193 and 199—Accused making reckless accusation in affidavit against Magistrate, Government Advocate and District Superintendent of Police, alleging that Magistrate has passed order against him after consultation with latter—He should be called upon, in interests of justice, to show cause why he should not be prosecuted under S. 193 with S. 199—Such accusation should not be left unnoticed.

Where an accused makes a reckless accusation in an affidavit against the trial Magistrate, the Government Advocate and the District Superintendent of Police to the effect that the Magistrate has, after consultation with the latter, passed an order against him, it is expedient in the interests of justice that he should be called upon to show cause why he should not be prosecuted under S. 193 read with S. 199, Penal Code, for affirming a false affidavit. If such accusations are allowed to pass unheeded, that confidence which must be reposed in the Courts by the litigants who deal with them, is bound to be impaired. In these days when wide publicity is given to everything done in, or said in connexion with the Court, such accusations cannot be left unnoticed; otherwise there is a danger of a wrong impression being created in the world outside that the Magistracy in the Province can do all sorts of illegal acts with impunity and that the superior Courts connive at them and thus encourage them in their illegal behaviour. [P 416 C 1]

Abdul Haye—for Petitioner.

Diwan Ram Lal—for the Crown.

Order.—Mr. K. L. Gauba along with four other persons is involved in a serious case of embezzlement in respect of several lacs of rupees. His case is pending in the Court of the Additional District Magistrate, Lahore. He has presented an application for the transfer of his case to some other competent Court. The main allegations, on which this application is founded, are: (1) That the Additional District Magistrate made an invidious distinction between him and the other accused persons so far as the acceptance of the sureties was concerned, inasmuch as he insisted on his sureties, owning moveable property to the extent of the security required, and forwarded their bonds to the various District Magistrates of the Districts from which they hailed in order to make enquiries into their financial status while in the case of his co-accused, he accepted the sureties himself without laying down any such condition and without making any such enquiry. Both the

condition of moveable property laid down by the Magistrate in the case of his sureties and the procedure adopted by him were not warranted by law. (2) That, on 30th July 1936, when his case came on for hearing before the Additional District Magistrate, the prosecution moved for an adjournment of the case for a fortnight and he presented an application for bail. The prosecution resisted his application for bail and he resisted their application for adjournment. The Magistrate, without pronouncing orders on these applications, left for his retiring room and while the Magistrate was recording orders rejecting his bail application, he sent for the Government Advocate and the Deputy Superintendent of Police (Rai Bahadur Mehta Ishar Das) and that these two officers remained with the Magistrate for some time. (3) That, in spite of his repeated applications for the inspection of the documents on which the prosecution relied, he has not been given any facilities for their inspection—in fact no documents have been placed on the record—and that his request to the Magistrate that the prosecution should be called upon to produce in Court all those documents on which they relied was turned down.

Both the application and the affidavit contained some other allegations, too, but counsel for Mr. Gauba has confined his arguments to the three points mentioned above, and has urged that the cumulative effect of all these incidents is to create a reasonable apprehension in the mind of Mr. Gauba that he will not get a fair and impartial trial in the Court of the Additional District Magistrate.

The Government Advocate has opposed this application for transfer and has contended that no distinctive treatment was meted out to the co-accused of Mr. Gauba, that the procedure adopted by the Magistrate was quite justified by law, that the allegations made by Mr. Gauba concerning him and the Deputy Superintendent of Police were absolutely false and that Mr. Gauba's request to inspect the documents on which the prosecution relied was, in the first instance, not disallowed by the Magistrate and, secondly, that Mr. Gauba was not empowered by law to call upon the prosecution to produce all the documents which they intended to produce through their witnesses before the hearing of the case commenced. In view of the importance of the case, the position

of the accused and the serious nature of the allegations made by him, I have allowed full latitude to his counsel to argue the case in all its aspects and lengthy arguments have been addressed to me on both sides.

After hearing counsel and examining the record, I have come to the conclusion: (1) that the law on the subject of the nature of security to be tendered is not clear and that the contention put forward by the Government Advocate that the Magistrate, while determining the sufficiency of the sureties, is not precluded from taking outside help in coming to his own conclusions is not without force, and that, even if it be held that the procedure adopted by the Magistrate was in any way open to objection, it does not afford any reasonable basis for the apprehension entertained by the petitioner; (2) that the allegations made against the Additional District Magistrate, the Government Advocate and the Deputy Superintendent of Police in respect of the incident of 30th July 1936 have been wantonly made and that a mountain has been made out of a molehill; (3) That, if Mr. Gauba or his co-accused had any right to inspect the documents, this right was not denied to them and that the prosecution had supplied all the information that they were required to do under S. 173, Criminal P. C., and that Mr. Gauba could not call upon the prosecution to produce any other documents on which they relied before the hearing of the case commenced.

I will now take up all these matters in the order in which they have been set forth above, and give my reasons for the conclusions at which I have arrived. Taking the question of the bail bonds first, I find that four sureties offered themselves on behalf of Mr. Gauba. They were Abdul Aziz of Baghapurana, District Ferozepore, Nazar Mohammad of Kotli Daim, District Gujranwala, Nur-ul-Haq of Lahore and Mohammad Sharif Khan of Chak Hyderabad, District Sheikhpura. In the case of Abdul Aziz, the report that was received was that he owned, along with his other brothers, a house worth Rs. 8,000 and in addition owned moveable property which was not worth more than Rs. 200. In the case of Nazar Mohammad the District Magistrate of Gujranwala reported that his land was valued at Rs. 43,000 and that his moveable property was not worth more than Rs. 2,500. In the case of

Nur-ul-Haq, the Tahsildar of Lahore reported that his assets did not exceed Rs. 30,000 and that his liabilities amounted to Rs. 20,000. In the case of Mohammad Sharif Khan although the report stated that he owned considerable amount of agricultural property and besides owned one house in his Chak, the Additional District Magistrate rejected him on the ground that on his own admission his moveable property did not exceed Rs. 1,300 in value. It may be mentioned here that Mr. Gauba had to tender four sureties of Rs. 37,500 each.

The position taken up by the Government Advocate in regard to this matter is that inasmuch as S. 514, Criminal P. C., clearly says that in the case of forfeiture during the lifetime of the surety his moveable property alone will be attached and sold, the Court is bound to take into consideration the surety's moveable property alone while determining his sufficiency. In support of his contention he further refers to S. 513, Criminal P. C., which authorizes the Court to permit a person to deposit a sum of money or Government Promissory Notes in lieu of executing a bond. As against this, petitioner's counsel relies on 18 P R 1906 Cr.¹ and 46 I C 295.² In 18 P R 1906 Cr.¹ Reid, C. J., while deciding the case of a person proceeded against under S. 118, Criminal P. C., remarked that :

As to sending the security on to the Tahsildar who is to report within ten days whether the person put on security and the surety have moveable property equal in value to the amount of the bond, the exclusion of immovable property is obviously illegal and the learned Government Advocate has not attempted to defend it.

In 46 I C 295,² Sir George Knox observed that :

While it is true that so long as a surety is alive only moveable property can for default under S. 514, Criminal P. C., be attached and sold for recovery of penalty, yet I agree with the learned Sessions Judge that if the house offered as security is worth Rs. 500 and the surety is reported by the Tahsildar to be a respectable person, the security should be accepted.

I am not called upon in this case to decide whether the rulings relied on by the petitioner's counsel lay down good law or the contention raised by the Government Advocate is legally sound. What I have to determine is whether the action

taken by the Magistrate so completely disregarded the legal provisions that the accused could reasonably apprehend that he was not proceeding impartially, and, in the circumstances described above, I have no hesitation in holding that the Magistrate was honestly of the belief that it was his duty to ascertain that the security tendered was sufficient and that the sufficiency of the security was to be judged only by the amount of the moveable property owned by the sureties. Courts may pass orders which may either be legal or illegal, but the mere passing of an illegal order will not justify an inference against their honesty or impartiality. To err is no sin and in this case even the error is not so patent. This question may some day be decided finally by this Court but so long as it remains undecided I do not consider that any Magistrate will be committing an illegality in insisting that, in the light of the provisions laid down in S. 514, Criminal P. C., that security alone can be termed sufficient which is backed by moveable property of the value of the amount secured.

The charge of the Magistrate's judging the sureties of the other accused persons by a different standard does not hold good at all, as in the only two instances cited by the counsel, the sureties offered were Advocates and not anonymous or objectionable persons. As regards the allegations made against the Magistrate, the Government Advocate and the Deputy Superintendent of Police, what appears to have happened is this: Sometime after the Magistrate went into his retiring room, he sent for the Deputy Superintendent of Police to ascertain from him what further evidence was intended to be produced in the case, for the production of which an adjournment was being asked for. The Deputy Superintendent of Police gave the necessary information and left his room within a couple of minutes. This small incident has been magnified into a serious accusation outlined above. I have no hesitation in saying that any Magistrate, who seeks inspiration from any counsel for the Crown, even if he be of the position of Government Advocate, or from any Police Officer, however highly placed he may be is unworthy of his office, but I am gratified to remark that in this case the Additional District Magistrate has not been found guilty of any such delinquency. I will not even declare that his act was indiscreet.

1. King-Emperor v. Kaim Khan, (1906) 18 P R 1906 Cr=5 Cr L J 148=14 P L R 1907=5 P W R 1907 Cr.

2. Nanhe v. Emperor, A I R 1918 All 182=46 I C 295=19 Cr L J 711=16 A L J 503.

The Government Advocate has made a declaration at the Bar that he never visited the Magistrate in his retiring room on that day. He even expressed his willingness to make an affidavit in this behalf.

In view, however, of the unequivocal statement made by the Government Advocate and the remarks made in 107 I C 108³ that such affidavits should not be taken from those members of the English Bar who are appearing professionally in a case in connection with which an affidavit is required, I have dispensed with his affidavit. The Deputy Superintendent of Police has, however, made a statement on solemn affirmation before me that the facts mentioned in sub-para. (1), para. 7 of the petition were absolutely false and further that at the time when he was sent for the accused as well as their friends were present in the court-room of the Additional District Magistrate and that the door by which he entered was visible from the court-room. I may remark here that even the counsel for the petitioner did not deny that there were some persons present in the court-room at that time besides the accused. I cannot imagine that any Magistrate of the position and standing of Mr. Isar would commit such an illegality as is attributed to him in such environments. The Additional District Magistrate submitted an explanation to the District Magistrate in this behalf and that explanation is on the same lines as the statement made before me by the Deputy Superintendent of Police. I may remark in passing that much stress was laid on the observations made by the District Magistrate in his order dated 15th September 1936, but the District Magistrate appears to have misappreciated the explanation submitted by the Additional District Magistrate and wrongly recorded that "these officers" were called to his retiring room for a few minutes. He has further erred in remarking that :

It would be possible, while accepting the Magistrate's explanation (as I do completely) to hold that this interview, however harmless in fact, might appear otherwise to the accused and might give him a reasonable, even if mistaken, apprehension that the Magistrate was offering undue facilities to the prosecution.

In my view, an accused is not entitled to have his case transferred from the Court of a Magistrate who is seised of it merely because he chooses to place a sinister

interpretation on an innocent act of the Magistrate. Otherwise, an accused person endowed with a suspicious nature will make the administration of justice impossible. Similarly baseless is the allegation made concerning the withholding of documents from the accused. All that S. 173, Criminal P. C., requires is that :

The officer-in-charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report a report, in the form prescribed by the Local Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case.

The form prescribed by the Local Government on which such police reports are submitted is divided into seven columns. Col. (1) provides for the name and address of the complainant or the informant. Col. (2) provides for the name and address of the accused who have not been sent up, whether arrested or not. Cols. (3) and (4) provide for the name and address of the accused who are sent up. Col. (5) is meant for giving the details of the property, including weapons, etc., recovered from the accused. Col. (6) is meant for the name and address of witnesses and col. (7) is meant for a brief statement of the offence committed by the accused and the facts relating thereto. It would thus appear that neither in S. 173, Criminal P. C., nor in the form prescribed by the Local Government, is it provided that the prosecution should produce along with the chalan all the documents on which reliance is to be placed in the trial or which have to be produced by the witnesses to be tendered for the prosecution. An accused person is consequently not entitled as of right to insist upon the production of any such document before the case starts. He does not run the risk of being hampered in his defence, as the law clearly entitles him to cross-examine the witnesses even after the charge. In this case, however, the Magistrate had allowed the petitioner as well as his co-accused full opportunity to inspect all the documents which were in the custody of the Official Liquidator and had further assured the accused that no documents had been produced in Court which were being withheld from them. Some of the accused persons availed themselves of this opportunity and inspected the documents in the office of the Official Liquidator. The petitioner, however, did not take any steps whatsoever to utilize the

3. Mashar Khan v. Emperor, A I R 1928 Lah 276=107 I C 108=29 Cr L J 220.

opportunity so offered. It cannot, in these circumstances, be held that the Magistrate was in any way prejudiced against the petitioner or that he was denying the petitioner any right that he legitimately could exercise under the provisions of the Criminal P. C.

As I have already held that the petitioner has made a reckless accusation against the Magistrate as well as the Government advocate and the Deputy Superintendent of Police, I consider that it is expedient in the interests of justice that he should be called upon to show cause why he should not be prosecuted under S. 193 read with S. 199, I. P. C., for affirming a false affidavit. I enquired from the counsel whether his client was prepared to withdraw this accusation, but his reply was in the negative. Now, if such accusations are allowed to pass unheeded, that confidence which must be reposed in the Courts by the litigants who deal with them is bound to be impaired. In these days when wide publicity is given to everything done in, or said in connection with the Courts, such accusations cannot be left unnoticed, otherwise there is a danger of a wrong impression being created in the world outside that the Magistracy in this Province can do all sorts of illegal acts with impunity and that the superior Courts connive at them and thus encourage them in their illegal behaviour. Before I close, I direct the Additional District Magistrate to proceed with the trial of the case expeditiously and not grant any unnecessary adjournments either to the prosecution or to the defence.

R.M./R.K.

Order accordingly.

A. I. R. 1937 Lahore 416

BHIDE, J.

Budh Singh — Decree-holder —
Petitioner.

v.

Dittu and another — Judgment-debtors
— Opposite Parties.

Civil Revn. No. 887 and Exn. Second Appeal No. 1271 of 1936, Decided on 16th January 1937, from order of Dist. Judge, Gujranwala, D/- 12th August 1936.

(a) Civil P. C. (1908), S. 151—Order of sale in contravention of Punjab Land Alienation Act—Punjab Land Alienation Act providing remedy against such order—Executing Court

cannot therefore under S. 151 set aside sale which is confirmed.

It is well established that recourse to inherent powers is not justifiable when another remedy is provided by law, for setting aside an illegal order. The Punjab Alienation of Land Act itself provides for such a remedy in an application by the Deputy Commissioner to set aside any order passed in contravention of the Act by a civil Court. The executing Court therefore is not justified in resorting to inherent jurisdiction under S. 151, Civil P. C., to set aside the sale which has been confirmed. [P 417 C 1, 2]

(b) Civil P. C. (1908), O. 21, R. 92—Objection not taken before sale is presumed to have been waived.

If no objection is taken to the sale before it takes place, it must be presumed to have been waived: 2 C W N 254, Ref. [P 417 C 1]

D. N. Aggarwal — for Petitioner.

L. M. Datta — for Opposite Parties.

Order.—In the course of proceedings relating to the execution of a decree on the basis of a mortgage the land belonging to two persons namely Dittu and Amir, was sold and the sale was confirmed on 22nd January 1934. Subsequently, when the decree-holder applied for delivery of possession on 16th April 1935 the judgment-debtors raised objections that they were members of an agricultural tribe and the land was not liable to be sold in execution of the decree according to the provisions of S. 16, Punjab Alienation of Land Act. It appears that the judgment-debtors were at first entered as Maliars in the revenue records, but on an application made by Allah Ditta, one of the judgment-debtors, an enquiry was made and by order of the Commissioner, dated 24th November 1933, the entry in the jama-bandi was altered and Allah Ditta was shown as an Arain. Copy of this jama-bandi entry was produced in support of the contention of Allah Ditta, judgment-debtor. No evidence was produced by the decree-holder to rebut the presumption attaching to the entry in the jamabandi and in the circumstances the finding of the learned District Judge that the judgment-debtors were members of an agricultural tribe must be accepted as final. The sale had taken place before the order of the Commissioner referred to above but this point does not appear to me to be material in this case because the order of the Commissioner is tantamount to a declaration that the previous entry was wrong, and that the judgment-debtor Allah Ditta was in fact an Arain and had been erroneously entered as a Maliar.

I, therefore, take it that the judgment-debtors were Arains at the date of the sale and their land was not liable to be sold in execution of the decree according to the provisions of the Punjab Alienation of Land Act. In these circumstances, A I R 1936 Lah 191¹ on which the learned counsel for appellant has relied cannot help him.

The main question for decision, however, is whether, after the sale had been confirmed it was open to the judgment-debtors to raise this objection in the execution proceedings. The trial Court apparently held that it had inherent powers to set aside the sale as it was illegal, but it is well established that recourse to inherent powers is not justifiable when another remedy is provided by law for setting aside an illegal order. The Punjab Alienation of Land Act itself provides for such a remedy in an application by the Deputy Commissioner to set aside any order passed in contravention of the Act by a civil Court. (See S. 21-A of the Act). In the circumstances it seems to me that the executing Court was not justified in resorting to inherent jurisdiction under S. 151, Civil P. C. Another ground taken by the Courts below for setting aside the sale was that no personal decree had yet been passed against the judgment-debtors under O. 34, R. 6, Civil P. C., and as the land in question was different from the land covered by the mortgage, it could not be sold. This objection was not taken by the judgment-debtors at any time and the Courts below have apparently taken it *suo motu*. This procedure also does not appear to be justifiable because the objection, not having been taken before the sale, must be presumed to have been waived: See 2 C W N 254.² According to O. 21, R. 92, when no objection is taken to a sale as referred to therein, the sale must be confirmed and becomes absolute on such confirmation. Further, according to the second proviso to R. 90, O. 21, Civil P. C., as amended by this Court, the sale could not be set aside on any ground which the objector would have taken before the sale. The judgment-debtors had been duly served before the sale, but had refused to accept service and had failed to appear.

Amir, one of the judgment-debtors, later on appeared before the confirmation and entered into a compromise with the decree-holder. He failed, however, to pay the decretal amount in Court as agreed within two months and then the sale was confirmed.

It was urged that the trial Court having acted in exercise of its inherent jurisdiction, no appeal was competent. This objection was apparently not taken in the Court of the District Judge, but even if no appeal was competent, the order passed by the Courts below can be revised under S. 115, Civil P. C., inasmuch as the Courts had, in my opinion, no jurisdiction to set aside the sale after it had been confirmed. I, therefore, set aside the orders of the Courts below on the revision side and restore the order confirming the sale. In view of all the circumstances I leave the parties to bear their costs.

S.C./D.S.

Petition allowed.

A. I. R. 1937 Lahore 417

SPECIAL BENCH

COLDSTREAM, SKEMP AND

ABDUL RASHID, JJ.

Charles Wakehearst Peyton —

Petitioner.

v.

Mrs. Ada Peyton and another —

Opposite Parties.

Matrimonial Reference No. 17 of 1936,
Decided on 19th February 1937.

(a) Divorce—Decree for dissolution and co-respondent ordered to pay damages — No appeal by co-respondent—Petition for confirmation of decree — Order regarding damages can be attacked by co-respondent in such petition.

A decree for dissolution of a marriage was passed and the co-respondent was ordered to pay damages to the petitioner and respondent. The co-respondent did not appeal from the order regarding damages but when the petition for confirmation of the decree was filed in the High Court, he sought to attack the order regarding damages:

Held: that he was entitled to do so even though he had not appealed against the order: 20 Bom 362 (F B), *Foll.* [P 418 C 1]

(b) Divorce Act (1869), S. 34—Damages—Quantum of.

The means of the adulterer have nothing to do with the question of quantum of damages.

[P 418 C 2]

Mohammad Monir — for Petitioner.

Azimullah — for Opposite Party

Order. — This is a petition by Charles Wakehearst Peyton praying this Court to confirm a decree granted by the

1. Abdul Rahim v. Abdul Haq, A I R 1936 Lah 191=161 I C 752.

2. Madhusudhan v. Kailash Chander, (1898) 2 C W N 254.

District Judge of Hissar on 29th April 1936 dissolving his marriage with the respondent, Mrs. Ada Peyton, on the ground of her adultery with the co-respondent, Maxwell Trever Rees. The respondent has not appeared to oppose the petition. In granting the decree the learned District Judge ordered that the co-respondent should pay Rs. 3,000 as damages allotting Rs. 2,000 to the petitioner and Rs. 1,000 to the respondent. Against this order the co-respondent has not appealed but on his behalf Mr. Azimullah asks us now to refuse to confirm the decree and order on the ground that the alleged adultery of the respondent with his client was not proved by the evidence and no decree should have been passed.

The parties were married on 1st February 1922 in the Catholic Church at Sirsa, District Hissar, and they resided together last in Rewari. In his petition, the petitioner stated that he was a domiciled British Indian subject and this was admitted as a correct statement by the respondent in her written reply to the petition. For the co-respondent it was pleaded that the Court had no jurisdiction but the grounds of this objection were not specifically stated. We are now informed by his counsel that the objection did not relate to the domicile of the parties. We have ourselves taken the petitioner's statement which shows that he has born and educated in India, that he has lived in India all his life and that he has no intention of ever going to England. We are satisfied that he is of an Indian domicile. Under S. 55, Divorce Act no appeal lies against the decree for dissolution of marriage, but the section itself allows an appeal against an order awarding damages and it is contended by Mr. Mohammad Monir for the petitioner that the co-respondent is not entitled to attack here the order regarding damages inasmuch as it was open to him to appeal against the order. The point appears to us to be settled by the Full Bench decision of the Bombay Court in 20 Bom 362¹ in favour of the co-respondent. Mr. Mohammad Monir admits that he can refer to no authority to the contrary. We have therefore heard Mr. Azimullah on the merits of the whole case.

To prove the adultery alleged, the petitioner relied principally on a very large

number of letters (over 90) written by the co-respondent to the respondent. The genuineness of these letters was not admitted by the respondent and co-respondent at the trial, but the Judge found that they had been written by the co-respondent to the respondent. We have compared these letters with the admitted writing of the co-respondent ourselves and are satisfied of the truth of the evidence of the petitioner, Mr. Fratei and the handwriting expert that the letters in evidence were written to Mrs. Peyton by Mr. Rees, the co-respondent. These letters show that the respondent and the co-respondent were in love with each other and were continuously arranging for clandestine meetings. In particular, two letters Ex. P. W. 6/15 dated 7th September 1931 and Ex. P. W. 6/17 dated 15th September 1931 are important proof of the illicit relations existing between the respondent and the co-respondent at the time at which they were written. The evidence of the petitioner that two days after he discovered the letters relating to her adultery with the co-respondent, he accused Mrs. Peyton of adultery and she declared that she had committed adultery with the co-respondent and would "continue to do so under her husband's nose" is corroborated by Mrs. Joseph, P. W. 2, whose veracity there is no reason to doubt.

We find that the adultery was rightly held to be proved by the District Judge. We are satisfied that there was no collusion or connivance or condonation, and we accordingly confirm the decree dissolving the petitioner's marriage with the respondent. The damages awarded are certainly high having regard to the status and pay of the co-respondent. We have however given the matter our anxious consideration, and in view of the wrong suffered and the actual expenses incurred on the case by the petitioner we are unable to say that the damages in this case have been assessed too highly. The means of the co-respondent have nothing to do with the question of the quantum of damages: see the rulings cited in Rattigan on Divorce, p. 284 of the 2nd Edn., 1936. Nor are we prepared, in the circumstances of this case, to interfere with the order regarding the payment of Rs. 1,000 to the respondent, as at the present time she has an infant to maintain and has also to maintain herself, because the co-respondent, so we are informed, has married

1. Kyte v. Kyte, (1896) 20 Bom 362 (F B).

another woman during the pendency of these proceedings. Petitioner's counsel does not press for costs of this hearing and we accordingly make no order as to costs in this Court.

S.C./D.S.

Decree confirmed.

A. I. R. 1937 Lahore 419

JAI LAL, J.

Ralla Ram—Decree-holder—Appellant.

v.

Khazan Singh—Judgment-debtor—Respondent.

Second Appeal No. 1950 of 1935, Decided on 11th July 1936, from order of Dist. Judge, Sialkot, D/- 17th July 1935.

(a) Easement — Decree for injunction against owner of servient tenement restraining him from building beyond certain height — Decree-holder seeking to execute decree by demolition of additions by judgment-debtor — Real question is whether judgment-debtor has infringed original decree — Whether decree-holder has rebuilt and has increased burden are immaterial questions.

Where the owner of a dominant tenement who has obtained an injunction restraining the owner of the servient tenement from building his house beyond a certain height and within a certain distance of the decree-holder's house, seeks to execute his decree by the demolition of the additions alleged to have been made to his house by the judgment-debtor, the real question is whether the owner of the servient tenement has infringed the restrictions imposed on him by the original decree. If he has, he must be made to comply with the decree passed against him. The questions whether the decree-holder has rebuilt his house and has increased the burden on the servient tenement are not material questions. [P 420 C 1]

(b) Easement — Mere rebuilding of dominant tenement—Whether destroys easement. (*Quaere*).

Quaere.—Whether the mere rebuilding of the dominant tenement destroys the easement : *Case law referred*. [P 419 C 2; P 420 C 1]

Parkash Chandra Jain and Qabul

Chand Mital — for Appellant.

Bhagat Singh — for Respondent.

Judgment.—The full facts of this case are stated in the judgment of the learned District Judge and need not be repeated here. Briefly speaking, the appellant and the respondent are owners of adjoining houses. In 1905 there was a dispute between the parties. The appellant complained that the respondent threatened to interfere with his easements of light and air and flow of water. He instituted a suit for injunction against the respondent. This suit was decreed partially, it having been held that the respondent could not build his house beyond a certain height and within a certain distance from the

appellant's house. The details of the decree are mentioned in the judgment of the learned District Judge. Recently the respondent has added to his house and the appellant has complained that the additions have affected his easements which are reserved to him by the decree of 1905 and has, therefore, applied for execution of that decree by demolition of those portions of the respondent's house which interfere with the enjoyment of his easement reserved to him by the decree of 1905. The District Judge has held that:

There is no doubt that by erecting the wall D J and building the third storey L H K J, the respondent has definitely infringed the conditions laid down by the decree granted in favour of appellant's predecessor-in-interest;

but he held that the appellant is not entitled to execute the decree because he has rebuilt his own house and by doing so the easement has been destroyed. There was some dispute between the parties as to the time when the erections mentioned above were constructed by the respondent. It was urged by the respondent that he had done so more than three years before the application for execution. The learned District Judge has, however, found that he did so within three years of the application for execution. The only question that could, therefore, be raised on this second appeal is whether by the building of his house the appellant has lost his right of easement and whether he can be said to have increased the burden of the easement on the servient tenement. With regard to the first proposition in its abstract form no authority has been cited in support of it by the respondent's counsel. In fact he did not even attempt to argue this proposition. But he did cite some authorities in support of his contention that by building the windows of the new house higher up and shutting the old windows lower down which were mentioned in the first decree, the appellant has increased the burden of the easement on the servient tenement. In support of this contention he relied upon 26 Bom 374.¹ Some observations in this case appear to support the contention of the learned counsel. This judgment was, however, dissented from in 45 I C 985,² but was approved in A I R

1. *Bai Hariganga v. Tricamlal*, (1902) 26 Bom 374=4 Bom L R 34.

2. *Dharam Das v. Piyare Lal*, A I R 1918 Lah 235=45 I C 985.

1926 Nag 474.³ S. 31, Easements Act, the principles of which are to apply to this Province, however, indicates that mere shifting of the position of the windows does not amount to an increase in the burden of the easement, but that in each case it is a question of fact whether the burden has in fact been increased. 44 All 343⁴ also supports the appellant's contention that mere rebuilding of the dominant tenement does not destroy the easement. That case related to an easement of light.

In my opinion the proper way to decide this case would be to direct the trial Court to proceed with the execution of the decree. It must determine whether, by the construction of the wall D J as indicated in the judgment of the learned District Judge and the building of a third storey L H K J, the respondent has interfered with the easement of the appellant of light and air and flow of water as it existed at the time of the decree of 1905. The Court must assume for the purpose of this application that the present position of the window and the parnalas is where they existed in 1905; and, if the erection of the wall and the third storey mentioned above would have interfered with the enjoyment of the easements as they existed in 1905, then they must be demolished in execution of the decree, wholly or to the extent to which they have interfered with these easements; otherwise the application for execution will have to be dismissed. From the judgment of the learned District Judge it seems that the erection of wall and the third storey would have interfered with the enjoyment of the original easements if they had now existed. In my opinion, in the present case the general question whether an easement is lost by merely rebuilding the dominant tenement or the raising of the height of the windows increases the burden of the easement on the servient tenement does not really arise. The real question is whether the respondent has infringed the restrictions imposed upon him by the original decree. If he has, then he must be made to comply with the decree passed against him. The questions might have arisen if

there had been no decree. I, therefore, accept this appeal, set aside the orders of the Courts below and send the case back to the learned Senior Subordinate Judge of Sialkot with directions to proceed with the execution of the decree with due regard to the observations made above. The costs of this appeal and the appeal before the District Judge shall abide the result.

R.M./R.K.

Appeal accepted.

*** * A. I. R. 1937 Lahore 420**

ADDISON AND DIN MOHAMMAD, JJ.

Gobind and others — Defendants —
Appellants.

v.

Ram Lal and others — Plaintiffs —
Respondents.

Second Appeal No. 498 of 1936, Decided on 8th January 1937, from decree of Senior Sub-Judge, Kangra, D/- 5th March 1936.

*** * Custom (Punjab)—Alienation—Setting aside — After-born reversioner's right to challenge alienation effected before his birth — Limitation under different circumstances explained.**

An after-born reversioner has no right to challenge an alienation effected before his birth, if at the time the alienation is effected, there is no person in existence who is competent to challenge it. If, however, there is a person in existence competent to object to an alienation, an after-born reversioner has a right to challenge an alienation effected before his birth, but he cannot avail himself of any extension of time under the Limitation Act on his own account as time begins to run against the person competent to challenge the alienation from the prescribed date, and when once time begins to run, no subsequent disability stops it. In determining the period of limitation available to an after-born son, he cannot be deprived of the privileges enjoyed by the person through whom he derives his right to sue. In other words, if the existence of a reversioner clothes an after-born reversioner with a right to sue, though an after-born reversioner cannot claim the benefit of S. 6, Limitation Act in his own right, he cannot be deprived of the benefit of the extended period claimable by a reversioner in existence at the time of the alienation. An after-born reversioner suffers under the same disabilities as those under which a reversioner in existence at the time of the alienation suffers, and, consequently, if the right of the reversioner in existence at the time of the alienation is lost by the lapse of time, the right of the after-born reversioner is also lost irrespective of his personal disabilities : *Case law reviewed.* [P 424 C 2; P 425 C 1]

3. Badri v. Jafarbai, A I R 1926 Nag 474=96 I O 546.

4. Rameshwar Dayal v. Maharaj Charan, A I R 1922 All 28=65 I O 643=44 All 343=20 A L J 202.

Achhru Ram—for Appellants.

Mehr Chand Sude—for Respondents.

Din Mohammad, J.—This case has been referred to a Division Bench by Bhide, J. "in view of the importance of the point of limitation involved and the apparent conflict of rulings". Before scrutinizing, however, the various decisions cited at the Bar, it appears to me to be necessary to state shortly the facts of the case.

Gagha and Gurbhagat, sons of Ganja, sold their land measuring 17 kanals 6 marlas to one Gobinda in 1917. They were admittedly governed by customary law and their powers of alienation were restricted. At the time of this alienation, Gagha had a son, Ram Lal, who had been born on 11th May 1915, while Gurbhagat was issueless. Subsequently, a son, Brij Lal, was born to Gagha and similarly, a son, Santa, was born to Gurbhagat. It is not in evidence when Brij Lal and Santa were born, but in my view this is not material for the purposes of this appeal.

On 14th August 1934, the suit out of which this appeal has arisen, was instituted by Ram Lal, Brij Lal and Santa for possession of the land sold to Gobinda, on the usual allegations of want of consideration and absence of legal necessity. By that time both the vendors had died. Ram Lal described himself as a major, which he evidently was, while the other two plaintiffs were shown as minors, and the vendee did not dispute it. He, however, contended, *inter alia*, that the suit was barred by time. The trial Judge was not satisfied that Ram Lal was below 21 years of age and he, consequently, dismissed his suit as out of time. In the case of the other two plaintiffs, he remarked that they could not take advantage of S. 6, Limitation Act, not having been in existence at the time of the alienation, and dismissed their suit, too, on that ground. He based his judgment mainly on A I R 1934 Lah 290¹ and did not choose to follow 13 Lah 520² as he considered that it proceeded on different facts. On appeal, the senior Subordinate Judge, believing the evidence examined by the plaintiffs in support of Ram Lal's alleged birth on 11th May 1915, came to the conclusion that he was less than 21 years of age at the time of the suit. He, accor-

dingly held his suit to be within time and relying on 13 Lah 520² held the suit of the other two plaintiffs also to be within time. He accordingly granted a decree to the plaintiffs for the whole of the land except Nos. 838, 2, 3, 4 and 5 which were held to be non-ancestral. From this order the vendee along with his mortgagees preferred a further appeal to this Court, which came on for hearing before Bhide, J., who, for reasons stated above, has referred the case to a Division Bench.

The only question that falls to be judged before us is that of limitation. The relevant sections of the Limitation Act, 1908, so far as material, are reproduced below.

Section 6 (1). Where a person entitled to institute a suit . . . is at the time from which the period of limitation is to be reckoned a minor . . . he may institute the suit . . . within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor

Section 7. Where one of several persons jointly entitled to institute a suit . . . is under any such disability and a discharge can be given without the concurrence of such person, time will run against them all; but, where no discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others, or until the disability has ceased.

Section 8. Nothing in S. 6 or in S. 7 . . . shall be deemed to extend for more than three years from the cessation of the disability . . . the period within which any suit must be instituted . . .

Section 9. Where once time has begun to run, no subsequent disability or inability to sue stops it.

These sections have been the subject of judicial decisions from time to time in relation to the question at issue, and I would, therefore, now examine those cases which have been placed before us by both sides. The leading authority on the subject of the right of an after-born reversioner to challenge a pre-natal alienation is a Full Bench ruling of the Punjab Chief Court reported as 55 P R 1903.³ The question referred to the Full Bench was, whether a son begotten after an alienation of ancestral property by his father could impugn that alienation, the parties being governed by custom. Three Judges constituted the Full Bench: Sir William Clark, C. J., Reid and Chatterji, JJ. The learned Chief Judge was of opinion that an after-born son could challenge the alienation, irrespective of the fact whether any collateral was in existence or not. Reid, J. came to a different

1. Arjan Singh v. Waryam Singh, A I R 1934 Lah 290=154 I O 592.

2. Jowala Singh v. Sant Singh, A I R 1932 Lah 605=140 I O 375=33 P L R 808=13 Lah 520.

3. Jowala v. Hira Singh, (1903) 55 P R 1903=117 P L R 1903 (F B).

conclusion and in the absence of any definite custom on the point based his decision on Hindu law. Chatterji, J. agreed with the finding of Reid, J. but on the score of custom. The decision of the majority was that, under the Punjab Customary law a transfer by an owner could not be contested by a son begotten by the owner after the date of the transaction unless there was in existence at the date of the transfer some one who could challenge it and had not ratified it before an after-born son was begotten. Neither was the point of limitation referred to the Full Bench, nor was it discussed.

In 22 P R 1907,⁴ a gift had been made in favour of his niece by one Lala on 5th November 1881, and registered a few days afterwards. On 10th August 1883, the donor had mutation of names in respect of the said property as also of the rest of his estate, effected in favour of the donee. At the time of these transactions, one Ghulam, a nephew of Lala, was in existence, but he took no steps to challenge the alienation. In August 1902, Ghulam's four sons, all of whom had been born after the alienations, brought a suit for a declaration that the gifts were invalid. At the time of the suit, three plaintiffs were minors and the fourth had attained his majority within three years of the suit. In these circumstances, it was held by a Division Bench of the Punjab Chief Court that the suit was time-barred, inasmuch as the cause of action had accrued in 1881 and 1883 respectively and time having thus begun to run, the subsequent birth of a reversioner did not stop it. It was observed by the learned Judges that a reversioner could not, if born after the cause of action had already accrued, and time begun to run, claim an extension of time under S. 7, Lim. Act, 1877. The learned Judges further remarked that a reversioner born after the alienation could contest its validity only if the period of limitation had not expired before the date of his birth and his suit was brought within the period prescribed by law. These remarks no doubt, favour the vendee in this case but, with all respect, I venture to say that they are in the nature of obiter dicta and their full implications were not considered at the time. The decision of the case, to my mind, mainly rested on the ground

that as the reversioner in existence at the time of the transfers had lost his right, the after-born reversioners could not, independently of him, claim any extension of time. In 108 P R 1907,⁵ a gift was made by one Nurdad in 1877 and mutation was effected thereon in 1878. He remained sonless for about ten years and then one son was born to him in 1887 and another in 1888. Nurdad died in 1903 and in 1905 a suit was brought to recover the gifted land by the two sons of Nurdad among others. It was contended by the donees that the suit was time-barred. Johnstone and Rattigan, JJ. who decided the case observed :

The way we look at the limitation question is this: If in 1877-78 there was any reversioner of Nurdad's in existence capable of objecting to the gift, then time began to run at once in favour of the donees. Plaintiffs undoubtedly on this hypothesis had a right to sue for a declaration when they came into existence, but time did not then begin to run afresh for them, nor can they in view of S. 9, Lim. Act, 1877 take advantage of S. 7 of the same Act. . . . If time did not begin to run against them in 1878, it could only be because there was no living reversioner in 1878 to contest the gift, in which case plaintiffs have no *locus standi* at all; and if time did begin to run, it did not cease to run on the births of the plaintiffs, minors though they were.

Here, too, the judgment against the minor plaintiffs born after the alienation, if properly scanned, appears to have been based on the fact that the persons in existence at the time of the gift had lost their right to challenge it by lapse of time. In 40 Cal 966,⁶ which was a case under Hindu law, four sons of a Hindu contested an improper disposition of property made by him. The learned Additional Judicial Commissioner of the Central Provinces held that as the first plaintiff had instituted the suit within three years of attaining the age of 21, he was entitled to the benefit of S. 7, Lim. Act, 1877, and the suit was not barred against him but it was barred as against his younger brothers, who were born after the commencement of what he considered the adverse possession of the defendant. On appeal to His Majesty in Council, it was conceded that if plaintiff 1 succeeded in the suit, his younger brothers, born before a partition of the estate, would be entitled to share in the relief. Their Lordships of the Privy Council observed that this position had

4. Umra v. Ghulam, (1907) 22 P R 1907=27 P L R 1908=89 P W R 1907.

5. Inayat Khan v. Shabu, (1907) 108 P R 1907.
6. Ram Kisor Kedarnath v. Jainarayan, (1913) 40 Cal 966=20 I; C 958=40 I A 213=10 N L R 1 (P O).

been rightly conceded. This authority however does not afford any help in the solution of the problem before us. It is to be kept in view that the incidence of Hindu law in the matter at issue is different from that of customary law, as explained in 55 P R 1903.³ Further, a Division Bench of this Court, in 1 Lah 558,⁷ considered the true import of this decision and remarked that the finding of their Lordships was not that the suit of the younger plaintiffs was within time but was merely a finding that plaintiff 1 single-handed could succeed in the suit.

In 1 Lah 558,⁷ four sons of a Hindu contested the sale by him of his occupancy rights more than 12 years after the alienation. At the time of the alienation only one of them was in existence and was about nine years of age. At the time of the suit however he was more than 21 years of age and his suit was thus clearly barred by time. On this ground, a Division Bench of this Court, dismissed the case of the other three sons also, although minors still, with the remark that they not having been in existence at the time, when the right to sue accrued, could not take advantage of the provisions of S. 6, Lim. Act. In 3 Lah 99,⁸ a Division Bench of this Court remarked:

There remains the question whether the minor plaintiffs in this case were competent to challenge the prior mortgages executed as they were more than 12 years before this suit. The view of the lower appellate Court that the plaintiffs would gain any benefit from the fact that Ala Singh's time for challenging these mortgages had not expired is plainly incorrect. The point hardly requires any authority, but a clear authority on the point is 1 Lah 558.⁷ Counsel for the respondent attempted to argue that as Ala Singh was still a minor, time was not yet running against the mortgagees. This is clearly a fallacious view of the law. The opinion of the District Judge, if correct, would involve the intolerable inconvenience of accumulated successive disabilities which for an interminable period might subvert titles apparently well established and produce the most ruinous instability.

It must be remarked in connexion with this case that neither the facts as given in the headnote nor those mentioned in the judgment present the case in its true perspective. A reference to the original record will show that the sale in suit took place in 1905 and the suit by the five minor sons of the vendor was instituted in 1916. Of these only one son was in

existence at the time of the sale and the remaining four had been born after the alienation, but their right to attack their father's alienation of 1905 was not contested. By the sale, however, certain previous mortgages had been redeemed and the main contention raised by the vendee was that in view of the fact that one Ala Singh, a brother of the vendor, was in existence at the time of the mortgages and had not challenged them, the after-born sons of the mortgagor could not attack them after Ala Singh's right had been barred by time. The remarks quoted above apply to that aspect of the case and so far as they go are consistent with the decision of this Court reported in 1 Lah 558,⁷ but in no way cover the present case. It further appears from the judgment of the District Judge that the eldest son of the mortgagor was also in existence at the time of some of the mortgages but that point was neither raised on appeal to this Court, nor was it considered by the learned Judges. I may also observe with great respect that the argument based on the danger of accumulated disabilities animadverted upon by the learned Judges does not appear to me to be very convincing, as such disabilities are of common occurrence and have been even provided for in sub-ss. (2), (3) and (4) of S. 6, Limitation Act. Similarly, under Art. 141, Limitation Act, a suit to contest a widow's alienation can be instituted within 12 years after her death, and there are cases on record where a vendee's title has been disturbed close upon half a century after the alienation.

In 47 All 165⁹ which again was a case under Hindu law, the sale that was attacked had taken place in 1893. Of the four sons of the vendor, the first had been born in 1886 and the second in 1891. They were thus in existence at the time of the sale. Of the remaining two sons, one was born in 1897 and the other in 1900. After referring to Ss. 6, 7 and 8, Limitation Act, their Lordships of the Privy Council observed :

It is conceded that the suit would not be saved by these sections if brought by the first three plaintiffs alone ; but it is contended that plaintiff 4 is entitled to the extended period for which the sections provide and that the suit is, therefore, not barred by limitation. Both the Courts in India have decided adversely to this conten-

7. Lachman Das v. Sundar Das, A I R 1920 Lah 39=59 I C 678=1 Lah 558.

8. Bur Singh v. Hazara Singh, A I R 1922 Lah 275=63 I C 760=3 Lah 99.

9. Ranodip Singh v. Parmeshwar Pershad, A I R 1925 P C 33=86 I C 249=52 I A 69=27 O C 343=47 All 165 (P O).

tion. The cause of action arose on 3rd June 1893 and it is from that date that the period of limitation is to be reckoned. The fourth plaintiff's subsequent birth on 30th November 1900, did not create a fresh cause of action or a new starting point from which limitation should be reckoned.

Their Lordships further remarked that a plaintiff who was not in existence at the time when the period of limitation began to run was not a person entitled to institute the suit within the meaning of S. 6, Limitation Act. In 8 Lah 19,¹⁰ which was a case under customary law, one of the plaintiffs who was admittedly of age was not found to be under 21 years of age at the time of the institution of the suit and the remaining three plaintiffs who were not in existence at the time of the alienation were minors. The case of the major plaintiff was obviously barred by time and as regards the minor plaintiffs the learned Judges who decided the case remarked that as they were not in existence at the time of the mutation, they were not entitled to the benefit of the extended period under S. 6, Limitation Act, and were only permitted to sue before the expiry of 12 years from the date of the mutation through a next friend. These remarks were based on 22 P R 1907⁴ and 108 P R 1907,⁵ but it would be obvious that they were not necessary for the disposal of the case. The suit of the after-born reversioners was barred in any circumstances inasmuch as the reversioner who was in existence at the time of the transfer had no subsisting right at the time the suit was instituted. Reference in this connection was made to 47 All 165⁹ and that judgment was enough to non-suit the after-born reversioners.

In 13 Lah 520,² which was decided by a Division Bench of this Court, of which my learned brother was a member, regard was paid for the first time to the subsisting right of the reversioner who was in existence at the time when the cause of action arose and it was remarked by the learned Judges that the after-born reversioner in that case was entitled to take advantage of the subsisting right of the reversioner who was alive at the time of the alienation, though he could not obtain a fresh period of 21 years from the date of his birth. With all respect, I am in full agreement with the view expressed therein, as, in my view, this is the only logical conclusion that follows from the

fact of conceding to the after-born reversioners a right to sue on account of the existence of a reversioner competent to object at the time of the alienation. So long as the right to sue subsists, an after-born reversioner cannot be reasonably deprived of its exercise by an arbitrary curtailment of the period of limitation in his case. If he derives his right from another person through any fiction of law, he must be empowered to exercise it so long as that other person can do so under the law. In being so permitted, an after-born reversioner is not allowed any benefit of S. 6, Limitation Act, in his own right, but is merely given full advantage of the privilege conferred on the person legally entitled to demand it.

The only other case that remains to be considered is A I R 1934 Lah 290,¹ which was relied on by the trial Judge in dismissing the suit. In that case also I have referred to the original record which shows that there was a reversioner in existence at the time of the execution of the will which was challenged by an after-born reversioner and that the right of the reversioner who was in existence at the time of the will to challenge it, was long barred by time before the after-born reversioner brought his suit. This authority, therefore, does not cover the facts of this case. At this time of day, it may look presumptuous on my part to attempt to clarify the law on the matter at issue but considering that it would tend to facilitate matters if the principles governing it were stated in clear terms and at one place, I venture to lay down the following propositions which in my view are deducible from the authorities reviewed above : (1) An after-born reversioner has no right to challenge an alienation effected before his birth, if at the time the alienation is effected, there is no person in existence who is competent to challenge it. (2) If, however, there is a person in existence competent to object to an alienation, an after-born reversioner has a right to challenge an alienation effected before his birth, but he cannot avail himself of any extension of time under the Limitation Act on his own account as time begins to run against the person competent to challenge the alienation from the prescribed date, and when once time begins to run, no subsequent disability stops it. (3) In determining the period of limitation available to an after-born son, he cannot be

10. *Shahamad v. Salabat*, A I R 1927 Lah 97 = 97 I C 435 = 8 Lah 19 = 28 P L R 283.

deprived of the privileges enjoyed by the person through whom he derives his right to sue. In other words, if the existence of a reversioner clothes an after-born reversioner with a right to sue, though an after-born reversioner cannot claim the benefit of S. 6, Limitation Act in his own right, he cannot be deprived of the benefit of the extended period claimable by a reversioner in existence at the time of the alienation. (4) An after-born reversioner suffers under the same disabilities as those under which a reversioner in existence at the time of the alienation suffers, and consequently, if the right of the reversioner in existence at the time of the alienation is lost by the lapse of time, the right of the after-born reversioner is also lost, irrespective of his personal disabilities.

Coming now to the facts of this case, in the matter of limitation it is governed by the Punjab Limitation (Custom) Act, 1920. Under S. 7 of that Act, no suit for the possession of ancestral immoveable property on the ground that an alienation of such property is not binding according to custom can lie if a suit for a declaration that the alienation is not so binding would be time-barred, unless a suit for such a declaration has been instituted within the period prescribed by the Schedule to the Act. Under Art. 1 of the Schedule, a suit for such a declaration can be brought within 6 years of the date of registration of a deed, if any, or of the attestation of mutation of the transaction in question or of the physical possession of the alienee as the case may be, or of the knowledge of the plaintiff. If no declaratory decree of the nature referred to above is obtained, a suit for possession can be brought only within six years of the starting points of limitation mentioned above and if such declaratory decree is obtained, then within six years of the date on which the right to sue accrues or the date on which the declaratory decree is obtained, whichever is later. In the present case, although the alienation took place in 1917, and time began to run from that date, Ram Lal's existence at the time of the alienation and his subsequent minority saved limitation for him under S. 6, Limitation Act 1908 read with S. 5, Punjab Limitation (Custom) Act 1920. Under S. 6 read with S. 8, Limitation Act 1908, he could sue within three years of attaining majority, and consequently, he was well within time when he instituted

the suit in 1934. On the principles enunciated above, Ram Lal's existence at the time of the alienation as well as the subsisting of his right helps his younger brother, Brij Lal, too, although, on his own account he cannot claim any extension of time. I would hold, therefore, that the suit of both Ram Lal and Brij Lal was rightly decreed by the Senior Subordinate Judge and as against them I would dismiss this appeal.

The case of Santa, however, stands on a different footing. Ram Lal, no doubt, could bring a suit to contest Gurbhagat's alienation so long as Santa was not born, but he did not do so. In the presence of Santa, he is not competent to sue for possession in respect of Santa's father's alienation. In these circumstances, Santa cannot seek any advantage on Ram Lal's account and his own suit for possession is evidently barred by time. His suit, therefore, relating to his own father's transfer cannot succeed. I would accordingly set aside the decree of the Subordinate Judge so far as it relates to Gurbhagat's transfer and allow the appeal to that extent. The result is that Ram Lal and Brij Lal would be entitled to obtain possession of one-half of the land in suit (excluding Nos. 838, 2, 3, 4, and 5 which have been found to be non-ancestral and thus immune from attack) without making any payment whatsoever, and the suit relating to the rest of the land would stand dismissed. As both sides have equally succeeded at the final stage of the suit, I would leave the parties to bear their own costs throughout.

Addison, J. — I agree.

B.D./D.S. *Order accordingly.*

A. I. R. 1937 Lahore 425

ADDISON AND DIN MOHAMMAD, JJ.

Mehr Mohammad Khan and another —
Plaintiffs — Appellants.
v.

Jamadar Adalat Khan — Defendant
— Respondent.

Letters Patent Appeal No. 148 of 1936, Decided on 1st February 1937, from decree of Jai Lal, J., D/-1st October 1936, reported in *A I R 1937 Lah 70*.

(a) *Res judicata* — Suit for declaration of private right of thoroughfare—Previous suit by certain other persons claiming same right not in representative capacity—No private

right claimed by plaintiffs in common for themselves and others in previous suit — Notice under O. 1, R. 8 not issued — Subsequent suit is not barred under either S. 11, Expl. 6 or O. 1, R. 8.

Certain persons instituted a suit for declaration that the defendant was not authorized to close a thoroughfare used by them from time immemorial. In a previous suit by certain other persons against the same defendant the same right of thoroughfare was claimed. The previous suit was not instituted in the interest of any other person other than the plaintiffs in that suit, nor was any private right claimed by the plaintiffs in that suit in common for themselves and others. The notice enjoined in R. 8 of O. 1, Civil P. O., was not issued :

Held : that a subsequent suit was not barred under either Expl. 6 to S. 11 or O. 1, R. 8, Civil P. C. : *A I R 1933 P C 183* and *A I R 1936 Lah 13, Expl.* [P 427 C 2]

(b) Civil P. C. (1908), Ss. 11, 91 and O. 1, R. 8—Representative suit relating to private right—Decision is binding on all interested persons including plaintiff only when formalities in O. 1, R. 8 are observed—Suit relating to public right—Decision is binding on all persons including plaintiff, only when provisions of S. 91 are complied with.

A decision in a representative suit binds all persons other than the plaintiffs expressly named in the plaint only when, (a) if the suit relates to a private right, the formalities as laid down in O. 1, R. 8, Civil P. C., are observed, and (b) if the suit relates to a public right, the formalities laid down in S. 91, Civil P. C., are observed : *A I R 1933 P C 183, Rel. on.* [P 428 C 1]

(c) Civil P. C. (1908), S. 11, Expl. (6)—Interpretation — Words 'claimed in common for themselves and others' govern only 'private right' and not 'public right'.

Words 'claimed in common for themselves and others' in S. 11, Expl. 6, Civil P. C., govern only the words 'private right' and not 'public right'. The words 'public right' stand by themselves. [P 428 C 1]

Ghulam Rasul — for Appellants.

Achhru Ram — for Respondent.

Din Mohammad, J.—The facts giving rise to this appeal are these: Mir Muhammad Khan and Abdullah Khan instituted a suit against Jamadar Adalat Khan for a declaration that the defendant was not authorized to close a thoroughfare marked in the plan as it had been in existence from time immemorial. They further asked for the grant of a perpetual injunction but they did not expressly specify in the plaint as to what relief they prayed for in that respect. The suit, however, was treated as one for the grant of a perpetual injunction restraining the defendant from obstructing the said thoroughfare. The defendant resisted the suit on a variety of pleas including that of res judicata. Both the trial Judge and the

District Judge dismissed the suit on the ground that it was barred by the rule of res judicata inasmuch as prior to the institution of this suit two other persons Raj Wali and Feroze had instituted a suit against the present defendant claiming a similar relief and had been non-suited. The plaintiffs came up in appeal to this Court and Jai Lal, J., before whom the appeal came on for hearing agreed with the decision of the Courts below and dismissed the appeal. Hence this Letters Patent Appeal. The sole question that falls to be determined in this case is whether the present suit was barred under Expl. 6 to S. 11 Civil P. C. That Explanation reads as follows :

Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Along with this is to be read R. 8, O. 1, Civil P. C., which says :

(1). Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct ; (2) any person on whose behalf or for whose benefit a suit is instituted or defended under sub-r. (1) may apply to the Court to be made a party to such suit.

Counsel for the appellants contends that both Expl. 6 to S. 11 and R. 8, O. 1, should be read together and unless all the formalities enjoined in R. 8 are observed, a suit, whether it relates to a public or a private right, does not bar a subsequent suit claiming the same relief. He further urges that the words 'claimed in common for themselves and others' as used in Expl. 6 govern the words 'public right' as well as 'private right' and inasmuch as in the previous suit instituted by Raj Wali and Feroze, no right was claimed in common 'for others', the present suit will not be barred by the doctrine of res judicata.

The judgment of the trial Judge is not clear as to the grounds on which the suit was dismissed. The District Judge, however, appears to have proceeded on the assumption that the right claimed in the previous suit was a public right and consequently the subsequent suit came within

the ambit of S. 11, Expl. 6, and the same view found favour with the learned Judge of this Court. In view of the recent pronouncement made by their Lordships of the Privy Council in 56 Mad 657¹ we have no hesitation in holding that neither the District Judge nor the learned Judge of this Court took a correct view of the law. As pointed out by their Lordships of the Privy Council, the words 'a public right or of' were added to Expl. 5 to S. 13 (which now corresponds to Expl. 6 to S. 11) for the first time in 1908 and as it stood before the Civil Procedure Code was amended, it merely referred to a private right and not to a public right. In the opinion of their Lordships, this amendment was introduced on account of the enactment of the new S. 91, which dealt with public nuisance and a suit in relation to which could either be instituted by the Advocate-General or by two or more persons having obtained the consent in writing of the Advocate-General. At p. 677, their Lordships have observed as follows :

So far as mere words are concerned it probably would have to be agreed that a suit in respect of a public nuisance brought by any member of the public would be a litigation 'in respect of a public right'. When, however, it is found that such a litigation where no special damage has been sustained is only authorized under the Code if it be instituted with the consent in writing of the Advocate-General, is it to be said that the benefit of the Explanation (6 to S. 11) is to be extended to a decree in such a suit where no such consent has been obtained, the necessity for it having been, perhaps, overlooked? The answer must, it seems, be in the negative; but, although the instance is more striking, the same principle must, their Lordships think, apply to a decree in a representative suit properly so called, when, in view of the provisions of the Code in that behalf, "no persons interested in such right other than the persons litigating are affected by the decree".

We are respectfully bound to follow this decision of their Lordships of the Privy Council and have no option but to hold that even if it were held that the previous suit related to a public right, the present plaintiffs will not be barred from claiming the same relief inasmuch as the decree made in the previous suit did not affect them in any manner and more especially as the formalities laid down under S. 91 were not observed. This disposes of the ground taken by the District Judge as well as the learned Judge of this Court. There still remains to be consi-

dered whether the subsequent suit was barred on any other ground. It is admitted that the previous suit was not instituted in the interest of any other person other than the plaintiffs in that suit, nor was any private right claimed by the plaintiffs in that suit in common for themselves and others. It is further obvious that the notice enjoined in R. 8, O. 1 was not issued. In these circumstances, we have no hesitation in holding that the subsequent suit was not barred under either Expl. 6 to S. 11 or R. 8, O. 1. In this respect also we rely on the judgment of their Lordships of the Privy Council alluded to above. The following remarks made by their Lordships at p. 676 of the report are pertinent :

Nor are their Lordships impressed by the general principles upon which apparently the Full Bench relied. First of all the learned Judges in ignoring the conditions imposed by the rule seem to have discounted altogether the requirements as to notice thereby made so prominent. The observance of these requirements, their Lordships hold to be essential. They constitute the nearest available substitute when dealing with numerous persons, scattered it may be throughout India, for the personal service upon a defendant required in the case of an ordinary suit. It is no more permissible to dispense with the one requirement than with the other if the person in view is to be bound by the decree.

At p. 672 of the Report their Lordships remarked as follows :

But, even if it be assumed that the original suit was a representative suit governed by S. 30, (O. 1, R. 8), but one which was prosecuted without leave of the Court and with no notice given of its institution either as required by the section or at all, then the very serious question arises whether the decree in such a suit is brought within S. 13, Expl. (5) of the Code of 1877, which deals with the plea of *res judicata*.

The judgment under appeal before their Lordships of the Privy Council had held that Expl. 6 was not controlled by O. 1, R. 8, and that if a Court allowed a suit to which the rule applied to proceed in a representative capacity for the benefit of numerous parties, all those parties would be bound by the decree if the contest leading to it were *bona fide*, even although the procedure prescribed by the rule was in no respect followed. In relation to this finding of the Full Bench of the Madras High Court their Lordships of the Privy Council observed as follows :

The far-reaching importance of this pronouncement of the Full Bench, couched as it is in general terms, will at once be recognized. It introduces into S. 11, with Expl (6)—itself an enactment of adjective law only—a result which attaches to the Explanation the effect of new substantive law in that it clothes with all the

1. Kumaravelu Chettiar v. Ramaswami Ayyar, A I R 1933 P C 183 = 143 I C 665 = 60 I A 278 = 56 Mad 657 (P C).

binding force as against them of a *res judicata* a decree in a representative suit which, apart from the Explanation, has no binding effect upon the persons therein expressed to be represented. A pronouncement which has this result is not one to be accepted readily, and their Lordships believe it to be mistaken.

In face of such a clear pronouncement of their Lordships of the Privy Council, it is not necessary for us to pursue the matter any further. Suffice it to say, that the construction placed by us upon the judgment of their Lordships of the Privy Council is that a decision in a representative suit binds all persons other than the plaintiffs expressly named in the plaint only when (a) if the suit relates to a private right, the formalities as laid down in O. 1, R. 8, are observed and (b) if the suit relates to a public right, the formalities laid down in S. 91, Civil P. C., are observed. Expl. 6 itself contemplates that the private right should be claimed by the plaintiffs in common for themselves and others, and R. 8 of O. 1 makes it incumbent upon Courts to give the prescribed notice of the institution of the suit to all those persons on whose behalf or for whose benefit the plaintiffs or defendants are permitted by the Courts to sue or be sued as the case may be. We may here observe that the contention raised by the appellants' counsel that the words "claimed in common for themselves and others" governed both 'public right' and 'private right' is altogether erroneous. As stated above, the words 'public right' were added in 1908 and they stand by themselves. Even the construction of the sentence in which these words stand leads to the same conclusion. In the presence of the Privy Council judgment referred to above, it does not appear to us to be necessary to discuss any further the judgments of the Courts in India. We may however remark in passing that our judgment in A I R 1936 Lah 13,² does not lay down any principle which is in conflict with the judgment of their Lordships of the Privy Council. Before we close, we may refer once more to the Privy Council judgment in order to clarify the position of the law in relation to the use of the words *bona fide* in Expl. 6 to S. 11. Their Lordships remarked :

Bona fide litigation will not excuse the neglect of statutory conditions. If the litigation be not *bona fide* the most complete observance of these

conditions will not give to the decree the force of a *res judicata*.

We accordingly accept this appeal, set aside the judgments of the Courts below and remand the case to the trial Court for disposal in accordance with law. We however wish to indicate for the guidance of the trial Court that on the issues involving the determination of the question whether S. 11 or S. 91, Civil P. C., bars the present suit, our decision is in favour of the plaintiffs and that the trial Court shall have to dispose of the rest of the case now. As the question was not free from difficulty, we leave the parties to bear their own costs incurred so far.

K.B./A.L.

Case remanded.

A. I. R. 1937 Lahore 428

SKEMP, J.

Udham Singh and others — Plaintiffs—
Appellants.

v.

Ran Singh and others, Defendants and
another, Plaintiff — Respondents.

Second Appeal No. 1054 of 1936, Decided on 5th January 1937.

(a) *Wajibularz—Construction—Shamilat to be partitioned according to shares mentioned in mislihaquiyat—Accretion of shamilat—Suit by co-sharers of tarf of village against stranger purchaser of share of tarf previous to accretion of shamilat that they are sole owners of 1/16 share in shamilat—Stranger purchaser held entitled to share in shamilat proportionate to his recorded share even though accretion occurred subsequent to sale.*

Certain shamilat land became attached to a village by a change of course in a river. Previous to the accretion of the shamilat land, some of the proprietors in a tarf of the village sold certain land in the village to a stranger who was therefore recorded as a co-sharer in the tarf of the village. The co-sharers in the tarf brought a suit for a declaration against the stranger purchaser that they were the sole owners of the 1/16 share in the shamilat land. The wajibularz provided that the shamilat was to be partitioned according to shares mentioned in the mislihaquiyat against the co-sharers of the village :

Held : that the purchaser who was a recorded co-sharer was also entitled to a share in the shamilat land proportionate to his proprietary share in the village as it stood on the date of the accretion of shamilat even though the accretion of shamilat was subsequent to the sale : A I R 1920 Lah 26; A I R 1921 Lah 162 and A I R 1929 Oudh 15, Rel. on. [P 429 C 2]

(b) *Appeal—New plea—Suit for declaration that plaintiffs alone are owners of certain shares in shamilat—No prayer for determination of shares made in plaint—Question of determination of shares of plaintiffs not raised in issue in trial Court—Question cannot be raised in appeal.*

2. *Bishen Singh v. Bakhshish Singh*, A I R 1936 Lah 13=158 I C 540=38 P L R 785.

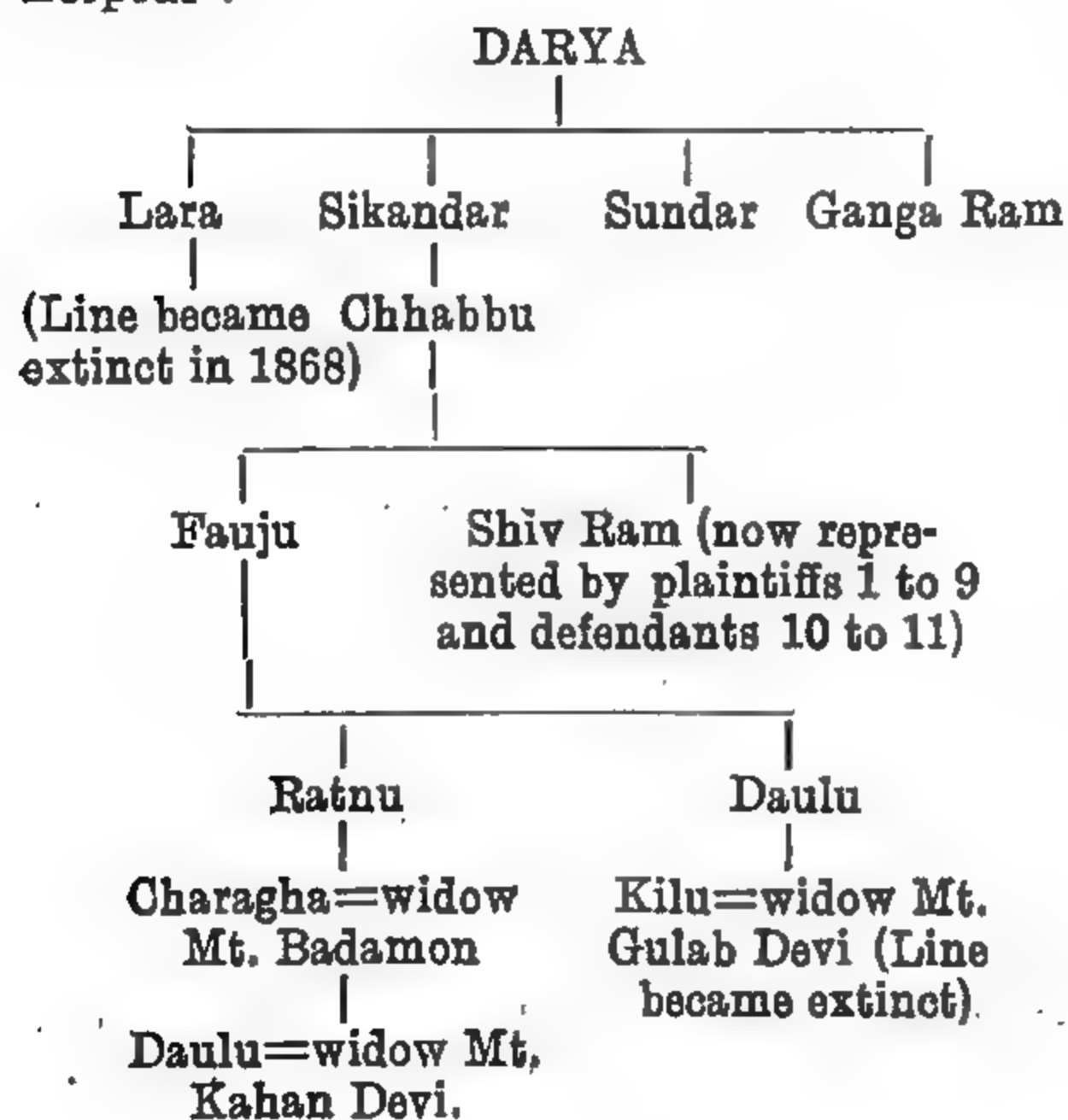
The plaintiffs brought a suit for declaration against a recorded co-sharer in a village that they alone were owners of the 1/16 share in shamilat land in the village. No prayer for determination of the shares of the plaintiffs in the village was made in the plaint. The trial Judge found that the defendants were also entitled to a share in the shamilat, and dismissed the suit. In the grounds of appeal by plaintiffs it was prayed that the shares of the plaintiffs in the shamilat land should be determined :

: *Held* : that such question could not be raised for the first time in appeal as the matter was not raised in issue in the trial Court. [P 430 C 1]

Chander Gupta for *D. N. Aggarwal* —
for Appellants.

Inder Dev for *Achhru Ram* —
for Respondents 1 to 9.

Judgment.—The dispute which has led to this second appeal arose from the partition of shamilat of Mauza Saloh, Tahsil Una, District Hoshiarpur. The shamilat in question is called shamilat Machh-Kachh and was for many years separated from this village by the river Sawan and attached to other villages. In the year 1904 by a change of course in the river this large area of shamilat became attached to village Saloh. Village Saloh is divided into five tarfs; one of them, tariff Tibbiwala, is entitled to a two anna share in the shamilat. The plaintiffs and the defendants to the present suit are all proprietors of tariff Tibbiwala. The plaintiffs sued for a declaration that they and two pro forma defendants were the sole owners of an area of 267 kanals 1/16 share of the whole area of the shamilat, i. e., they sued for a declaration that they were the owners of half the share of tariff Tibbiwala. The pedigree table below will prove helpful :



On 18th April 1890, Daulu, son of Charagha, and Mt. Badaman, widow of Charagha, sold an area of 40 ghumaons 7 kanals 8½ marlas being one-half of 81 ghumaons 6 kanals 17 marlas in a specified khata to a stranger, named Kahan Singh, together with the share in shamilat pertaining to the land sold. The contesting defendants are the descendants of the vendee Kahan Singh. Now the plaintiffs sued for a declaration that they were the sole owners of 1/16th share and that the descendants of Kahan Singh had no right in the shamilat. Their point was that at the time of the sale in 1890, this shamilat was not in existence and that therefore it could not be transferred in the sale. This was really the only point in dispute. The trial Judge agreed that the sale did not transfer rights of shamilat although the deed comprises the expression *ma hissa shamilat har qism mutalqa arazi mazkur*, but he held that the defendants became proprietors in tariff Tibbiwala by the sale in 1890 and were therefore entitled to share in the shamilat which subsequently accrued in 1904. He relied on the condition laid down in the wajib-ul-arz of 1913-1914 whereby the shamilat was to be partitioned according to the shares mentioned in the mislihauiyat, the mislihauiyat showing that the defendants were recorded owners according to the shares in the pedigree table.

The trial Judge therefore dismissed the suit. The plaintiffs appealed and the learned District Judge agreed with the trial Court on the main point. He relied on the rulings, A I R 1920 Lah 26;¹ A I R 1921 Lah 162² and A I R 1929 Oudh 15,³ for the proposition that each proprietor is entitled to a share proportionate to his proprietary holding as it stood on the date of accretion of shamilat. The facts of the Oudh ruling are very similar to those of the present case. After hearing arguments I agree with the two lower Courts that the defendants are entitled to their share. In fact I would hold that the sale deed intended to transfer any rights there might be in shamilat but it is not necessary to go into that. The District Judge however instead of maintaining the decree of the

1. Sultan Ali v. Amir Khan, A I R 1920 Lah 26 =57 I C 132.

2. Ahmad Yar v. Muhammad Ali, A I R 1921 Lah 162=3 L L J 445.

3. Shiv Ram Lal v. Ganga Shankar, A I R 1929 Oudh 15=111 I C 370.

trial Judge dismissing the suit went into the question of the respective shares of the parties. This point was not mentioned in the plaint and strictly speaking did not arise, as the suit was for a declaration that the plaintiffs alone were entitled to this shamilat. A ground of appeal however was taken to the District Judge that the trial Judge should have determined the shares. The learned District Judge did determine them and held that the plaintiffs and pro forma defendants were only entitled to 1/64th share of the whole shamilat. It is admitted before me that this finding is wrong and that the plaintiffs are entitled to a larger share. It is also admitted that I can go into this in second appeal because it involves the construction of the sale deed, a document of title: 11 Lab 199.⁴

It was then suggested that I should remand the case for a finding as to the shares but after consideration I think it more satisfactory to restore the judgment of the trial Judge. No declaration as to shares was sought in the plaint. The matter was not put in issue and was only raised for the first time on appeal to the District Judge. I therefore do not think the plaintiffs are entitled to a declaration as to their share in the present suit. Further the matter is difficult and complicated and I think it would be more satisfactory that the matter of the shares should in the first instance be considered by the revenue authorities who will have the local expert knowledge of their subordinate officials. If either party is dissatisfied with the conclusion of the revenue authorities as to the shares that party can bring a civil suit or ask the revenue officer to act himself as a civil Court. It is agreed between the learned counsel before me that such a further suit would not be barred by O. 2, R. 2, Civil P. C. Therefore deeming it expedient not to give any finding as to the shares in the course of the present suit but recognizing that the finding of the learned District Judge was erroneous on this point, I set aside his judgment and decree and restore that of the trial Court dismissing the present suit. The plaintiffs are to bear the defendants' costs throughout.

K B./A.L.

Order accordingly.

4. Wali Mahomed v. Mohammad Bakhsh, A I R 1930 P C 91=122 I C 316=57 I A 86=11 Lah 199 (P C).

A. I. R. 1937 Lahore 430

TEK CHAND AND DALIP SINGH, JJ.

Chhittar and others — Defendants —
Appellants.

v.

Ude Singh and another—Respondents.

Letters Patent Appeal No. 77 of 1936, Decided on 16th July 1936, from decrees of Jai Lal, J., D/- 13th March 1936, as reported in *A I R 1936 Lah 994*.

Co-sharers — Adverse Possession — Possession should be referred to lawful rather than unlawful source when two alternatives are open—Co-sharer entering into possession of land belonging to widow co-sharer and paying land revenue for it — Title of widow recognized and her name shown as co sharer — Land mutated among all co-sharers along with co-sharer in possession, on death of widow—Possession of co-sharer in possession is not adverse in absence of any overt act showing adverse possession.

Possession should always be referred to a lawful source rather than to an unlawful source where the two alternatives are open to the Court.
[P 431 C 2]

Where a co-sharer enters into exclusive possession of the land in dispute belonging to a widow co-sharer, paying land revenue for the same but the title of the widow to her share has all along been recognized, and her name has been shown in the revenue records as a co-sharer, and, where on the death of the widow her share is mutated among all the co-sharers along with the co-sharer in possession, the possession of the latter (co-sharer in possession) cannot be held to have been adverse in absence of any overt act showing adverse possession and all the reversioners of the widow are entitled to succeed to her share on her death. The mere fact that the co-sharer in possession was in exclusive possession of the widow's share and was paying land revenue for the same, or the fact, that the land was partitioned among the sons of the co-sharer does not prove any overt act or adverse possession to the widow: *A I R 1929 Lah 195*; *A I R 1929 Lah 464* and *A I R 1918 P C 1, Rel. on.*

[P 431 C 2 ; P 432 C 1]

S. L. Puri for M. L. Puri —

for Appellants.

Achhru Ram and Asa Ram Aggarwal—
for Respondents.

Dalip Singh, J.—The facts of this case are given at length in the judgment of the learned District Judge and in the judgment of the learned Judge of this Court sitting in Single Bench. They need not be recapitulated here at length. The pedigree-table of the parties is given in the judgment of the learned District Judge and it appears from it that one Chhajju was the common ancestor of the parties. He had four sons, Ram Saran, Rai Chand, Bishan Chand and Kishan Chand. The

branch of Bishan Chand appears to have separated from the other three branches, which remained joint. In 1852 the land in dispute was shown as jointly owned by the branch of Ram Saran, the branch of Rai Chand and the branch of Kishan Chand. In 1882 the share of the branch of Rai Chand is shown as in possession of the branch of Kishan Chand. Sometime after this in 1884 the branch of Ram Saran separated their share. The branch of Kishan Chand was shown as holding possession both of their own share as well as the share of the branch of Rai Chand. The ownership, however, is shown as belonging to the branch of Kishan Chand and the branch of Rai Chand in equal shares, the branch of Rai Chand being represented by Mt. Barwalo, widow of Rai Chand's son Sansar Chand. In 1889 the three sons of Kishan Chand partitioned the entire property between themselves, Mt. Barwalo's name continuing to be shown as a co-sharer with each of the branches of the three sons of Kishan Chand. In 1906 Mt. Barwalo died and her share was mutated equally between the branch of Ram Saran, the branch of Bishan Chand, and the branch of Kishan Chand. The question now arising in the three appeals is whether the branch of Kishan Chand had by adverse possession, or otherwise, obtained a title to the share that was entered in 1906 as belonging to Mt. Barwalo. Three suits raise this identical point. One Court—the Court of the Assistant Collector acting as a civil Court in partition proceedings held that the branch of Kishan Chand had acquired title to the share of Mt. Barwalo.

The learned Subordinate Judge in two other declaratory suits held that the branch of Kishan Chand had not acquired title to the land of Mt. Barwalo. On appeal, the learned District Judge upheld the order of the learned Subordinate Judge and set aside the order of the learned Assistant Collector. Three second appeals were taken to this Court and the learned Judge held that the branch of Kishan Chand had acquired title to the share of Mt. Barwalo by adverse possession which commenced at any rate, in 1906 on the death of Mt. Barwalo. The learned Judge did not decide the contention which appears to have been raised before him that the branch of Kishan Chand was also holding adversely to Mt.

Barwalo during her lifetime. The present three appeals are from the decision of the learned Judge in Single Bench holding that the branch of Kishan Chand had acquired title to the share of Mt. Barwalo.

So far as appears from the judgment of the learned Judge, it would seem that he held that the possession of the branch of Kishan Chand was adverse after 1906, namely, the date of the death of Mt. Barwalo, because although they were co-sharers with Mt. Barwalo originally, they were in possession of her share. Therefore their possession after the death of Mt. Barwalo could not be considered as possession on behalf of all the co-heirs of Mt. Barwalo. The ordinary rule about the possession of co-sharers did not apply because the co-sharer in question, namely, the branch of Kishan Chand, had not entered into possession after the death of Mt. Barwalo, but was already in possession of the share of Mt. Barwalo. This proposition is held to be justified on the analogy of the heirs of a Muhammadan. It is stated that the possession of one co-heir of a Muhammadan is not on behalf of his co-sharers. Neither of these propositions has been supported by the learned counsel for the respondent who concedes that these propositions are not justified in law.

I agree with the position taken up by the learned counsel for the respondent on this point and it is unnecessary to discuss the matter further than to refer to 10 Lah 842¹ and 10 Lah 849,² and to the well known proposition laid down in the Privy Council ruling, 64 P R 1918³ that possession should always be referred to a lawful source rather than to an unlawful source, where two alternatives are open to the Court.

The learned counsel for the respondent has contended, however, that the branch of Kishan Chand was holding adversely to Mt. Barwalo. He seeks to establish this by relying on the fact that in 1883 Mt. Barwalo was shown as ghair qabiz after a mutation enquiry, that the branch of Kishan Chand continued in exclusive possession of her share paying the land

1. Ahmad Bibi v. Shamas Din, A I R 1929 Lah 195=109 I C 658=10 Lah 842.

2. Muhammad Bakh v. Fateh Muhammad, A I R 1929 Lah 464=118 I O 905=10 Lah 849=31 P L R 179.

3. Hardit Singh v. Gurmukh Singh, A I R 1918 P C 1=47 I O 626=64 P R 1918 (P O).

revenue for the same and in 1889 it partitioned the entire property without reference to Mt. Barwalo. None of these points, to my mind, prove any overt act or adverse possession to Mt. Barwalo. The entry of the mutation in 1883 showing Mt. Barwalo as ghair qabiz was not repeated and might merely be the recognition of the fact that the co-sharer, Mt. Barwalo, was not in actual possession of her share. In the partition of 1889, as already stated, the title of Mt. Barwalo was recognized. No reference could be made to her possession because she did not have actual possession. Therefore no adverse possession can be held to be established against her.

The learned counsel also contended that ouster was established after 1906, because in 1919 the branch of Kishan Chand had a Jamabandi entry corrected, which showed that all the co-sharers paid the land revenue into one showing that they alone paid the land revenue. This again is not a denial of right but the assertion of a fact. I cannot see that any ouster follows therefrom.

As a result I would accept all the three appeals and restore the decrees of the learned District Judge. I would leave the parties to bear their own costs throughout in each case.

Tek Chand, J.—I agree.

R.M./R.K. *Appeals allowed.*

A. I. R. 1937 Lahore 432

BHIDE, J.

Alla Din — Insolvent — Petitioner.

v.

Firm Kirpa Ram-Sundar Das —
Opposite Party.

Civil Revn. No. 548 of 1936, Decided on 13th January 1937, from order of Addl. Dist. Judge, Lahore, D/- 4th June 1936.

(a) Provincial Insolvency Act (1920), Ss. 69 and 75—Aggrieved person — Creditor is not aggrieved by order refusing to sanction prosecution under S. 69—Creditor cannot appeal from such order.

Where the insolvency Court refuses to sanction prosecution of the insolvent under S. 69, Provincial Insolvency Act, the creditor is not a person aggrieved by the order and as such he is not entitled to appeal from such order under S. 75 of the Act: *A I R 1930 Lah 323; A I R 1930 Sind 2 and A I R 1933 Nag 9, Rel. on.* [P 432 C 2]

(b) Provincial Insolvency Act (1920), S. 69—Offence under—Insolvent in jail omitting to mention equity of redemption of property mortgaged by him many years ago—Insolvent admitting mortgage immediately after notice—Prosecution of insolvent held not warranted.

Where the insolvent was in jail and had only omitted to mention the equity of redemption of certain property which he had mortgaged many years ago, and he admitted the mortgage at once when the fact was brought to his notice:

Held: that the prosecution of the insolvent was not warranted under S. 69, Provincial Insolvency Act: *A I R 1918 Lah 247, Rel. on.*

[P 432 C 2]

R. L. Anand II — for Petitioner.

Dharam Bhusan — for Opposite Party.

Order.—This is a petition for revision of an order of the Additional District Judge, Lahore, ordering the prosecution of an insolvent named Alla Din under S. 69, Insolvency Act. The Insolvency Judge had refused to order prosecution, but on appeal the learned Additional Judge has taken a different view. The learned counsel for the appellant contends that a creditor cannot be considered to be an aggrieved person and as such entitled to appeal under S. 75, Provincial Insolvency Act, and that the learned Additional Judge was therefore not competent to entertain the appeal. In support of the contention which appears to be correct, he has cited *I Lah 213*,¹ *A I R 1930 Sind 2=118 I C 198*² and *A I R 1933 Nag 9*.³ The learned counsel for the respondent has not been able to cite any authority in point, taking a contrary view. On merits also the case was not at all strong. The insolvent was in jail and had only omitted to mention the equity of redemption of certain property which he had mortgaged many years ago. He admitted the mortgage at once when the fact was brought to his notice and in such circumstances prosecution was hardly warranted: *44 I O 128*.⁴ I accept the petition for revision with costs and set aside the order of the learned Additional District Judge.

W.D./A.L.

Revision allowed.

1. *Gujar Shah v. Barkat Ali Shah*, *A I R 1920 Lah 323=56 I O 744=1 Lah 213=130 P L R 1920*.
2. *James Finlay & Co. v. Amanmal Ladhamal*, *A I R 1930 Sind 2=118 I O 198*.
3. *Pur Singh v. Alad Khan*, *A I R 1933 Nag 9=141 I O 350=28 N L R 286*.
4. *Wadhawa Singh v. Emperor*, *A I R 1918 Lah 247=44 I O 128=19 Cr L J 272=158 P L R 1917*.

A. I. R. 1937 Lahore 433

ADDISON AND DIN MOHAMMAD, JJ.

Tikka Sant Singh — Judgment-debtor
— Appellant.

v.

Sain Das Chawala — Decree-holder —
Respondent.

Letters Patent Appeal No. 103 of 1936, Decided on 14th January 1937, from judgment of Agha Haidar, J., D/- 26th May 1936, Reported in *A I R 1936 Lah 830*.

Civil P. C. (1908), S. 60 (1) (n) and O. 40, R. 1—Right of residence in certain house along with other property for maintenance given to son owing to dispute between father and son—House attached in decree against son—Right of residence though not liable to attachment and sale under S. 60 (1) (n), still as son did not live therein, receiver of same held could be appointed by way of equitable execution to realize rent and make payment towards debt.

A person seeking 'equitable execution' by appointment of receiver must show that he was met by difficulties arising from the nature of the property, which prevented his obtaining relief at law. One principle to be applied is to see whether in lieu of the assets the amount due under the decree is likely to be realized within a reasonable time from the profits of the attached property. Another principle is that such an appointment should appear in the circumstances to be the best course both for the creditor and the debtor.

[P 434 C 2]

Owing to a dispute between the father and the son, along with other property for his maintenance, the son was given the right of residence in a certain house, with no power to transfer the same. In execution of a decree against him the house was attached. It was contended by him that it was not liable to attachment and sale under S. 60 (1) (n), Civil P. C. The son did not reside in the house but it was let out to tenants :

Held : that though the son's right to residence in the house was not liable to attachment and sale under S. 60 (1) (n), still as he did not reside in the house and the house was let out, there was no likelihood of any inconvenience being caused to him if a receiver was appointed for the same. It being just and convenient, a receiver could be appointed to realize the rent of the house with a direction to the receiver that the surplus remaining after deducting expenses should go towards the satisfaction of the debt under the decree : *A I R 1925 P C 176*; *A I R 1931 P C 160* and *A I R 1932 Cal 189, Rel. on.*

[P 434 C 2]

Parkash Chandra — for Appellant.*Mela Ram Aggarwal*—for Respondent.

Addison, J.—*Tikka Sant Singh* is the son of *Baba Ujagar Singh Bedi*. There was a dispute between the father and son as regards the maintenance to be allowed to the son and it was referred to the arbitration of *Nawab Malak Muhammad*

Hayat Khan Noon, Deputy Commissioner of *Gujranwala*, who made an award on 9th November 1927. By means of this award, besides other properties an area of 1150 acres situated on the right bank of the *Parah canal* was given to *Tikka Sant Singh* for the maintenance of himself, his wife and his children. He was also given the option of residing in village *Akalgarh* and in addition thereto there was reserved for his residence the house known as "*Cosy Nook*" in the hill-station of *Murree*. It was further provided that *Tikka Sant Singh* had no right to sell, mortgage or otherwise transfer or charge the estate granted to him for the purpose of maintenance and residence in any way.

Sain Das obtained a decree against *Tikka Sant Singh* for a sum of Rs. 7,800 part of which sum had already been realized in execution. In further execution proceedings the decree-holder proceeded to attach and sell the house "*Cosy Nook*" at *Murree*. *Tikka Sant Singh* preferred objections to the effect that the house could not be attached as he had no disposing power over it. He also relied upon S. 60 (1) (n), Civil P. C., claiming that the attached house was in the nature of future maintenance and was thus immune from attachment and sale. This contention was upheld by the executing Court and the decree-holder instituted an appeal in this Court which was heard by a Single Judge. He upheld the decision of the executing Court to the effect that the right of residence enjoyed by *Tikka Sant Singh* in "*Cosy Nook*" could not be put to sale in execution of the decree, but relying upon 47 All 385¹ the Single Judge directed that the executing Court should appoint a receiver to act under the orders and supervision of the Court, realise the income of the property and after defraying the incidental expenses and his own remuneration to devote the proceeds in satisfaction of the decretal amount. This was allowed by way of equitable execution. Against this decision *Tikka Sant Singh* has preferred this Letters Patent appeal.

In the Privy Council case, 47 All 385,¹ the respondent had obtained a money decree against the appellant and applied to attach and sell 16 villages in execution thereof. The appellant held the villages

1. *Rajindra Narain Singh v. Sunder Bibi*, *A I R 1925 P C 176*=87 *I C 295*=52 *I A 262*=47 *All 385 (P C)*.

under the terms of a compromise deed which provided that he was to hold and possess the villages in lieu of his maintenance without power of transfer during the lifetime of his brother. It was held that the appellant's interest in the villages was 'a right to future maintenance' within S. 60, sub-s. (1) (n), Civil P. C., 1908 and therefore could not be attached and sold, but that a receiver should be appointed to realise the rents and profits with direction to pay thereout a sufficient and adequate sum for the maintenance of the appellant and his family, and to apply the balance, if any, to the liquidation of the decree. It was remarked by their Lordships that although S. 60 (1) (n), Civil P. C., barred the attachment and sale of the property, the proper remedy lay in a fitting case in the appointment of a Receiver with powers as already indicated. This case is nearly on all fours with the case before us and it only remains to determine whether this is a fit case to do so. Another case where their Lordships of the Privy Council held that a receiver of the rent and profits had been rightly appointed in execution of a decree is reported in 59 Cal 1.²

Another case which may be referred to is 59 Cal 205,³ a Division Bench decision. It was said there that the observations of the Judicial Committee of the Privy Council in 47 All 385¹ show sufficiently that the view that by the introduction of S. 51 in the new Code of Civil P. C. the decree-holder may as of right and as a matter of course apply for execution by the appointment of a receiver is not correct, but that, on the other hand, the remedy by the appointment of a receiver is by way of equitable execution or indirect execution, the receiver taking the place of the debtor in cases in which equitable and special considerations intervene. It was also pointed out that the terms of O. 40, R. 1 are wider than the corresponding S. 502 of the Code of 1882 and do not provide that the appointment of a receiver should be confined to a suit. But S. 51 of the Code is to be read with R. 11, O. 21 and R. 1, O. 40 and the order is to be regarded as made under the last mentioned rule and justified, if only that rule would justify it. Under the Law

of England there is authority for the proposition, that a person seeking 'equitable execution' must show that he was met by difficulties arising from the nature of the property, which prevented his obtaining relief at law. One principle to be applied is to see whether in lieu of the assets the amount due under the decree is likely to be realized within a reasonable time from the profits of the attached property. Another principle is that such an appointment should appear in the circumstances to be the best course both for the creditor and the debtor.

With all respect I am in agreement with the principles laid down in 59 Cal 205,³ and applying the principles therein I am of opinion that this is a fit case to appoint a receiver in respect of the house 'Cosy Nook'. When the house was attached it was found to be in possession of a tenant. The decree is likely to be satisfied by a receiver being appointed in ten years or less. Though in the Punjab a son cannot under Hindu law claim a partition against his father, it has been held by a Division Bench of this Court in 13 Lah 455⁴ that the son's interest in co parcenary property is liable to attachment and sale during the lifetime of the father, although the son has no power to enforce a partition in his father's lifetime. By the award between the father and son it is now doubtful whether the son's interest is liable to attachment and sale. Though, therefore, the right of residence reserved for the judgment-debtor in 'Cosy Nook' cannot be sold by virtue of the provisions of S. 60 (1) (n), Civil P. C., it appears to be just and convenient that a Receiver should be appointed of that property in the terms stated by the Single Judge. The judgment-debtor was not actually in occupation of the house when it was attached and therefore there can be no inconvenience to him in this arrangement, while it will be to his interest that the decree should be gradually satisfied in the way directed. For the reasons given I would dismiss the appeal with costs.

Din Mohammad, J.—I agree.

K.B./A.L.

Appeal dismissed.

2. Wasif Ali Mirza v. Karnani Industrial Bank Ltd., A I R 1931 P C 160=132 I O 727=59 Cal 1=58 I A 215 (P C).

3. Hemendra Nath Roy v. Prokash Chandra Ghosh, A I R 1932 Cal 189=137 I C 98=59 Cal 205=35 O W N 1066.

4. Nihal Chand Gopal Das v. Mohan Lal, A I R 1932 Lah 211=135 I O 197=13 Lah 455=33 P L R 779.

* * A. I. R. 1937 Lahore 435

ADDISON AND ABDUL RASHID, JJ.

Firm Haveli Shah-Sardari Lal —

Assessee — Petitioners.

v.

Commr. of Income-tax—Opposite Party.

Civil Ref. No. 13 of 1936, Decided on 6th May 1936.

* * Income-tax Act (1922), S. 8—Securities purchased—As price, vendor was paid capital sum plus interest computed from last due-interest-date to date of purchase—Interest held could not be deducted from interest subsequently received by vendee—That price is expressed separating computed accrual of interest did not matter.

Where the assessee purchases Government securities and as their price pays to the vendor the capital sum plus interest computed *de die in diem* from the last due-interest-date to the date of purchase, he cannot deduct this interest from the interest actually drawn by him subsequently on these securities. The interest on Government securities does not accrue from day to day and cannot be received until due date and a mere quotation in the bargain of estimated accrued interest does not establish a separate contract in respect of the interest; and even if it were considered to be a separate contract, it would remain part and parcel of the whole purchase consideration and would not be deductible: *A I R 1930 Pat 33 (F B)* and *Wigmore v. Summerson & Sons; Inland Revenue Commrs. v. Oakley, (1926) 1 K B 131, Rel. on.* [P 435 C 1, 2; P 437 C 1]

M. L. Puri and V. N. Sethi —
for Petitioners.

Sarv Mitra Sikri for Jagan Nath Aggarwal — for Opposite Party.

Addison, J.—This is a reference by the Commissioner of Income-tax regarding the assessment of a joint Hindu family Haveli Shah-Sardari Lal for the assessment year 1934-35. The question of law referred is as follows:

The assessee (not being a dealer in securities by way of "business") having purchased securities at a price expressed as a capital sum plus interest computed *de die in diem* from the last due-interest-date to date of purchase, is the said computed interest deductible from the interest actually received by him, in assessment under S. 8 of the Act?

The assessment in question was made on a total income of Rs. 3,00,699 including Rs. 2,68,785 under S. 8, Income-tax Act. The latter sum is made up as follows:

Interest (gross) received from Government in respect of securities purchased 1926-32	Rs.	2,55,750
Interest (Income-tax free) received in respect of securities purchased from April to November 1933	...	13,035
Total	...	2,68,785

From this sum the assessee wishes to take the sum of Rs. 9,102-1-4 on the

ground that it was interest paid by him to the sellers of the securities at the time of the 1933 purchases. These purchases consisted entirely of Government of India 1945-55 (Income-tax free) 5 per cent. loan. Ordinary income-tax was thus not charged under S. 8, Proviso 2, but in accordance with S. 16 (1) super-tax is chargeable on the whole sum and was charged upon Rs. 2,68,785. The sole question is whether the sum of Rs. 9,102-1-4 should be deducted from charge. The Commissioner has stated that no precise evidence of the terms of purchase was given except to the extent of putting in advices from the purchasing brokers or banks in Calcutta, and he has given the following as an example:

In accordance with the instructions contained in your letter I beg to advise the purchase of securities as detailed below in further execution of your order:

P. No. 2267.

To cost of 5 per cent. Loan 1945-55 for Rs. 16,500 at Rupees 106-14-0 per cent.	Rs. a. p.	17,634 6 0
Interest from 15th April 1932 to 12th October 1932, being five months and 27 days	...	405 10 0
Commission at $\frac{1}{2}$ per cent. on Rs. 18,040	...	45 4 0
Postage, etc.	...	0 11 0

Debited to your account ... 18,085 15 0

The Commissioner has stated that so far as appears the amount of Rs. 9,102-1-4 is wholly comprised of the computed interest. We are not concerned with past practice of the Income-tax authorities. S. 8 makes income-tax payable by an assessee under the head 'Interest on securities' in respect of the interest receivable by him on any security of the Government of India, etc. This section can only have one meaning and that is that income-tax is payable on the interest receivable from Government by any holder of such a security. This was the view taken by a Special Bench of the Patna High Court in 4 I T C 264¹ at p. 280. There the opinion was expressed that S. 8, Income-tax Act, was conclusive so far as this question was concerned. The interest, it was said, was undoubtedly receivable by the assessee. It was received by them and the section thus made them liable. It was pointed out that interest on Government securities did not accrue from day to day but on

1. Rajniti Prasad Singh v. Commr. of Income-tax, A I R 1930 Pat 33=123 I C 617=9 Pat 194=11 P L T 669=4 I T C 264 (S B).

certain specified dates. It did not, therefore, accrue to the vendors at all since they sold before any interest accrued. The form the contract took and the terms in which it was expressed were matters between the assessee and the vendors, and the assessee might well have protected themselves by insisting that the amount of tax which would ultimately be payable by them under S. 8 should be deducted from the purchase money. The Commissioner of Income-tax is in agreement with this decision and has given his opinion that the computed interest was part of the purchase price and was not in any event deductible from the assessee who actually received interest. He, however, referred the question to this Court as it has not been agitated so far here.

In my judgment the machinery sections of the Act also help in determining this matter though I am of the same opinion as was held by the learned Judges in the case quoted that the contention of the assessee must fail on the terms of S. 8 of the Act, as no interest was receivable or could be received until due date, by which time the assessee was owner and received the whole interest. Again, it would be impossible to keep track of interest adjustments between transferors of negotiable securities. S. 18 (3) requires that ordinary income-tax (when due) shall be deducted at the time of payment while S. 18 (5) provides that any such deduction shall be treated as a payment of income-tax on behalf of the owner of the security and credit shall be given to him therefor in the assessment, if any, made for the following year. Lastly, S. 48 (3) provides for refund of the excess so credited to the owner of the security, if in the event the due charge is less than the deduction. The credit, therefore, under S. 18 (5) can only be allowed to the owner of the security on his producing the certificate necessary under R. 38 while it is impossible to consider computed interest in the hands of the vendors. These machinery sections, therefore, support the view that the tax is chargeable only on the owner of the security at the time when the interest becomes receivable.

The same question has arisen in England and is fully discussed in 9 Tax Cas 577 as well as in 9 Tax Cas 582² by Rowlatt, J.

In the first case the stock sold was not sold with an allowance for computed interest but *en bloc*. But that does not make any difference. Rowlatt, J., made the following pertinent remarks in the first named case:

To my mind it is absurd to say that a person is paying £5,000 in March for £ 5,000 to be paid in June. He does not do it. Therefore there would have to be, in any case, a valuation of the amount of accrued interest that has been sold. The truth of the matter is that the seller does not receive 'interest', while it is interest that is the subject matter of taxation. He receives the price of the expectancy of interest and that is not the subject of taxation, and the whole thing, I think, really depends upon that fallacy.

In the second case the same learned Judge pointed out that the results might be curious but many results in super-tax were curious. He goes on to say:

The result is that nobody on the super-tax level, who has not more money than appreciation of Income tax law will ever buy a security that is full of dividend because he is buying super-tax; and if a man wants to sell a security, if he is on the super-tax level he had better sell when it is full of dividend, because then he is selling super-tax. Those are accidents which do not seem to me possibly to affect the administration of the Acts, and I cannot conceive how the Acts could be administered, except at great cost and inconvenience not only to the Revenue but to private people who now are not concerned with these minutiae, if the contention which the Crown put forward here, not in their own interest but in the interest of purchasers really, was to succeed.

The last observation of Rowlatt, J., has already been alluded to by me when dealing with the machinery sections. Clearly it would be impossible to keep track of interest adjustments between transferors and transferees of negotiable securities, and a Statute, as remarked by Dunedin, L. J. in 10 Tax Cas 88³ at p. 110, is designed to be workable and the interpretation thereof by a Court should be to secure that object. I have no hesitation in holding that S. 8 itself is conclusive on the matter while the machinery sections make it still more clear. The only contention remaining to be further discussed is that because the purchase price was expressed separating a computed accrual of interest that amount was not in fact a part of the purchase consideration but was a separate charge incurred against the interest when the assessee eventually received it. This argument has already been dealt with by Rowlatt, J., and it seems clear that the

2. *Wigmore v. Summerson & Sons; Inland Revenue Commissioners v. Oakley*, (1926) 1 K B 131=94 L J K B 836=9 Tax Cas 577 and 582=69 SJ 745=41 TLR 568=134 L T 408.

3. *Whitney v. Inland Revenue Commissioners*, (1926) A C 37=95 L J K B 165=134 L T 98=10 Tax Cas 88=42 T L R 58.

mere quotation in the bargain of estimated accrued interest does not establish a separate contract in respect of the interest, and even if it were considered to be a separate contract, it would remain part and parcel of the whole purchase consideration, and would not be deductible. I would, therefore, answer the question put in the terms of the Commissioner's opinion already given. There will be no order as to costs.

D.S./R.K. *Reference answered.*

A. I. R. 1937 Lahore 437

ADDISON AND DIN MOHAMMAD, JJ.

Inayat Ullah Khan and another —
Plaintiffs—Appellants.

v.

Kanshi Ram, Decree-holder and
another, Judgment-debtor and
Official Receiver, Defendants —
Respondents.

First Appeal No. 29 of 1936, Decided on 12th October 1936, from decree of Addl. Sub-Judge, First Class, Lahore, D/-29th November 1935.

Evidence Act (1872), S. 13 — Judgment in previous suit may be relevant for establishing particular transaction—But neither findings of fact nor reasons upon which judgment is founded can be relevant in subsequent suit.

Judgment in a previous suit may be relevant under S. 13, Evidence Act, for establishing a particular transaction, but the findings of facts and reasons upon which the judgment is founded are no part of the transaction and cannot be relevant in a subsequent suit: *A I R 1931 P C 89, Rel. on; A I R 1935 Lah 64, Disting.; A I R 1935 Lah 179, Expl.* [P 438 O 2; P 439 O 1]

Khan Bahadar Malik, Mohammad Hussain and Mohammad Latif —
for Appellants.

M. C. Mahajan and Inder Dev Dua —
for Respondent 1.

Devi Das — for Respondent 3.

Din Mohammad, J. — The defendant Kanshi Ram obtained a decree against Muhammad Laiq Khan and in the execution of that decree attached certain press machines. The plaintiffs Inayat Ullah Khan and Mt. Akbari Begam, who are respectively the son and widow of Alaf Khan, brought the suit out of which this appeal has arisen for a declaration that the machines in question were their property and could not consequently be attached in the execution of the decree against Muhammad Laiq Khan. This

suit was resisted by Kanshi Ram and dismissed by the Subordinate Judge.

The plaintiffs did not adhere to a uniform position in their pleadings and it will be necessary therefore to set out those pleadings in detail. In the plaint presented on 1st August 1934, the plaintiffs alleged that Muhammad Laiq Khan exercised undue influence on Alaf Khan and secured from him a document dated 1st November 1931, transferring the machines in question to him (Muhammad Laiq Khan) and that later when the relatives of Alaf Khan got wind of this transaction, they arranged the restitution of the property to Alaf Khan by the execution of a deed dated 3rd August 1933. Both the documents dated 1st November 1931 and 3rd August 1933 were registered. It was further averred that on 7th January 1934 Muhammad Laiq Khan again prevailed upon Alaf Khan to execute a will and a deed of waqf and that the plaintiff at once instituted a suit to have them cancelled. It was further added that the plaintiffs had all along been in possession of the machines since Alaf Khan's death, which took place on 31st January 1934. An amended plaint was put in on 11th March 1935 and there the allegation was made for the first time that Muhammad Laiq Khan had secured two fictitious documents without consideration on 1st November 1931. One of those documents is the document referred to above but what the other document was nobody has cared to tell. The plaintiffs' counsel was afterwards examined on 22nd March 1935 before the framing of the issues and he stated that Muhammad Laiq Khan took advantage of the senility and mental weakness of Alaf Khan and got the document, dated 1st November 1931, executed in his favour, and that subsequently on 3rd August 1933 the machines transferred by the document of 1931 were re-transferred to Alaf Khan but on the receipt of "full consideration" which was Rs. 10,000. The defendants traversed all the allegations made in these pleadings and contended that the document dated 1st November 1931, evidenced a genuine transaction and that the subsequent document said to have been executed by Muhammad Laiq Khan was fictitious and brought into existence to defraud his creditors. It is admitted that Muhammad Laiq Khan was adjudged insolvent in 1935.

Counsel for the appellants mainly confined his arguments to prove the fictitious nature of the document executed on 1st November 1931 and advanced the following reasons in support of his contention : (1) that no consideration passed to Alaf Khan before the Sub-Registrar and that the document itself was attested two days after its execution, that is, on 3rd November 1931, when it was registered ; (2) that all the outstanding debts which also had been transferred by that document to Muhammad Laiq Khan were discharged by Alaf Khan himself and not by Muhammad Laiq Khan ; (3) that the subsisting mortgages on the machines in question were paid off by Muhammad Laiq Khan ; (4) that one of the machines mortgaged to Mahabir was sold by Alaf Khan to pay off the mortgage debt ; (5) that the statement of Muhammad Laiq Khan goes in the plaintiffs' favour and that his conduct in securing a will from Alaf Khan on 7th January 1934 can only be consistent with the contention put forward by them ; (6) that in the suit brought to contest the will and the alleged waqf executed by Alaf Khan, a finding has been given that the document in question was fictitious and that that finding is relevant in the case.

After giving due consideration to all the arguments addressed to us, we have come to the conclusion that the plaintiffs have no legs to stand on. It is true that no money was paid in the presence of the Sub-Registrar and that the attestation by the marginal witnesses took place on 3rd November 1931 but in the first place in the face of the admission of the plaintiffs' counsel himself that on the occasion of the execution of the subsequent document in 1933, full consideration was paid to Muhammad Laiq Khan, this contention loses all its force. Moreover, Alaf Khan was under Mahomedan law fully empowered to make a gift of his property to any person he chose and it is in evidence that Muhammad Laiq Khan was married to a girl whom Alaf Khan had brought up as his own daughter. There is nothing strange therefore in Alaf Khan's transferring his machines to Muhammad Laiq Khan. There is not a tittle of evidence on the record to show that Alaf Khan in those days, when the document is said to have been executed, had any reason to make a fictitious or bogus transfer in favour of any body. He was not in debt nor had any other exigency arisen which

would tend to show that Alaf Khan stood in need of making a fraudulent transfer.

Similarly, it is true that no outstanding debts were discharged by Muhammad Laiq Khan and that even the mortgage money was paid off by Alaf Khan but that does not advance the case of the plaintiffs any further. The document transfers the machines in question free of all incumbrances inasmuch as it makes no reference to any incumbrance whatsoever and in these circumstances Alaf Khan was the only proper person to discharge his liabilities.

One machine is said to have been sold to Mahabir out of the machines mortgaged to him, but it is not clear on the record whether that machine was the machine which was included in the document dated 1st November 1931. A comparison of the two documents dated 1st November 1931 and 3rd August 1933 will clearly show that the machines mentioned in 1933 are practically the same which are mentioned in 1931. There is no doubt the omission of one Litho machine measuring 22x36 in the subsequent document but in the absence of any positive evidence on the record to show that the machine sold to Mahabir was one of the machines which were transferred to Muhammad Laiq Khan in 1931, it will not be either possible or fair to hold that this was so. Moreover, beyond the verbal statement of Mahabir there is no reliable evidence to prove this transaction. The argument that Muhammad Laiq Khan's statement in Court and his conduct in prevailing upon Alaf Khan to execute a will and a deed of waqf subsequent to the document of 3rd August 1933, help the plaintiffs, is devoid of force. It is evident that Muhammad Laiq Khan was interested in the plaintiffs and could be made to say anything that would help them. Moreover, he was heavily indebted in 1933 and had good reason to divest himself of any property that he possessed. He naturally trusted his own benefactor Alaf Khan and further to safeguard his own interest and the interest of his wife prevailed upon him to execute a wakf. The judgment of the Subordinate Judge dated 1st June 1935, may be relevant under S. 13, Evidence Act, but its findings cannot be used in this case nor can the reasons upon which the judgment is founded. If any authority is required for this proposition, reference may with advan-

tage be made to 58 Cal 1187.¹ Their Lordships have remarked :

They think that the judgment in question is only admissible under the provisions of Ss. 13 and 43, Evidence Act, as establishing a particular transaction in which the partibility of the Pandra estate was asserted and recognized, viz., the partition resulting from the 1793 suit. The reasons upon which the judgment is founded are no part of the transaction and cannot be regarded, nor can any finding of fact there come to, other than the transaction itself, be relevant in the present case. The judgment, therefore, is no evidence that Thakur Shib Singh got the Achra villages by partition; it is at most evidence that he might have done so, and this is plainly not sufficient.

Counsel for the appellants has referred us to two judgments of this Court: A I R 1935 Lah 64² and A I R 1935 Lah 179.³ In the former case, a Division Bench of this Court in which one of us was a party held that where a judgment in a previous suit declared a certain property to be waqf and consequently exempt from attachment and also contained the previous history of the property by reference to which certain words in a relevant document could be properly explained, the judgment was admissible in evidence under S. 42, Evidence Act, inasmuch as the matter of waqf was a matter of public nature. This evidently is not the case here and the judgment therefore is irrelevant for the purposes of the present case. In the latter case, one of us sitting alone referred to the Privy Council judgment mentioned above and to the other authorities dealing with the subject including a judgment by Tek Chand, J. and came to the conclusion that under S. 13, Evidence Act, the judgments relied upon in that case were relevant. Be that as it may, that judgment shall have to be read and interpreted in the light of the Privy Council judgment on which it was based.

Counsel for the appellants have taken us through the record and referred particularly to the statements of Mahabir, Lakhmi Das, Aziz Din, Muhammad Abdulla, Muhammad Hussain and Des Raj. We are not, however, convinced that these statements help the plaintiffs in any manner. It is one thing to assert that a transaction is bogus and a totally different

thing to urge that it was brought about by undue influence. As indicated above, the contention first raised by the appellant was that it was a case of undue influence. Later, it was urged that the original transaction was a bogus affair. This by itself would indicate that the plaintiffs themselves were not sure as to what line to take. But whatever their position in the written pleadings, it was made clear by their counsel in his statement before the issues. It cannot at all be imagined that an astute businessman like Alaf Khan would have advanced Rs. 10,000 in cash to Muhammad Laiq Khan for the return of those very machines which according to the plaintiffs had never belonged to Muhammad Laiq Khan. Counsel has tried to wriggle out of this admission by putting forward an explanation that at the time when he made the statement he was not properly instructed. This explanation to say the least is most unconvincing. Counsel should realize their responsibility when they make statements of fact on behalf of their clients and should not commit their clients to any position on which they are not sufficiently informed; but if once a statement is made in all solemnity, especially when it goes to the root of the case, it cannot be ignored so lightly. In view of all the circumstances mentioned above, we have no hesitation in holding that the plaintiffs have failed to prove their case. We accordingly affirm the decree of the Court below and dismiss this appeal with costs.

S.O./A.L.

Appeal dismissed.

* A. I. R. 1937 Lahore 439

ADDISON AND DIN MOHAMMAD, JJ.

Ram Gopal — Petitioner.

v.

Gauri Shankar and others—Opposite Parties.

Civil Misc. No. 818 of 1935, Decided on 8th December 1936, from judgment of Jai Lal and Sale, JJ., D/- 11th July 1935.

* Court-fees Act (1870), Sch. 1, Arts. 4 and 5 — 'Fee leviable on the plaint or memorandum of appeal' — Interpretation—Court-fee on application for review must be either fee or one-half of fee leviable on original plaint or original memorandum of appeal.

The words 'the fee leviable on the plaint or memorandum of appeal' in Arts. 4 and 5, Sch. 1, Court-fees Act can be only interpreted to mean that the court-fee to be paid on an application for review of judgment must be either the fee or one-

1. Gobinda Narayan Singh v. Sham Lal Singh, A I R 1931 P C 89=131 I C 753=58 I A 125=58 Cal 1187 (P C).

2. Misbahuddin v. Vidya Sagar, A I R 1935 Lah 64=156 I C 268=33 P L R 106.

3. Mutasaddi v. Mt. Lachmi, A I R 1935 Lah 179=152 I C 1060=37 P L R 34.

half of the fee leviable on the plaint or memorandum of appeal, i. e., which is prescribed for the original plaint or original memorandum of appeal even though the review relates only to a part of the relief: *A I R 1923 Rang 203* and *A I R 1927 Mad 360, Dissent.*; *A I R 1924 Cal 881, Approved.* [P 441 O 1]

S. M. Sikri and J. N. Aggarwal—

for Petitioner.

*Dewan Ram Lal—*for Opposite Parties.

Addison, J. — Under S. 5, Court-fees Act, the Taxing Officer referred to the Hon'ble Chief Justice the question of the interpretation of the words "the fee leviable on the plaint or memorandum of appeal" appearing in Arts. 4 and 5, Sch. 1 in the Court-fees Act. The Hon'ble Chief Justice has sent the reference to this Bench for decision. The question involved is the court-fee leviable on an application for review of judgment. The interpretation put upon the words in this Court has been uniform, at least since 1921, when apparently the matter was first raised. It was held then that the word 'appeal' meant the appeal originally filed and that even if the review related to a part of the relief, the same court-fee should be paid as was paid on the appeal if the application was put in on the 90th day and one-half thereof if it was put in on or before the 89th day, i. e., according as the application came within the purview of Art. 4 or Art. 5, Sch. 1, Court-fees Act. The matter again came before the Taxing Officer in 1932 in Civil Appeal No. 690 of 1928 and it was again referred to the Taxing Judge who made the following order :

The wording of Art. 5 is quite clear and all the High Courts take the same view except Madras and Bombay. The plaint can only mean the original plaint. The English used cannot be twisted into any other meaning. Similarly the memorandum of appeal means the original memorandum. I see no reason to differ from the previous view taken by this Court that under this Article must be paid court-fee amounting to one-half of the court-fee leviable on the original appeal. I am not concerned with the reasonableness of the law or otherwise.

Since that decision a Single Judge of the Rangoon High Court has followed the Madras and Bombay High Courts who hold the opposite view and his decision was reported in 146 I C 560.¹ The learned Judge said that he was inclined to agree with the judgment of Wallace, J. in 50 Mad 488,² as it seemed

to him that if the view of the Calcutta, Allahabad and the Lahore High Courts were to prevail, then a glaring piece of injustice would be done to an applicant seeking a review only on the question of costs awarded against him and where the original plaint and memorandum of appeal bore an *ad valorem* court-fee on the amount of the claim in suit out of all proportion to the value of the relief sought in review. The Taxing Judge of this Court, on the other hand, in 1932 said that he was not concerned with the reasonableness of the law or otherwise.

The interpretation put upon the Articles in 50 Mad 488,² was that a petition for review of an original or appellate decree must be valued on the reliefs prayed for in the petition as if the petitioner were then filing a plaint or memorandum of appeal for those reliefs. This interpretation departs from the wording of the Articles and adds considerably to the words of the Articles. The decision was founded on the argument that the word 'leviable' was not the same as the word 'levied'. It was pointed out, however, by a Division Bench of the Calcutta High Court in 82 I C 297³ that :

The use of the term 'leviable' in Art. 5, Sch. 1 to the Court-fees Act does not justify the inference that the Legislature intended to introduce a fiction into the law, namely, an imaginary representation of the plaint or memorandum of appeal at the time when the application for review is filed.

With all respect we consider that this is a complete answer to the argument on which the Madras judgment is founded. It may be that the law is hard but that is no reason why Judges should refuse to follow plain words. The court-fee leviable on an application for review of judgment is either one-half of the fee or the fee leviable on the plaint or memorandum of appeal. The word 'the' is significant and it must be held that it denotes the original plaint or memorandum of appeal. 'Leviable' means which may be levied, i. e., which is permitted by the statute to be levied, i. e., which is prescribed for the plaint or memorandum of appeal. The word 'levied' could not have been inserted in Arts. 4 and 5, for no court-fee is levied, say, in the case of a suit or appeal which is allowed to be instituted in *forma pauperis*. Again, it

1. *A. A. R. Chettyar Firm v. Daw Htoo*, *A I R 1933 Rang 203*=146 I C 560=11 Rang 120.

2. *Punya Nahako v. Emperor*, *A I R 1927 Mad 360*=100 I C 72=50 Mad 488=52 M L J 128.

3. *Nanda Lal v. Jogendra Chandra*, *A I R 1924 Cal 881*=82 I C 297=28 O W N 403=39 C L J 222.

may be that a smaller fee than that prescribed has been levied on the plaint or memorandum of appeal without its being noticed, and the use of the word 'levied' would have carried the same mistake into the matter of the court-fee payable on an application for review of judgment. We have no hesitation in holding that the only interpretation that can be given to the language used is that the court-fee to be paid on an application for review of judgment must be either the fee or one-half of the fee leviable on the plaint or memorandum of appeal, i. e., which is prescribed for the original plaint or original memorandum of appeal, and we so decide.

We were asked to take action under S. 149, Civil P. C., and to give time for putting in the proper court-fee. This, however, is a matter which is not presently before us and it will have to be decided by the Judge or the Bench before whom the application will come in the ordinary course. The only question before us is the taxing question referred under S. 5, Court-fees Act, and at the present stage we have no jurisdiction to go further. There will be no order as to costs.

V.B.B./K.S. *Reference answered.*

* A. I. R. 1937 Lahore 441

BHIDE, J.

Bhag Mal — Defendant — Appellant.

v.

Lala Kishen Lal, Official Receiver
and others—Plaintiffs—Respondents.

Second Appeal No. 47 of 1936, Decided on 13th January 1937, from order of Dist. Judge, Gujranwala, D/- 15th August 1936.

* (a) Insolvency—Question whether sale by insolvent is benami — Second appeal is competent.

The question whether the sale by an insolvent is benami falls under S. 4, Prov. Insol. Act, and hence a second appeal lies. [P 441 C 2]

(b) Provincial Insolvency Act (1920), Ss. 4 and 53—Burden of proof—Sale only 11 months before insolvency application sought to be set aside—Circumstances raising presumption of want of good faith on vendee's part — It is for vendee and insolvent to rebut presumption and prove good faith and sound financial position of insolvent at time of sale.

Where the sale by the insolvent sought to be set aside takes place only 11 months before the application for insolvency and the circumstances give rise to presumption as to want of good faith on the part of the vendee, it is for the vendee and

the insolvent to rebut the presumption and prove that the insolvent's financial position was sound at the time of the sale and both of them acted in good faith : A I R 1931 P C 75 and A I R 1934 P C 3, Ref. [P 442 C 1]

Badri Dass and Achhru Ram—

for Appellant.

A. R. Kapur—for Official Receiver.

Kahan Chand—for Respondent —

(Ram Lal).

Judgment. — This is a second appeal arising out of proceedings under Ss. 4 and 53, Prov. Insol. Act, for the setting aside of an alienation. The property alienated stood in the name of two persons named Har Bhagwan and Ram Lal, but the Official Receiver's contention was that they were mere benamidars, that the real owner of the site and the house thereon was the insolvent and the sale being fraudulent was liable to be set aside under the Insolvency law. This contention has been upheld by the Courts below and the alienation has been set aside. From this decision, the vendee Bhag Mal appeals. A preliminary objection was raised that no second appeal was competent; but it seems to me that the decision of the question whether the sale was benami would fall under S. 4, Prov. Insol. Act, and hence a second appeal would lie.

On merits, the learned counsel for the appellant has not challenged the learned District Judge's finding that the property in question did belong to the insolvent though the site on which the house stood was originally purchased by and entered in the revenue records as the property of Har Bhagwan and Ram Lal, because the finding being one of fact is not open to challenge in second appeal. But he contended that this finding was not sufficient to prove that the appellant had not acted in good faith or that he had not paid valuable consideration. He urged that according to 9 Rang 170¹ and 12 Rang 105² the burden of proving that the property was not purchased in good faith and for valuable consideration by the appellant lay upon the Official Receiver, that the Official Receiver had not discharged the onus, and the learned District Judge also had given no clear finding on the point. After carefully considering the facts on

1. Official Receiver v. P. L. K. M. R. M. Chettyar Firm, A I R 1931 P C 75=131 I C 767=58 I A 115=9 Rang 170 (P C).

2. Harry Pope v. Official Assignee, Rangoon, A I R 1934 P C 3=146 I C 743=60 I A 362=12 Rang 105 (P C).

the record I do not think there is much force in the above contentions. The learned District Judge has given a finding that Bhag Mal had knowledge of the benami nature of the transaction. It follows from this in the circumstances of the case that he could not have acted in good faith. It has been found that the house had been built by the insolvent and that the insolvent was actually living in it before the sale and that these facts were known to the appellant. The appellant has not explained why he purchased the house from Har Bhagwan and Ram Lal in these circumstances. This raises a strong presumption that he was not acting in good faith. Ram Lal strenuously contended at first that the property belonged to him and it was only when an entry in his bahi was found which clearly showed the benami nature of the transaction that he was forced to admit that the transaction was benami. It was suggested that the property was probably originally purchased with money borrowed by Har Bhagwan and Ram Lal. But if this were so, there was no reason why Ram Lal should not have at once stated the facts correctly and produced some documentary evidence in the shape of entries in his bahi in support of the same. The attitude taken up by Ram Lal and the conduct of the appellant in accepting the sale from Har Bhagwan and Ram Lal when he knew that the house was built by the insolvent raise a strong presumption of want of good faith on the part of both of them.

It was urged that the Official Receiver had not shown that the insolvent was in a financially embarrassed condition and was unable to pay his debts when the sale was effected. But the sale took place only 11 months before the application for insolvency, and in view of the presumption as to want of good faith arising from the circumstances referred to above it was I think, for the appellant and the insolvent to rebut that presumption and prove that the insolvent's financial position was sound at the time of the sale and both of them acted in good faith. I therefore uphold the finding of the learned District Judge and dismiss the appeal with costs.

V.B.B./A.L. *Appeal dismissed.*

A. I. R. 1937 Lahore 442

ADDISON AND DIN MOHAMMAD, JJ.

Bhagat Ram Kohli — Decree-holder
— Appellant.

v.

Angels Insurance Co., Ltd., Delhi —
Judgment-debtor — Respondent.

Letters Patent Appeal No. 10 of 1936,
Decided on 13th January 1937, from
judgment of Agha Haidar, J., D/- 26th
November 1935.

(a) Companies Act (1913), S. 153 — Proceedings under—It is not obligatory on company or Court to serve notice of creditors' meeting on every creditor—Mere absence of a creditor does not invalidate proceedings—If majority required by S. 153 (2) is present decision becomes binding on every creditor or member and company.

Section 153, Companies Act, does not make it obligatory either upon the Court or the company to serve a notice of the creditors' meeting on each and every creditor of the company, and the decision arrived at the meeting of the creditors and the company and sanctioned by the Court, though in the absence of any individual creditor, does not become invalid merely because a notice of the meeting is not served upon him. The only safeguard intended to protect the interest of the creditors is that provided in sub-s. (2) of S. 153. If the required majority is present at the meeting, the decision is binding on creditors or members and the company. [P 443 O 2]

(b) Companies Act (1913 as amended by Act of 1936), S. 153—Scheme arrived at between creditors and company at a meeting and sanctioned by Court—Judgment-creditor is of same class as that of unsecured creditor of company who has not obtained decree against company—Judgment-creditor cannot execute his decree as scheme is binding on him also.

Where a scheme arrived at between the creditors and members of a company at a meeting of creditors and the company, is sanctioned by the Court, a judgment-creditor who has obtained a decree against the company cannot execute his decree against the company as he is of the same class of unsecured creditors who have not obtained decrees against the company. The scheme is binding on such judgment-creditor as well: *A I R 1936 Cal 282; A I R 1935 Cal 777 and 39 C W N 875, Rel. on; A I R 1935 Cal 398 and A I R 1936 Cal 162, Dissent.* [P 444 O 1, 2]

Achhru Ram — for Appellant.

Bhagwat Dayal — for Respondent.

Din Mohammad, J.—The facts giving rise to this Letters Patent appeal are these: On 26th January 1934, the General Manager of the Angels Insurance Co., Ltd. Delhi, (hereinafter called the company), presented a petition containing a proposed compromise between the company and its creditors and asking that the creditors' meeting might be called under

S. 153, Companies Act, 1913. A meeting was accordingly called and held on 18th March 1934. The creditors did not find the scheme propounded by the company acceptable to them and the meeting ended in a fiasco. On 22nd March 1934, another petition to the same effect was made by certain creditors putting forward a different set of proposals. Thereupon, the Court allowed a second meeting to be called which was held on 6th May 1934. On 15th May 1934, a meeting of the members of the company was held, in which the proposals originally embodied in the application of 22nd March and subsequently approved on 6th May were unanimously adopted. The proceedings of the meeting of 6th May 1934 were submitted to the Court for sanction which however the Court very rightly refused on 19th May 1934 on the ground that S. 153 did not contemplate a meeting of creditors alone behind the back of the company. It was further pointed out that the members of the company should also have been consulted. It appears that the fact of the members having met on the 15th and adopted the original proposals put forward by the company was not brought to the notice of the Court. Consequently, another meeting of the members of the company was held on 11th June which re-affirmed the decision arrived at on 15th May. The Court was once more moved by one Surjan Das on 23rd June and eventually the scheme put forward by the company and approved by the creditors and members was sanctioned on 7th July 1934.

In the meantime, one Mr. Bhagat Ram Kohli, Advocate, Sargodha, obtained a decree against the company on 17th April 1934 and sued out execution on 10th May 1934. The company resisted this application on the ground of the compromise mentioned above. The executing Court dismissed the objections of the company. On appeal, the District Judge affirmed the decision of the executing Court. On further appeal to this Court, Agha Haidar, J. held that Mr. Bhagat Ram Kohli was bound by the compromise sanctioned by the District Judge of Delhi on 7th July and allowed the appeal of the company. Hence this Letters Patent appeal. Only two points have been raised before us: (1). That Mr. Bhagat Ram Kohli not having been served with a notice of any of the meetings that were

held between the company and its creditors was not bound by the decision arrived at in those meetings; and (2). That he being a judgment-creditor did not belong to the class of creditors who held the meetings and was hence not bound by the compromise.

We have heard counsel at length and have come to the conclusion that there is no force in either of the points raised. S. 153 does not make it obligatory either upon the Court or the company to serve a notice of the creditors' meeting on each and every creditor of the company and we have not been referred to any law which would invalidate a decision arrived at by the creditors and the company in the absence of any individual creditor. On the other hand, at p. 364 of *Rustomji's Company Law* a case has been cited in which it was held that where there was an inadvertent omission to advertise a scheme of arrangement under S. 153 but it was satisfactorily proved that thirty out of thirty-one shareholders of the company had received the notices, the meetings had in substance been held in the manner prescribed and the Court would not insist on further meetings being convened. Moreover as we interpret the law, the only safeguard intended to protect the interest of the creditors is that provided in sub-s. (2) of S. 153. In other words, if a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the Court, is binding both on the creditors or members and the company. In the case before us, it is not urged that the majority required by sub-s. (2) was not present or had not been notified and, in these circumstances, the objection raised by Mr. Bhagat Ram cannot prevail.

In support of the second contention raised on behalf of the appellant, reliance has been placed on A I R 1935 Cal 398¹ and A I R 1936 Cal 162.² In A I R 1935 Cal 398,¹ a scheme was framed by the depositors with the object of saving the

1. *Shushilabala Basu v. Anjuman Trading & Banking Co. Ltd.*, A I R 1935 Cal 398=156 I C 590.

2. *Manikganj Trading & Banking Co., Ltd. v. Madhabendra Kumar Shaha*, A I R 1936 Cal 162=40 C W N 580.

Bank. A female depositor however had obtained a decree against the Bank before the scheme framed by the depositors was approved by the Court. Henderson, J., held that the scheme was not binding on her as she was no longer a depositor but a judgment-creditor and her interest was not in any way the same as that of the depositors. In A I R 1936 Cal 162,² a Division Bench of the Calcutta High Court composed of Guha and Bartley, JJ., re-affirmed this principle. As against this, counsel for the respondent has drawn our attention to three other judgments of the same High Court which support his contention. In A I R 1935 Cal 777,³ Mitter, J., held that unsecured creditors of a company who had already obtained decrees against the company were within the same class as unsecured creditors who had not obtained decrees against the company. In A I R 1936 Cal 282,⁴ a Division Bench of the Calcutta High Court, of which Guha, J., was a member, held that a scheme of composition passed and sanctioned under the provisions of the Companies Act applied to all creditors of the company including judgment-creditors. In 39 C W N 875,⁵ Cunliffe, J. also laid down that unsecured creditors of a company who had obtained decrees and such unsecured creditors as had not obtained decrees did not constitute different classes of creditors.

It may be interesting to note in this connexion that the Indian Companies (Amendment) Act, 1936 has introduced a clear provision in S. 153 itself which says that for purposes of this section unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors. Even the two Calcutta judgments cited on behalf of the appellant proceeded on the ground that a depositor who had obtained a decree on the footing of his deposit had a conflicting interest with those depositors who were not so fortunately placed. In the present case, we do not consider that there was any conflict of interest between Mr. Bhagat Ram and the other creditors who attended the creditors' meeting and agreed to the

composition scheme. On these grounds, we have no hesitation in holding that Mr. Bhagat Ram was bound by the scheme sanctioned by the Court on 7th July 1934 and that consequently his execution could not proceed. We accordingly dismiss the appeal and affirm the decision of Agha Haidar, J. There will be no order as to costs before us.

K.B./A.L.

Appeal dismissed.

A. I. R. 1937 Lahore 444

JAI LAL, J.

Ram Chand and others — Petitioners.

v.

Mohd. Akram Khan Sahib — Opposite Party.

Civil Revn. No. 385 of 1936, Decided on 25th November 1936, from order of Dist. Judge, Jhelum, D/- 29th February 1936.

Insolvency — Deposit by employees with employer for good behaviour — Employer becoming insolvent—There is no trust created in respect of deposit—Employees are only creditors.

Employees took service with their employer and deposited with him money as security for due performance of duties. On employer going into insolvency, the employees claimed that the deposit was by way of trust and that money should be paid to them in preference to the creditors of the insolvent :

Held : that there was no object of the trust and the so-called trustee, employer, was not expected to carry out any trust: it was a simple case of deposit by an employee with his employer as security for his good behaviour. And hence the depositors must be deemed to be the creditors and the depositor as the debtor, and the relationship of beneficiaries and trustee did not exist in their case : A I R 1932 Bom 311, *Rel. on.* [P 445 O 1]

*Shamair Chand — for Petitioner.**Daulat Ram and Mohd. Amin — for Opposite Party.*

Order.—The petitioners took up service with Lorind Chand and Sons who were appointed treasurers by the Government. As security for due performance of their duties the petitioners deposited an aggregate sum of Rs. 2,600 with Lorind Chand and Sons. Gurdas Mal was one of the partners of Lorind Chand and Sons in the business of treasurership and the deposits came to his share in partition proceedings between the partners. Subsequently Gurdas Mal was declared an insolvent and his estate vested in the Special Receiver. The petitioners then claimed that with regard to Rupees 2,600 deposited by them Gurdas Mal

3. Serajgunj Loan Office Ltd. v. Nil Kanta Lahiri, A I R 1935 Cal 777=39 C W N 1199 =62 O L J 310.

4. Barisal Loan Office Ltd. v. Sasthi Charan Bhattacharya, A I R 1936 Cal 282=166 I O 408=39 C W N 1198.

5. *In re Jalpaiguri Banking & Trading Co., Ltd.*, (1935) 39 C W N 875=164 I O 261.

must be treated as a trustee and, therefore, this amount should be paid to them in preference to the claims of the creditors of the insolvent. This contention has been negatived by the insolvency Judge and also by the learned District Judge on appeal. On this petition it is contended that the petitioners should be deemed to be beneficiaries under a trust and Gurdas Mal must be held to be a trustee. Consequently Rs. 2,600 must be dealt with as trust money in the hands of Gurdas Mal. It is not contended before me on behalf of the respondent, the Special Receiver, that if Gurdas Mal be held to be a trustee and the amount in question trust money, then in the insolvency proceedings the petitioners are not entitled to be paid back Rs. 2,600 in preference to the creditors of the insolvent, but it is strenuously contended that the money in question cannot be held to be trust money. No authority has been cited on behalf of the petitioners. On behalf of the respondent reliance is placed on 34 Bom L R 728¹ which fully covers the present case. In fact the circumstances of that case were much stronger in favour of the depositors and in spite of them it was held that no trust was created in respect of the amount in dispute in favour of the claimants. There was no object of the trust in this case and the so-called trustee Gurdas Mal was not expected to carry out any trust; it was a simple case of deposit by an employee with his employer as security for his good behaviour. In my opinion therefore the depositors must be deemed to be the creditors and the depositor as the debtor, and the relationship of beneficiaries and trustee does not exist in their case. I accordingly dismiss this petition with costs.

B.D./D.S.

Petition dismissed.

1. *In re Manekji Petit Manufacturing Co., Ltd.*,
A I R 1932 Bom 311=140 I C 814=34 Bom
L R 728.

A. I. R. 1937 Lahore 445

ADDISON AND DIN MOHAMMAD, JJ.

Chiranji Lal and Sons, Delhi —

Assessee — Petitioners.

v.

Commissioner of Income-tax, Punjab —
Opposite Party.

Civil Ref. No. 22 of 1936, Decided on
26th November 1936, from Commissioner
of Income-tax, Punjab, N. W. F. and
Delhi Provinces, Lahore, D/- 8-7-1936.

Income-tax Act (1922), S. 59—Rules under,
R. 2—Assistant Commissioner not competent
to order registration—He has discretionary
power to permit application to Income-tax
Officer—High Court is competent to deter-
mine whether jurisdiction is properly exer-
cised or not—Application for registration by
firm—Recital in application not in accord-
ance with facts—Assistant Commissioner is
justified in refusing to register firm.

Under R. 2 of the rules framed by the Board
of Inland Revenue under S. 59, Income-tax Act,
the Assistant Commissioner is not himself com-
petent to order the registration of a firm. The
only power that he can exercise under the rule is
to permit the presentation of the application to
the Income-tax Officer and thus condone the
delay. Further the matter is entirely discre-
tionary with him and he cannot be compelled
under any provisions of the Act or the rules made
thereunder, to grant the prayer made to him by
the assessee. Still on general principles the High
Court is competent to determine whether the
jurisdiction, which vested in the Assistant Com-
missioner, has been perversely refused.

[P 446 C 1]

Where in an application by a firm for registra-
tion a recital is not in accordance with facts, the
Assistant Commissioner is justified in refusing to
register the firm : 8 I T C 107, *Rel. on.*

[P 446 C 2]

*Kirpa Ram Bajaj — for Petitioners.**J. N. Aggarwal — for Opposite Party.*

Din Mohammad, J.—The Commis-
sioner of Income-tax was required to state
the case and refer the following question
to this Court: "Whether the Assistant
Commissioner was right in refusing to
register the firm?" The facts bearing
upon the question of law involved in this
case are these: A firm composed of Rai
Sahib Chiranji Lal and his four sons had
been registered under an instrument of
partnership dated 17th March 1930, and
had been assessed as such until 1933-34.
On 21st May 1934, notice was served upon
the firm to furnish the usual return. On
17th July 1934, Rai Sahib Chiranji Lal
died. The return was furnished on the
10th August accompanied by an applica-
tion for renewal of registration, to which
an undated letter was annexed, saying,
that the constitution of the firm remained
the same as it was declared during the
previous year. This statement of fact
was evidently wrong on the day on which
it was made, inasmuch as the constitution
of the firm had changed on account of
Chiranji Lal's death. On 6th September
1934, notice under S. 23, sub-s. (2) was
served on the assessee. On the 14th
September, the assessee appeared and
after recording the necessary evidence an
assessment order was made. At the same

time the application for registration was refused. From this order the assessee preferred an appeal to the Assistant Commissioner and in addition renewed his prayer for registration of the firm. The Assistant Commissioner, however, rejected the application for registration and confirmed the assessment. Counsel for the assessee has relied on R. 2 of the rules made by the Board of Inland Revenue under S. 59, Income-tax Act, 1922, the material portion of which is reproduced below :

Any firm constituted under an instrument of partnership specifying the individual shares of the partners may, ... register with the Income-tax Officer the particulars contained in the said instrument on application in this behalf made by the partners or by any of them. Such application shall be made :

(a) (b) (c) With the permission of the Assistant Commissioner hearing an appeal under S. 30 before the assessment is confirmed, reduced, enhanced or annulled.

In our opinion, this rule does not help the assessee. In the first place, as we read the rule, the Assistant Commissioner was not himself competent to order the registration of the firm. The only power that he could exercise under the rule was to permit the presentation of the application to the Income-tax Officer and thus to condone the delay, so to say. Further, the matter was entirely discretionary with him and he could not be compelled under any provisions of the Act or the rules made thereunder to grant the prayer made to him by the assessee. The question before us, therefore, is narrowed down to this : whether the exercise of his discretion by the Assistant Commissioner is subject to the control of this Court, and, if so, to what extent. Counsel for the assessee has not referred us to any provision of the Income-tax law which controls the Assistant Commissioner in the exercise of his discretion under this rule. On general principles, however, we are disposed to think that we are competent to determine whether the jurisdiction which vested in the Assistant Commissioner had been perversely refused. From this point of view, we have examined the order made by the Assistant Commissioner and have come to the conclusion that the reasons recorded by him for not granting the assessee's prayer that he could, if he so chose, grant, are not only not unsound but are cogent and convincing. In the case in 8 I T C

107¹ decided by a Special Bench of the Rangoon High Court, the learned Judges upheld the refusal of the Income-tax Officer on the ground that a recital in the application was not in accordance with facts. That case is, in our view, practically on all fours with the present case. We accordingly answer the question referred to us in the affirmative. Costs of this reference will be paid by the assessee.

V.B.B./D.S.

Reference answered.

1. A. M. Banjee & Sons v. Commissioner of Income-tax, Burma, (1934) 8 I T C 107 (SB).

A. I. R. 1937 Lahore 446

ADDISON AND DIN MOHAMMAD, JJ.
Lal Khan and another — Insolvents
— Appellants.

v.

Official Receiver Ferozepore, and others — Creditors — Respondents.

First appeal No. 280 of 1936, Decided on 17th February 1937.

Punjab Debtors' Protection Act (2 of 1936), Ss. 4 (1) and 2 (4) — Applicability — S. 4 (1) applies only when attachment and alienation of land emanate from civil Court — Though "Court" includes insolvency Court under S. 2 (4) it does not include Receiver in insolvency — S. 4 (1) does not apply to case of receiver leasing out insolvent's property.

The condition for applicability of S. 4 (1), Punjab Debtors' Protection Act is that the attachment and alienation of land must emanate from a civil Court. Although 'Court' includes an insolvency Court under S. 2 (4) of the Act it does not include a Receiver of insolvent's property. A sale of an insolvent's property is an act of the Official Receiver and not that of Court and hence S. 4 (1) does not apply to the lease of insolvent's land granted by the Official Receiver : *A I R 1927 P C 113; A I R 1927 Mad 1; A I R 1931 Rang 122* and *A I R 1935 Lah 268 (F B), Ref. [P 447 C 2; P 448 C 1]*

J. L. Kapur — for Appellants.

J. N. Aggarwal — for Respondents.

Din Mohammad, J. — A preliminary objection has been raised by the respondents that no appeal lies to this Court. It is urged that the order of the Additional District Judge complained against was passed on appeal under S. 68, Provincial Insolvency Act 1920, and that from such an order no appeal is provided for by S. 75 of the same Act. Counsel for the appellants concedes this proposition, but, relying on the proviso to sub-s. (1), S. 75, Provincial Insolvency Act, has asked us to treat his petition of appeal as a petition for revision. That proviso reads as follows:

Provided that the High Court, for the purpose of satisfying itself that an order made in any

appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit.

We consider that the point involved in this case is an important point of law, and we have, therefore, decided to hear this petition as a petition for revision. The question involved in this petition turns upon the true interpretation to be placed on sub-s. (1), S. 4, Act 2 of 1936. That sub-section is couched in the following terms :

Notwithstanding anything contained in any other enactment for the time being in force, whenever a civil Court orders that land be attached and alienated temporarily in the execution of a decree for the payment of money, the proceedings of such attachment and alienation shall be transferred to the Collector.

In the case of the appellants who were adjudicated insolvents the Official Receiver is conducting proceedings in relation to the temporary alienation of their land and the appellants contend that he has no jurisdiction to do so in view of the provision of law reproduced above. They further refer to Cl. (4), S. 2, where "Court" is defined to include a Court acting in the exercise of insolvency jurisdiction. After hearing counsel on both sides we have come to the conclusion that the contention of the appellants must fail. Under S. 28, Provincial Insolvency Act, as soon as an order of adjudication is made, the property of an insolvent vests in the receiver, and to all intents and purposes he takes the place of the insolvent. Under S. 59, Provincial Insolvency Act, the receiver is enjoined to realize the property of the debtor and distribute dividends among the creditors entitled thereto, and for that purpose he is empowered to sell all or any part of the property of the insolvent. This he is entitled to do without the leave of the Court, which under the same section is necessary in certain other matters. It is on this ground that it has been invariably held that a sale by a receiver of the property of an insolvent is not a sale "in execution of an order of a civil Court". If any authority be needed for this proposition, reference may be made to 49 All 367,¹ 50 Mad 135,² 9 Rang 231³ and 16

Lah 173.⁴ In 49 All 367¹ a Division Bench of the Allahabad High Court had observed as follows :

We find it impossible to hold the view that a village custom which refers only to a voluntary sale by one co-sharer of his property can in any way apply to the case of an involuntary sale carried out against his wishes by a Court through a Collector or an Official Assignee, or anybody else.

Their Lordships of the Privy Council in animadverting upon these remarks of the learned Judges said :

With deference to the learned Judges, it seems to their Lordships that this overlooks one of the fundamental principles of all arrangements for the realization and distribution of a bankrupt's property. In every system of law the term may vary, but in all, there is an official, be he called an assignee or trustee or any other name, and that official is by force of the statute invested in the bankrupt's property. But the property he takes is the property of the bankrupt exactly as it stood in his person, with all its advantages and all its burdens. ... Just, therefore, as if the conveyance had been made to an individual, that individual would have had at once the disadvantage and the privilege of the custom of pre-emption, so the Official Assignee was in the same position and could only sell what he got.

In 50 Mad 135,² it was held by the majority of the Court that a sale by an Official Receiver in insolvency was not a transfer by operation of law or by, or in execution of, a decree or order of Court. The same principle was affirmed in 9 Rang 231³ and in 16 Lah 173,⁴ which is based on the three judgments mentioned above.

These decisions do not directly touch the point at issue but they go a long way in establishing that the sale of an insolvent's property is an act of the receiver and not that of the Court. This being so the provision of law as contained in sub-s. (1), S. 4 does not help the appellants. The attachment and alienation of land must emanate from a civil Court before that sub-section comes into play; and although "Court" includes an insolvency Court, it does not include a receiver in insolvency. Counsel for the appellants has urged that the intention of the Legislature was to protect the debtors both in ordinary and in insolvency cases and that consequently the wording of S. 4 should be taken to include sales by receivers. We, however, consider that we are not justified in so straining the language of an enactment as to import into it words which do not exist there. To do so would be repug-

1. Sheobaran Singh v. Kulsum-un-nissa A I R 1927 P C 113=101 I C 368=54 I A 204=49 All 367 (P C).

2. P. B. Sankaram v. G. Narasimhalu, A I R 1927 Mad 1=99 I C 8=50 Mad 135=51 M L J 529 (F B).

3. Venkatachalam Chettyar v. Merugesan Servai, A I R 1931 Rang 122=131 I C 732=9 Rang 231 (S B).

4. Gurbakhsh Singh v. Sardar Singh, A I R 1935 Lah 268=155 I C 693=37 P L R 402=16 Lah 173 (F B).

nant to the recognized principles governing the interpretation of statutes. If anybody considers that the language of the law is defective, his remedy lies in appealing to the Legislature to amend the law and not in moving the Courts to stretch it. We accordingly hold that the order of the Additional District Judge dismissing the appeal against the Official Receiver's action in proceeding to farm out the insolvent's land and affirming that action is not open to any legal objection. With these remarks we dismiss the petition, but in view of the peculiar circumstances of the case we leave the parties to bear their own costs before us.

K.B./A.L.

*Appeal dismissed.***A. I. R. 1937 Lahore 448**

TEK CHAND AND SKEMP, JJ.

Sardar Balwant Singh and another — Defendants—Appellants.

v.

Sardarni Basant Kaur and others, Plaintiffs and others, Defendants — Respondents.

First Appeal No. 1209 of 1935, Decided on 19th October 1936, from decree of Addl. Sub-Judge, First Class, Lahore, D/. 24th June 1935.

Northern India Canal and Drainage Act (8 of 1873), S. 68—Order of executive engineer granting application for new warabandi—Onus to show that order is improper lies on party seeking to set it aside in civil Court.

Where a party who is aggrieved by an order of executive engineer passed under S. 68, Northern India Canal and Drainage Act, granting an application for a new warabandi brings a suit in a civil Court to set it aside the burden of showing that the order is unjust and inequitable or otherwise improper lies on him: *A I R 1932 Lah 672, Rel. on.* [P 448 C 2 ; P 449 C 1]

*Harbhajan Das — for Appellants.**Dewan Mehr Chand— for Respondents.*

Skemp, J.—In the year 1918 the predecessors-in-interest of the present parties came to an arrangement governing irrigation at Mauza Kulla, Tahsil Qasur. On 5th August 1918 an application under S. 68, Northern India Canal and Drainage Act, embodying their agreement was made to the Executive Engineer, who on 13th September 1918 accepted the application. In accordance with this, one party had water for 11 pahars and 2 gharis, the other party for 44 pahars and 6 gharis, these together constituting a whole week of 56 pahars.

This arrangement was carried out for a number of years, but in 1931 certain of the parties applied for a new warabandi. The executive engineer after holding an enquiry passed an order on 8th January 1932 setting aside the former warabandi and fixing a new one. Thereupon the present plaintiffs, some of the proprietors in Mauza Kulla, brought a suit in a civil Court for a declaration that the agreement of 1918 should be enforced in preference to the new one which they sought should be declared null and void. The case somewhat unfortunately came before four Subordinate Judges. Issues were framed and decided but the only one that is now of any importance is the 3rd. This was originally framed in the following terms: "Whether the new arrangement in supersession of the old one is a valid and enforceable one under the law?" The onus was objected to at the time and subsequently altered, the new issue running: "Whether the new arrangement in supersession of the old one is invalid and unenforceable under the law?" the onus being then placed on the plaintiffs.

On this issue the Subordinate Judge who finally decided the suit found in favour of the plaintiffs. He said that the old warabandi had been in force for some years and that there seemed to be no justification for the new one. He quoted certain remarks from the file of the Irrigation Branch showing that the office did not wish to alter the old warabandi. He finally said:

Unless the Irrigation Department gave a finding that the old warabandi was not equitable or that circumstances had arisen which necessitated a change, there was no justification to substitute a new warabandi for the old one.

The defendants have appealed. In my opinion the learned Subordinate Judge who decided the case did not take quite a correct view. The order of the executive engineer is certainly very brief. The operative part simply says:

Case heard today in the presence of the partners, Zilladar of the circle, Patwari and the proposed warabandi was sanctioned accordingly, but this order as stated in the written statement was upheld on appeal in the Irrigation Branch. In such circumstances there is no doubt that the onus to set aside the order of the executive engineer lies on the party seeking to do so. This has already been held by Tek Chand, J. in *I R 1932 Lah 672*.¹ Some difficulty

1. *Isher v. Jiwan*, *I R 1932 Lah 672*.

appears to have been caused to the learned Subordinate Judge by a passage in 71 P R 1888.² This was a ruling on S. 20 of the Act but it contains a passage:

Section 68 on the other hand deals with disputes between persons already possessing shares in a water-course as to their mutual rights and liabilities and all that the Canal Officer is empowered to do is to effect a temporary settlement of the dispute which will hold good until the parties can obtain a permanent one from the ordinary Courts.

The relevant part of S. 68 runs:

Such order (i. e. of the executive engineer) shall be final as to the use or distribution of water for any crop sown or growing at the time when such order is made, and shall thereafter remain in force until set aside by the decree of a civil Court.

It would appear that the use of the word 'temporary' in the passage quoted was in opposition to 'final'. It is not a final order in this sense but considering that it is passed by the officer in the best position to know all the circumstances the onus is necessarily on those seeking to have it set aside in a civil Court. As to the actual decision of the Subordinate Judge on issue 3, there is no doubt that the order was valid and enforceable but that it is liable to be set aside on sufficient cause being shown. In my opinion sufficient cause has not been shown so far upon this record. The real issue was not whether the order was valid and enforceable but whether it was unjust and inequitable or otherwise improper and that issue has not been tried. The minds of the parties appear to have been obscured by technicalities, and it may be noted in passing that the defendants even denied the existence of the order of 1918 which, however, was easily proved. The real questions in issue are something like this: Ought the order of 1932 to be set aside and if so, why? If so, what is the proper order? These questions, however, are too vague and indefinite to be suitable issues for the trial of a suit. They are the nearest approach to issues which we can get from the material available on the record. As it is impossible to come to a satisfactory conclusion I am of opinion that the case ought to be remanded under S. 151, Civil P. C., for a retrial. The Subordinate Judge is to examine both parties with a view in particular to finding out the following facts: 1. What was the state of affairs before 1918? 2. What reasons led to the order of 1918? and

3. What were the reasons for the change in 1932?

For this it will be very desirable to produce copies from the relevant file of the Irrigation Branch. This file was referred to by the trial Judge but no copies from it were placed on the record. It will be also desirable to obtain the evidence of an officer of the Irrigation Branch, either the executive engineer who passed the order in 1932 or some other officer well acquainted with the circumstances. The judgment and decree of the trial Court are set aside and the case is remanded for retrial under S. 151, Civil P. C., with reference to the foregoing remarks. The costs hitherto incurred are to be costs in the case. Parties have been told to appear in the Court of Chaudhri Chhaju Ram, Subordinate Judge, First Class, Lahore, on 17th November 1936.

Tek Chand, J.—I agree.

K.B./D.S.

Case remanded.

A. I. R. 1937 Lahore 449

TEK CHAND, J.

Mt. Raqia Begam — Plaintiff —

Appellant.

v.

Nek Mohammad and others —

Defendants — Respondents.

Second Appeal No. 694 of 1936, Decided on 26th November 1936.

(a) Punjab Courts Act (6 of 1918), S. 41 (3) — Neither party adducing evidence on point of custom—Court relying on presumption — No certificate for second appeal is necessary.

Where neither party to the suit adduces any evidence oral or documentary on the issue of custom, the point involved, and the Court relies only on the presumption, no certificate under S. 41 (3), Punjab Courts Act, is needed for second appeal.

[P 450 C 2]

(b) Custom (Punjab)—Burden of proof—Succession—Party asserting that he is governed by custom must prove it and what that particular custom is.

Where in regard to succession to certain self-acquired property, a party asserts that it is governed by custom and not by personal law, he must prove that he is so governed, and further what that particular custom is: 41 P R 1906 (F B) and A I R 1917 P C 181, *Rel. on.*

[P 450 C 2; P 451 C 1]

Ghulam Rasul — for Appellant.

M. L. Puri — for Respondents.

Judgment.—This judgment will dispose of R. S. A. Nos. 694 and 695 of 1936 and C. R. Nos. 420 and 421 of 1936 which arise from two connected suits. The property involved in one of these suits was the self-acquired property of Fateh.

2. Kadir Baksh v. Bhagat Ram, (1888) 71 P R 1888.

Mohammad, Kumhar of Kalra, Jhelum district. The property in dispute in the second suit was the self-acquired property of Ghulam Mohammad Kumhar of the same place. Fateh Mohammad and Ghulam Mohammad died sonless and the defendants, who are their collaterals, took possession of the property left by them. The plaintiff in each case is the daughter of the last owner, and she brought a suit for possession alleging that the deceased was governed by Mahomedan law, under which the plaintiff was the preferential heir and, in any case, even if custom applied, the collaterals did not possess a superior right of succession to self-acquired property against daughters. The trial Judge held that the parties were governed by custom and not by Mahomedan law, and as no evidence had been produced to prove a custom different from that prevailing among the agricultural tribes of the Province in regard to succession of self-acquired property, he decreed both suits. The collaterals preferred appeals to the Senior Subordinate Judge with special appellate powers, who relying upon the Answer to Question 58 in Talbot's General Code of Tribal Custom of the Jhelum District, dismissed the suits. Shortly after the decision of these appeals the Senior Subordinate Judge was transferred, and his successor was not invested with appellate powers. The plaintiffs therefore filed applications under S. 41 (3), Punjab Courts Act, before the District Judge for grant of certificates for preferring second appeals in this Court. The learned District Judge observed that he "found himself in a peculiar and almost embarrassing position" as he disagreed entirely with the decision of the learned Senior Subordinate Judge, but nonetheless he did not think that the appeals were certifiable, as to his mind the matter was not open to sufficient doubt. He evidently thought that the certificate could be granted only, if he was doubtful of the correctness of the decision, but that if he was certain in his mind of its error, it was not competent to him to grant the certificate. He accordingly rejected the applications but at the same time, he "advised the plaintiffs to approach the High Court in revision against his order". The plaintiffs have preferred second appeals to this Court against the decision of the Senior Subordinate Judge in each case and, apparently acting on the 'advice' given by the

learned District Judge, have also filed petitions for revision against his order declining to grant the certificates.

Before me the first contention raised by counsel for the plaintiffs is that in these cases certificates under S. 41 (3), Punjab Courts Act, are not necessary, as neither party led any evidence at the trial bearing upon the question of custom involved and that the cases had been decided by either Court on presumptions only. He points out that the trial Court relied solely on the presumption arising from the custom prevailing among the agricultural tribes of the province as set out in S. 23 of Rattigan's Digest, and the appellate Court relied on that arising from the entry in Talbot's *Riwaj-i-am*. He further urges that the onus really lay on the defendants to prove the particular custom by which they were governed in derogation of their personal law and that neither in the *jawabidawa*, nor in the course of the trial before the Subordinate Judge, nor in the arguments before him was the *riwajiam* of the district referred to by the defendants, nor was it mentioned in the grounds of appeal filed in the lower appellate Court, and that if the Senior Subordinate Judge thought it proper to rely on it, the cases should have been remanded to give the plaintiffs an opportunity to show that the entry was wrong and was not in accordance with the actually prevailing rule of succession in the tribe. After hearing counsel for the respondents I am of opinion that no certificate was necessary in these cases, as neither party had led any evidence whatever, oral or documentary, bearing on the point in issue. No copy of the *Riwaj-i-am* of the village or tribe was exhibited at the trial, nor any reference appears to have been made to it or to the published *Riwaj-i-am* of the district before the trial Court. In the circumstances, the cases did not fall within the restrictive provisions of Cl. (3), S. 41, Punjab Courts Act, and the appeals, as filed, are competent. On the merits, the case is a very simple one. As already stated, the defendants set up a custom, in derogation of their personal law. The onus therefore lay on them initially to prove what that custom was. As laid down by their Lordships of the Privy Council in 45 Cal 450,¹ approv-

1. Abdul Hussain Khan v. Bibi Sona Desro, A I R 1917 P C 181=43 I C 306=45 I A 10=12 S L R 104=45 Cal 450 (P C).

ing the following observations of Robertson, J. in 41 P R 1906² at p. 410:

In all cases under the Act (Punjab Laws Act, 1872), it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further to prove what the particular custom is. There is no presumption created by the clause in favour of custom; on the contrary it is only when the custom is established that it is to be the rule of decision.

It was therefore for the defendants to prove what the particular custom was, by which they were governed in respect of succession to self-acquired property. They produced no evidence whatever in the trial Court. At the time of arguments in appeal they relied, for the first time, on the entry in the *Riwaj-i-am* prepared by Mr. Talbot. This *Riwaj-i-am* has been held to be an imperfectly prepared document in numerous judgments of the Chief Court and the High Court, and the particular entry relied upon, i. e., Answer given to Question 58, has been held to be not in accord with the prevailing custom: see *inter alia* 10 Lah 249³. It must therefore be held that the defendants on whom the onus lay have failed to prove that they have got a preferential right to succeed to the property in dispute in each case. I accept the appeals, set aside the judgment of the learned Senior Subordinate Judge and restore those of the trial Court. The appellants will get their costs in all Courts. The revisions have become infructuous and are dismissed.

V.B.B./D.S.

Appeals accepted.

2. Muhammad Khan v. Sisbano, (1906) 41 P R 1906 (F B).

3. Sultan v. Mt. Sharfan, A I R 1928 Lah 703 = 111 I C 846 = 10 Lah 249 = 30 P L R 668.

* A. I. R. 1937 Lahore 451

FULL BENCH

YOUNG, C. J., MONROE AND DIN

MOHAMMAD, JJ.

Bahadur and others — Appellants.

v.

Mt. Nihal Kaur — Respondent.

Second Appeal No. 326 of 1936, Decided on 5th April 1937.

(a) Custom—Evidence of—Custom must be proved to be in existence as far as living testimony can establish it — Recent judicial decisions laying down custom contrary to one in ancient *riwaj-i-ams*—Such custom cannot be held to be established.

A custom to be legal must be proved to have been in existence for a time preceding the memory of man. It not always being possible to obtain such proof, the Courts have invariably been will-

ing to presume the existence of a custom for such a period provided that evidence is produced which proves that a custom has been in existence as far as living testimony can establish it. [P 452 C 1]

Where therefore recent judicial decisions lay down a custom contrary to that as laid down in ancient *riwaj-i-ams*, such custom cannot be held to be established as the commencement of such custom is not so old that "the memory of man runneth not to the contrary." [P 452 C 1, 2]

* (b) Custom (Punjab) — Succession — Jats of Sialkot District—Daughters have no right to succeed to father's property in preference to collaterals.

Among Jats of the Sialkot District the immemorial custom is that daughters cannot succeed to their father's self-acquired or other property in preference to male collaterals: A I R 1936 Lah 403, *Rel. on.* [P 453 C 2]

(c) Custom (Punjab) — Custom in one district not in conformity with general customary law — No presumption arises that its force is weakened.

Where a custom recorded in one district is not in conformity with the custom prevailing elsewhere i. e., with the general customary law, no presumption arises that the force of the custom is weakened, one of the essential characteristics of custom being that it is local or tribal law as distinct from the general law. [P 454 C 1]

Qabul Chand for M. L. Puri—

for Appellants.

Nihal Singh—for Respondent.

Judgment.—The question involved in this case came before a Division Bench of this Court in second appeal. The learned Judges differed and as there was a conflict of opinion in this Court itself upon the point involved, they suggested that the case should be put before a Full Bench. Mt. Nihal Kaur, the plaintiff in the suit, claimed that she was entitled to possession of her father's self-acquired property in preference to the defendants who are her father's collaterals; the sole question for decision is whether Mt. Nihal Kaur has proved a custom among the Jats of the Sialkot District that daughters succeed to their father's self-acquired property in preference to collaterals. It is difficult to see from the papers before us whether a custom was pleaded in the trial Court. The issues as struck do not clearly include an issue with regard to custom, but the learned Judge of the trial Court held that the daughter was by custom entitled to succeed. The learned District Judge on appeal gave a certificate as follows:

I do hereby certify that in my opinion the custom in point is of sufficient importance and such substantial doubt regarding its existence has been created by the latest authority of the High Court as to justify a second appeal under S. 41 (3),

Punjab Courts Act, 1918, to the High Court of Judicature at Lahore.

We must take it therefore that the question of custom was pleaded and argued in the lower Courts and that therefore the sole question is whether such a custom as alleged has been proved. In this view of the matter there does not appear to us to be any great difficulty in deciding the point. It is first necessary to appreciate what evidence is necessary in order to establish a custom. In this matter it is useful to refer to Blackstone. This learned author stated that :

A custom in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary; so that if any one can show the beginning of it, it is no good custom.

In (1608) Dav. Ir. 28¹ at pp. 31 and 32 it is said :

It is *jus non scriptum* and made by the people in respect of the place where the custom obtains. For where the people find any act to be good and beneficial and apt and agreeable to their nature and disposition, they use and practise it from time to time, and it is by frequent iteration and multiplication of this act that the custom is made and being used from a time to which memory runneth not to the contrary obtains the force of law.

Another definition is contained in *Termes de la ley* :

Custom may be defined to be a law or right not written, which being established by long use and consent of ancestors hath been and daily is put in practice.

A custom to be legal must therefore be proved to have been in existence for a time preceding the memory of man. It not always being possible to obtain such proof, the Courts have invariably been willing to presume the existence of a custom for such a period provided that evidence is produced which proves that the custom has been in existence as far as living testimony can establish it. The onus in this case, therefore, was on the plaintiff to show that among Jats of the Sialkot District a custom obtains that daughters succeed to their father's self-acquired property in preference to collaterals and that such a custom has existed "so long that the memory of man runneth not to the contrary". In this she has clearly and demonstrably failed. The plaintiff depended solely upon instances relevant under S. 13, Evidence Act, the instances being judicial decisions which she alleges are in favour of the proposition for which she contends. It is noticeable

however that the attempt to establish the commencement of this alleged "custom" far from being so old that the "memory of man runneth not to the contrary" can be shown to be well within existing human memory. As Blackstone says if any one can show the beginning of it, it is no good custom". Two documents have been produced and referred to; the first is the Customary law or *Riwaj-i-am* of the Sialkot District, 1895. This *Riwaj-i-am* alludes to the previous *Riwaj-i-am* of 1865, which is not before us. The compiler of the document of 1895 however records that the work of the 1865 record was thoroughly and carefully done. The main interest of the earlier *Riwaj-i-am* is that (according to the 1895 *Riwaj-i-am*) it states that daughters cannot inherit. The record of 1895 clearly shows that it had never occurred to any one up to that time to suggest that among Jats of the Sialkot District a daughter could inherit the self-acquired property of her father, and apparently the same position existed in 1865. Question 47 of the 1895 Customary Law of the Sialkot District is as follows :

Under what circumstances can daughters inherit (1) the immoveable or ancestral, (2) the moveable or acquired property of their father? Are they entitled to inherit to the exclusion of sons, or the widow, or the near male kindred of the deceased? If they are excluded by the near male kindred, is there any fixed limit of relationship within which such near kindred must stand towards the deceased in order to exclude his daughters?

The answer is clear beyond doubt. It is : "If there is any male kindred, a daughter cannot inherit property of any description". At this date, according to a judicial instance given under Question 47 it had been suggested that among Hindu *Varaiches* a daughter possibly might be preferred to collaterals of the eighth and more remote degrees, but that it had been held that a daughter who claimed that such a custom existed failed to prove it. The second document is the *Riwaj-i-am* of 1916. It is here noted for the first time that an effort had been made to endeavour to establish a custom more in accordance with modern thought, namely that daughters might inherit the self-acquired property of their fathers in preference to the male collaterals of the 5th or more remote degrees. The custom as laid down by the learned compiler of the Customary Law is clear and that is that in the inquiries conducted by him personally he was

1. Tanistry case, (1608) Dav. Ir. 28=80 E R 516.

considerably impressed by the hold that the agnatic theory has upon the mass of the people who do not keep stock of judicial decisions. The right of alienation outside the family and the succession of married daughters were as a rule emphatically denied. It was only among the educated classes that any mention was made of limits to the rights of male collaterals and they generally referred to a Chief Court judgment as the ground of their belief. . . . On the other hand there is undoubtedly a strong tendency among sonless proprietors towards getting rid of the shackles of agnatic claims and it must be remembered that women have not had a chance of expressing their views on the subject.

Question 47 in the *Riwaj-i-am* of 1916 is as follows :

Under what circumstances can daughters inherit (1) the immoveable or ancestral, (2) the moveable or acquired, property of their father? Are they entitled to inherit to the exclusion of sons, or the widow, or the near male kindred of the deceased? If they are excluded by the near male kindred, is there any fixed limit of relationship within which such near kindred must stand towards the deceased in order to exclude his daughters?

The answer again is clear :

In the absence of male lineal descendants and of widows, unmarried daughters take possession of their father's property till marriage but not subsequently. Married daughters do not inherit in the presence of collaterals. This is the general rule, but under the influence of judicial decision some people assert that daughters succeed in preference to collaterals of the 5th or more remote degrees. Mughals assert that agnates of the 4th degree are excluded by daughters.

This last *Riwaj-i-am* clearly shows the "beginning of the attempt to create a new custom". But even here the custom alleged is only that of exclusion of the collaterals of the 5th or more remote degrees. It is not stated in this *Riwaj-i-am* that there was any judicial decision up to that date to the effect that among Jats of the Sialkot District daughters succeeded to their father's self-acquired property in preference to all collaterals. The instances given in the *Riwaj-i-am* as exceptions to the custom do not appear to support the plaintiff's present contention. The first instance in this case given by the plaintiff is a judicial decision in 1922. This decision however was based on a wrong view of the law. The learned Judge in that case decided that the *Riwaj-i-am* possessed very little evidential value. The Privy Council however in 45 P R 1917² laid it down beyond dispute that the statements contained in the *Riwaj-i-am* formed a strong piece of evidence in support of custom. The first real instance therefore upon

which the present plaintiff relies is in 1928, a decision of a Bench of this Court. Several other decisions after 1928 of this High Court were also used by the plaintiff as instances to prove a custom. Looking at the whole case in the light of what we have said above the question whether the plaintiff has been able to prove a custom or not is devoid of any difficulty. Evidence dating only from 1928 cannot prove a custom.

On the other hand, the opposite proposition appears to be sound that the *Riwaj-i-ams* of 1865, 1895 and 1916 are strong evidence that the custom is to the contrary, namely that among Jats of the Sialkot District the immemorial custom is that daughters cannot succeed to their father's self-acquired or other property in preference to male collaterals. This evidence cannot in law be rebutted by the modern instances relied upon by the plaintiff. We sympathise with the effort made by the various tribes and persons concerned to modernise this ancient custom, but a custom once established, as this custom undoubtedly appears to have been, can only at this time be altered by legislation and not by modern judicial decisions. It has been argued by counsel for the plaintiff that the onus of proof of custom was originally placed on the defendants in the trial Court, and that therefore it was for the defendants to prove the custom relied upon by them. Even if this was so, the defendants referred to the *Riwaj-i-ams* and thereafter the onus was upon the plaintiff. This onus as pointed out above she has failed to discharge after producing all the evidence available to her, and after having had every opportunity to produce evidence. This point was not discussed in the judgments by which this case was referred to this Full Bench, nor is it mentioned in the grounds of appeal. It has been argued that the effect of the statements in the *Riwaj-i-ams* is weakened by the fact that women were not in those days consulted by the officer compiling the Customary law. We do not agree. In India, as indeed in all other countries, women until recently have had nothing to do with the making either of law or custom. It is possible that in a few hundred years, when our present era may have been wholly forgotten, custom may be created in favour of the rights of women if in the meantime legislation has not altered the existing law.

2. *Beg v. Allah Ditta*, A I R 1916 P C 129=38 I C 854=44 Cal 749=44 I A 89=45 P R 1917 (P C).

It has also been suggested that where a custom recorded in one district is not in conformity with custom prevailing elsewhere which used to be called the general Customary law the presumption is weakened. This we cannot follow, one essential characteristic of a custom being that it is local or tribal law as distinct from the general law. We approve of the opinion expressed in A I R 1936 Lah 403.³ On a careful consideration of the arguments of counsel, the *Riwaj-i-ams* and the evidence produced by the plaintiff in this case, we are clearly of opinion that the plaintiff has failed to prove the custom alleged by her. We would therefore accept this appeal and dismiss the suit. In view of the conflicting decisions of this Court previously, parties will bear their own costs throughout. It would be of great assistance to the people of this province and to the Courts if legislation were undertaken codifying and, if so desired, amending some portions at least of the Customary law.

K.B./A.L.

Appeal allowed.

3. Gulab v. Umar Bibi, A I R 1936 Lah 403=
164 I C 796=38 P L R 807.

A. I. R. 1937 Lahore 454

ABDUL RASHID, J.

Radha Lal — Decree-holder — Defendant — Appellant.

v.

Fateh Mohammad, Plaintiff and others
— Judgment-debtors — Defendants—
Respondents.

First Appeal No. 100 of 1936, Decided on 15th July 1936, from order of Senior Sub-Judge, Karnal, D/- 18th March 1936.

(a) Appeal—Unclassed suit arising out of another suit of small cause nature—Unclassed suit does not become small cause suit—Appeal against order in such suit is not barred.

Where the suit is an unclassified suit, the mere fact that it arises out of a suit of a small cause nature does not make such suit a small cause suit. Hence an appeal against the order in the unclassified suit is not barred. [P 455 C 1]

(b) Civil P. C. (1908), O. 43, R. 1 (u), O. 41, R. 23 — For competency of appeal Court must see what lower Court purported to do and did—Case remanded under O. 41, R. 23 — Order is appealable under O. 43, R. 1 (u).

For the purposes of the competency of an appeal the Court has to see what the lower Court pur-

ported to do and actually did and not what the lower Court should have done. [P 455 C 1]

Where the appellate Court remands the case under O. 41, R. 23, Civil P. C., its order is appealable under O. 43, R. 1 (u): *A I R 1932 Lah 376, Foll.* [P 455 C 1]

(c) Civil P. C. (1908), O. 41, R. 23—Plaintiff relying on certain document in suit objecting to attachment and sale but not proving it in trial Court—Trial Court after considering all evidence dismissing suit — Appellate Court remanding case under O. 41, R. 23, finding that trial Court did not consider document—Order of remand held illegal, as it was open to plaintiff to prove document in trial Court.

The plaintiff brought a suit objecting to the attachment and sale of certain property claiming it as his own. He relied on certain documentary evidence, but was unable to prove it. The trial Court after considering all the evidence dismissed the suit. In appeal it was held that the document had not been taken into consideration by the trial Court and so the case was remanded under O. 41, R. 23, Civil P. C. for re-decision:

Held: that it was open to the party who relied on the document to prove it in the trial Court. As this was not done, the plaintiff was not entitled to a fresh trial. The case was not decided by the trial Court on a preliminary point. Hence the appellate Court had no power to remand the case for a fresh decision under O. 41, R. 23. [P 455 C 1]

Qabul Chand — for Appellant.

Mohsin Shah — for Respondents.

Judgment. — This appeal arises out of an action brought by Fateh Mohammad against Radha Lal, Imam Ali and Nawab for a declaration to the effect that two cows and one calf in the custody of Imam Ali, defendant 2, were the property of the plaintiff and were not liable to attachment and sale in the execution of the decree of Radha Lal against Imam Ali and Nawab. The trial Court dismissed the plaintiff's suit on merits after considering the entire oral and documentary evidence produced by the parties. Against this decision the plaintiff preferred an appeal in the Court of the learned Senior Subordinate Judge. The learned Judge was of the opinion that a material document dated 10th January 1931, which had been placed on the record by Imam Ali, had not been taken into consideration by the trial Court in coming to this decision. The learned Senior Subordinate Judge accepted the plaintiff's appeal and setting aside the decree of the trial Court remanded the case under O. 41, R. 23, Civil P. C., for re-decision. Against this order of remand Radha Lal, defendant 1, has preferred an appeal to this Court.

The learned counsel for the respondents took two preliminary objections: first,

that the order of the learned Senior Subordinate Judge was not appealable, and secondly, that as the appellant had urged in this Court that the learned Senior Subordinate Judge was wrong in remanding the case under O. 41, R. 23, Civil P. C., no appeal lay against the order of the Senior Subordinate Judge under O. 43, R. 1 (u), Civil P. C. In my opinion these preliminary objections are not well founded. The present suit is an unclassified suit and the mere fact that it arises out of a suit which was of a small cause nature does not make the present suit a small cause suit. The first preliminary objection has therefore no force. As far as the second preliminary objection is concerned, it has been held by this Court (*vide* A I R 1932 Lah 376¹) that for the purposes of the competency of an appeal the Court has to see what the lower Court purported to do and actually did and not what the lower Court should have done. As the learned Senior Subordinate Judge remanded the case under O. 41, R. 23, Civil P. C., his order is appealable under O. 43, R. 1 (u), Civil P. C. On the merits the order of the learned Senior Subordinate Judge is unsustainable. The document dated 10th January 1931 has neither been proved nor exhibited. It was open to the party who relied on this document to prove it in the trial Court. As this was not done by or on behalf of the plaintiff, he is not entitled to a fresh trial. The case was not decided on a preliminary point by the trial Court and the learned Senior Subordinate Judge had no power to remand the case for a fresh decision under O. 41, R. 23, Civil P. C. For the reasons given above I accept this appeal, set aside the order of the learned Senior Subordinate Judge, dated 18th March 1936, and send the case to him with directions that he shall decide the appeal preferred to him on the merits in accordance with law. The court-fee levied on the memorandum of appeal in this Court shall be refunded and the other costs will abide the result. The parties have been directed to appear in the Court of the Senior Subordinate Judge on 17th August 1936.

V.B.B./A.L.

Appeal accepted.

1. Gopal Das v. Ishar Das, A I R 1932 Lah 376 = 137 I C 258 = 33 P L R 496.

A. I. R. 1937 Lahore 455

TEK CHAND AND SKEMP, JJ.

Diwan Chand Nirmal Singh and another — Defendants — Appellants.

v.

Bhagwan Chand, Plaintiff and *others*, Defendants—Respondents.

First Appeal No. 1303 of 1935, Decided on 6th October 1936, from decree of Sub-Judge, 1st Class, Lahore, D/- 29th March 1935.

(a) Civil P. C. (1908), O. 22, R. 2—Defendant 1 dead — Application to bring legal representatives of deceased filed after limitation — Suit held abated as it did not fall under O. 22, R. 2 and it could not proceed against defendant 2 alone—Deceased defendant residing at no fixed residence—Sufficient cause for delay — Application is application to set aside abatement and abatement should be set aside.

In a suit to recover certain amount, one of the two defendants died and the application by the plaintiff to bring his legal representatives on record was filed after the statutory period. The deceased defendant had no fixed residence and the plaintiff did not know of his death immediately. There was sufficient cause for the delay in making the application :

Held : that O. 22, R. 2, Civil P. C. had no application, as the suit against the survivor defendant alone could not proceed, and under that rule proceedings abated. But the application to bring the legal representatives on record could be regarded as an application to set aside the abatement and as there was sufficient cause for the delay, plaintiff not being guilty of laches the abatement should be set aside : A I R 1919 Lah 319; A I R 1928 Lah 746 and A I R 1924 Lah 429, *Rel. on.* [P 456 C 2 ; P 457 C 1]

(b) Appeal — Practice — Finding of fact — Plaintiff challenging finding of trial Court—No production of best available evidence—Plaintiff not going in witness box nor calling material witness—Finding of trial Court held could not be interfered with.

Where in appeal the plaintiff challenged the finding of fact of the trial Court, but abstained from producing the best available evidence to prove his case nor did he go into the witness box or call a material witness :

Held : that the appellate Court could not differ from the finding of the trial Court. [P 457 C 2]

(c) Interest — Partnership financed by plaintiff — Defendant-partner undertaking to plaintiff to repay advance soon—No payment for many years—Plaintiff is entitled to interest on amount outstanding.

A partnership business financed by the plaintiff fell through. The defendant, the partner, undertook to repay soon afterwards the sum advanced by the plaintiff for business. This promise was frequently repeated, but the amount was not paid for many years. In a suit on the advance the plaintiff claimed interest also on the advance :

Held : that it could not be in the minds of the partners that the defendant alone should use the

large sum of money for many years without paying interest and the plaintiff was therefore entitled to interest on the amount advanced by way of damages : *A I R 1928 All 500, Rel. on.*

[P 457 C 2]

R. L. Anand I — for Appellants.

J. N. Talwar, Brijnandan Singh and Balwant Rai — for Respondent (Plaintiff).

Skemp, J.—The plaintiff, Lala Bhagwan Chand, lodged a suit in Lahore on 30th May 1933, alleging that on 12th June 1929, he had entered into an agreement with Rai Bahadur Diwan Chand and Mr. A. R. Diwan for the purpose of carrying on business, to be financed by the plaintiff. On the same date under the terms of the agreement he had advanced Rs. 5,000 to these two gentlemen, but on 26th July 1929 the partnership had been dissolved and the Rai Bahadur and Mr. Diwan undertook to return the Rs. 5,000 to the plaintiff shortly. They had failed to do so and the plaintiff had only received a sum of Rs. 1,000 on 30th May 1930. Accordingly he sued for the balance of Rs. 4,000 together with interest at 12 per cent. per annum, a total of Rs. 6,030. Rai Bahadur Diwan Chand never appeared and after many efforts the trial Court had him served by substituted service and proceeded ex parte against him on 31st May 1934. Before being served it was reported that Mr. A. R. Diwan was dead and his sons Nirmal Singh and Tirlok Singh were brought on the record in his stead. They took all possible objections and the trial Court framed 13 issues on which it held on preliminary issues that the Court had jurisdiction to try the suit, that the legal representatives of Mr. Diwan were not brought on the record within the prescribed time but that the suit did not abate. The trial Court further held that the suit was entertainable in its then form and that it was within time, that the deed of partnership dated 12th June 1929 was inadmissible in evidence as it was unstamped but that this was of no moment because the plaintiff could rely on the document Ex. P/8, which dissolved the partnership. The trial Court further held that the suit could proceed against Nirmal Singh and Tirlok Singh, that the advance of Rupees 5,000 was actually made to Rai Bahadur Diwan Chand and Mr. Diwan for partnership business, that a written undertaking was made to repay the sum and that the

plaintiff was entitled to interest by way of damages at the Court rate. On these findings it granted a decree to the plaintiff for Rs. 5,015 together with costs. The decree against Nirmal Singh and Tirlok Singh was to the extent of the estate of the deceased Mr. A. R. Diwan which came into their hands. The two contesting defendants have appealed against this decree.

Their learned counsel Mr. Ram Lal Anand gave up several points decided against the appellants before the arguments began and abandoned others in the course of arguments. He wished to take the point of jurisdiction, but S. 21, Civil P. C., is conclusive against him and he admitted that no injustice was caused by the trial in Lahore. Finally three points were argued namely, (1) that the suit abated, (2) that the suit could not proceed against Nirmal Singh and Tirlok Singh because they had inherited no property from their father; (3) that interest should not have been allowed. As to abatement, the trial Court held that the application to bring the sons of Mr. Diwan on the record was not within time but that the case was covered by O. 22, R. 2, Civil P. C., because the cause of action survived against Rai Bahadur Diwan Chand who was jointly and severally liable together with Mr. Diwan. On studying the point we find that O. 22, R. 2, has no application. The relevant part lays down that where there are more defendants than one, and any of them dies, and where the right to sue survives against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed against the survivors. The important point for our purposes is that the suit shall proceed against the surviving defendant alone; in this case against Rai Bahadur Diwan Chand alone. If the argument of the respondent's counsel were sound the case could not have proceeded against the sons of Mr. Diwan.

Respondent's counsel also urged that the suit ought not to have abated or that if it abated the Court had set aside the abatement. The facts are as follows: Mr. Diwan belonged to a village in the Sialkot District. One of his relations Sardar Makhan Singh, an Honorary Magistrate, said that he lived at different places such as Calcutta, Jhansi and Delhi. The correspondence in respect of the

return of Rs. 5,000 was all carried on from Jhansi and it would appear that the partnership business operated in the Central Provinces. He actually died at Shahdara, Delhi, on 24th September 1933. The fact of his death was first brought to light by the report of the postal peon on the registered envelope enclosing summonses sent by the Court. This report is dated 20th November 1933, and simply says: "The addressee is dead". This was brought to the knowledge of the plaintiff at the next hearing, 5th December 1933. On that date the plaintiff himself was not present and on the following date, 3rd January 1934, the plaintiff's counsel prayed for time to ascertain whether Mr. Diwan was really dead. On 10th January 1934 the Court gave an order apparently allowing a month's time to file an application to bring on the record the legal representatives. An application was actually made on 9th February 1934. In these circumstances it appears to us that the application to bring on the record the sons of Mr. Diwan should be regarded as an application to set aside the abatement, a course followed in 49 I C 501¹ and A I R 1928 Lah 746.² The leading case is 5 Lah 70,³ in which a Division Bench allowed the applicant to bring a legal representative of the deceased on the record nine months after his death where the defendant had no fixed residence and the applicant did not know of his death. In the present circumstances we think that the plaintiff was guilty of no laches and that there was sufficient cause for the delay in making the application and that the abatement should be set aside.

As to the next point, it is clear from the will of Mr. A. R. Diwan's father, Maya Das that there was an ancestral house left by Maya Das. This would be a nucleus of any further property acquired and it is irrelevant whether Nirmal Singh and Tirlok Singh actually obtained any property from their father; that point can be settled in execution. In this connexion another question is raised. The plaintiff made an application that Mr. A. R. Diwan had left another son in Delhi, named Shanti Kumar, and stated that he believed

this son was illegitimate. The defendants admitted that Shanti Kumar was their father's son but denied that he was illegitimate. The Court held that Shanti Kumar was illegitimate and his name was struck off the record. The grounds of appeal state that Shanti Kumar is legitimate but we cannot differ from the finding of the trial Court because although the appellants produced some evidence they have abstained from producing the best evidence available. They did not go into the witness-box themselves and they did not call Mt. Koshalia Devi, mother of Shanti Kumar. Hence we hold for purposes of this case that Shanti Kumar is not shown to be legitimate.

Finally Mr. Ram Lal Anand quoted a number of cases in which interest by way of damages had been refused and he argued that it could not be allowed in this case. Mr. J. N. Talwar for the respondent also quoted a large number of rulings. He admitted that there was no contract to pay interest and that the terms of the Interest Act did not apply, but he urged strongly that in the present circumstances interest ought to be allowed on equitable grounds. A sum of Rs. 5,000 was advanced by one business man to two others for partnership purposes on 12th June 1929. The partnership fell through a few weeks later on 26th July 1929. On the latter date the recipients promised to repay the money shortly, a promise which they frequently repeated, but only Rupees 1,000 was sent. It could not be in the minds of these business men that two of them should use a large sum of money for many years without paying interest. It is unnecessary to review all the rulings cited, but one particularly strong case 50 All 818,⁴ may be referred to, in which a Division Bench of the Allahabad High Court allowed to the rightful claimant interest on compensation under the Land Acquisition Act which had been paid in error to a person not entitled to it.

For these reasons we think that the decree of the lower Court is correct and we reject the appeal with costs. Before concluding, it is necessary to say a word about the way in which the lower Court treated the documents on the record. The provisions of O. 13, R. 4, Civil P. C. were entirely ignored. The documents on the

1. Arur Singh v. Todarmal, A I R 1919 Lah 319 = 49 I C 501.

2. Kirpa Ram v. Bhagat Chand, A I R 1928 Lah 746 = 112 I O 5.

3. Jowala Ram v. Hari Kishen Singh, A I R 1924 Lah 429 = 80 I C 690 = 5 Lah 70.

4. Anrudh Kumar v. Lachhmi Chand, A I R 1928 All 500 = 115 I C 114 = 26 A L J 753 = 50 All 818.

record were marked as exhibits, but not even initialled by the Judge or by any one else. This applies equally to Ex. P/9 (the deed of partnership) which the lower Court held to be inadmissible as unstamped, and which ought to have been but was not returned and to other documents on the record which the respondent's counsel has shown to us were duly proved by evidence. A good deal of unnecessary trouble was caused by this neglect of the law and the attention of the learned Subordinate Judge is invited to the provisions of this order.

Tek Chand, J.—I agree.

V.B.B./A.L.

Appeal dismissed.

A. I. R. 1937 Lahore 458

ABDUL RASHID, J.

Khushi Muhammad — Accused —
Petitioner.

v.

Chaudhri Abdulla Khan — Opposite
Party.

Criminal Revn. Petn. No. 1331 of 1936,
Decided on 17th December 1936, from
order of Addl. Sess. Judge, Lahore,
D/- 28th August 1936.

Criminal P. C. (1898), S. 257—Cost of witnesses — In warrant cases cost of causing attendance of defence witnesses is to be borne by Crown — Departure from this rule is not permissible without assigning adequate reasons.

In warrant cases the cost of causing the attendance of defence witnesses is to be borne by the Crown, and without assigning adequate reasons a departure from this rule is not permissible. Where the Magistrate orders the accused to deposit the process fee and diet money of all defence witnesses without assigning any reasons such order is not proper: 108 I C 907; A I R 1929 Lah 23; AIR 1932 Lah 481 and A I R 1936 Lah 919, *Rel. on.* [P 458 C 2]

Ram Lal Anand I — for Petitioner.

Bashir Ahmad — for Opposite Party.

Order.—The petitioner Khushi Muhammad is being proceeded against under S. 500, I. P. C. Charges have been framed against him. The petitioner presented an application in the trial Court for the summoning of 22 persons as defence witnesses. The trial Court passed the following order on the application :

The witnesses be summoned on receipt of process fee and diet money, otherwise not. But witnesses 21 and 22 are not to be summoned.

Against this order a petition for revision was presented in the Court of the Additional Sessions Judge, Lahore. The learned Additional Sessions Judge dismissed this petition on the ground that the order of which revision is sought is an interlocutory order and no revision lies from such orders. The petitioner has, therefore, preferred a petition for revision to this Court. The offence under S. 500 I. P. C., is no doubt non-cognizable, but the case is a warrant case. It has been held by this Court that in warrant cases the usual rule is that the cost of causing the attendance of the witnesses of an accused person is to be borne by the Crown, and without assigning adequate reasons a departure from this rule is not permissible. Reference may be made in this connexion to 108 I C 907.¹ A similar observation was made in 117 I C 667.² Two other rulings of this Court, in 33 P L R 811³ and A I R 1936 Lah 919,⁴ also lay down that as a rule in warrant cases the cost of causing the attendance of the witnesses of an accused person should usually be borne by Government. The above mentioned four rulings were given by four different Judges of this Court.

The order of the learned Magistrate, dated 14th August 1936, does not assign any reasons why the accused should be required to deposit the process fee and diet money of all the defence witnesses. This order cannot be upheld. I, therefore, order that the witnesses for the defence, except witnesses Nos. 21 and 22, be summoned at Government expense. As far as witnesses 21 and 22 are concerned, it would be open to the Court to refuse to summon them if it is of opinion that their evidence is not necessary for the purposes of the case and that they are being summoned for the purposes of vexation and delay. This question will be considered by the trial Court. For the reasons given above, I accept this petition for revision to the extent indicated above. This order should be forwarded to the trial Magistrate today, if possible, as the

1. Habib v. Mehdi Hussain, (1928) 108 I C 907 = 29 Cr L J 459.

2. Sayed Habib v. Emperor, A I R 1929 Lah 23 = 117 I C 667 = 30 Cr L J 814.

3. Ram Narain v. Emperor, A I R 1932 Lah 481 = 1932 Cr O 619 = 139 I C 508 = 33 Cr L J 761 = 33 P L R 811.

4. Parshotam Das v. Emperor, A I R 1936 Lah 919 = 1936 Cr O 1007 = 166 I C 128 = 38 P L R 1165.

case is fixed for the announcement of judgment on the 21st instant.

W.D./A.L.

Order accordingly.

A. I. R. 1937 Lahore 459

COLDSTREAM AND BHIDE, JJ.

Mohammad Ali and others —

Plaintiffs—Appellants.
v.

Mt. Anayat Bibi and others —

Defendants—Respondents.

Second Appeal No. 2096 of 1935, Decided on 7th December 1936, from Addl. Dist. Judge, Lahore, D/- 9th May 1935.

(a) Custom (Punjab) — *Riwaj-i-am*—Value of—English version is abstract of vernacular version at times duly corrected by Settlement Officer—Question of preference between English and vernacular version depends on facts of each case.

The *Riwaj-i-am* is usually prepared in vernacular in the first instance and the English version is generally abstract of the same; but the vernacular version is checked by the Settlement Officer when preparing the English abstract and he may at times find it necessary to alter the statement of custom in the vernacular *Riwaj-i-am* if he finds it to be incorrect. The question whether the vernacular or the English version should be preferred must, therefore, depend upon the circumstances of each case: *A I R 1927 Lah 241*; *A I R 1936 Lah 802* and *A I R 1936 Lah 804* and *A I R 1934 Lah 432, Disting.*

[P 460 C 1]

(b) Custom (Punjab)—*Riwaj-i-am*—Vernacular and English versions of custom—To determine which version is correct it is useful to refer to earlier *Riwaj-i-am*—*Riwaj-i-ams* of years 1868 and 1894 of Lahore District excluding collaterals of fifth degree in preference to daughters in matter of succession among Rajputs—Correctness of statement of custom in *riwaj-i-am* of 1916 doubtful—Burden to prove custom different from that established by *Riwaj-i-ams* of 1868 and 1894 is on one who alleges it.

In order to determine whether the vernacular or the English version contains a correct statement of custom it is useful to refer to the compilations of *Riwaj-i-am* prepared at the previous Settlements of the district. [P 460 C 2]

The *Riwaj-i-ams* of the years 1868 and 1894 contained statement of a custom whereby in matter of succession among the Rajputs of Lahore District the daughters excluded collaterals of the fifth degree. The correctness of the statement of custom in the *Riwaj-i-am* of 1916 was doubtful:

Held: the burden of proving a custom different from that stated in the *Riwaj-i-am* of the years 1868 and 1894 was on the person alleging it: *A I R 1936 Lah 68, Rel. on.* [P 461 C 2]

Sheikh Abdul Aziz— for Appellants.

Mohammad Hussain —

for Respondents.

Bhide, J.—The parties to this case are Rajputs of the village Nat in the Lahore District. The plaintiffs who are collaterals of one Mohammad Khan in the fifth degree, sued for possession of the property left by him on the allegation that the property was ancestral and they were entitled to succeed to it according to custom in preference to his daughter Mt. Inayat Bibi. The Courts below have dismissed the suit and from this decision plaintiffs have appealed on the basis of a certificate on the point of custom granted by the learned Additional District Judge.

The first point urged in appeal was that the Courts below have erred in placing the burden of proof as regards the alleged custom on the plaintiffs. It appears that there was a conflict between the entries as regards the custom in the vernacular *Riwaj-i-am* and the Customary law of the district in English prepared in 1916 at the last Settlement of the Lahore District by Mr. Bolster. According to the vernacular *Riwaj-i-am* the daughter excluded collaterals of a remoter degree than the fifth while according to the Customary Law of the district in English 'Rajputs of villages Begpura, Sande Khai and Naul Hithar stated that daughters excluded agnates of the fifth and remoter degree.' In other words, according to the vernacular *Riwaj-i-am* collaterals of the fifth degree were entitled to succeed in preference to a daughter but not according to its English version. There was no mention of the village Nat in the latter but the learned Judge of the appellate Court relying on 10 Lah 422¹ held that the entry was illustrative and not exhaustive and that there was a presumption that the rule stated above applied to the parties. This point was not disputed before us. The learned counsel for the plaintiff-appellants has urged that the onus of proof should have been placed on the defendant in view of the entries in the vernacular *Riwaj-i-am* of which the Customary law of the district in English purported to be an abstract. In support of this contention he cited five Division Bench decisions of this Court reported in 8 Lah 281,² *A I R 1933 Lah 640*,³ *A I R*

1. *Jundi v. Chiragh Din*, *A I R 1928 Lah 870* = 112 I C 840 = 10 Lah 422 = 30 P L R 682.

2. *Labb Singh v. Mt. Mango*, *A I R 1927 Lah 241* = 100 IC 924 = 8 Lah 281 = 29 P L R 586.

3. *Ghulam Muhammad v. Mt. Zainab Bibi*, *A I R 1933 Lah 640* = 145 I C 231 = 34 P L R 891 = 14 Lah 651.

1936 Lah 594,⁴ A I R 1936 Lah 802⁵ and A I R 1936 Lah 804,⁶ in which it was urged the vernacular Rawaj-i-am was preferred to the English version in similar circumstances. The only ruling to the contrary cited on behalf of the respondent was a Single Bench decision reported as A I R 1934 Lah 432.⁷ In the latter case, however, the English version was preferred merely on the ground that it was published later.

The authorities cited by the learned counsel for the appellant do not appear to be of any assistance. Three of the cases cited, viz. 8 Lah 281,² A I R 1936 Lah 802⁵ and A I R 1936 Lah 804,⁶ related to the Customary law of the Amritsar District and the point for decision therein was the weight to be attached to the opinion of the author given in a footnote underneath the answer to Question 61 in the compilation. A I R 1933 Lah 640³ and A I R 1936 Lah 594⁴ relate to the Lahore District but the tribe concerned and the point at issue in those cases were different. A I R 1934 Lah 432⁷ which was relied on by the respondent also relates to a different tribe. The English version was preferred to the vernacular Riwaj-i-am in that case on the ground that the former was the final draft. The ruling, however, discussed the previous Riwaj-i-ams and gave other reasons for accepting the custom as stated in the English version. I do not think the rulings cited above can be considered to lay down any general rule as to whether the vernacular or the English version is to be preferred. It is true that the Riwaj-i-am is usually prepared in vernacular in the first instance and the English version is generally an abstract of the same; but the vernacular version is checked by the Settlement Officer when preparing the English abstract and he may at times find it necessary to alter the statement of custom in the vernacular Riwaj-i-am if he finds it to be incorrect. The question whether the vernacular or the English version should be preferred must, therefore, depend upon the circumstances of each case.

In the present instance there is, I think, no doubt that there is a conflict between the vernacular and the English versions of the Customary law of the Lahore District prepared at the last Settlement so far as the custom in dispute is concerned. The author of the English version has clearly stated in para. 3 of his introduction that the English version was a 'brief abstract of the vernacular compilation'. It is also stated in the introduction that he had scrutinized the vernacular version and passed it; yet so far as the answer to question 61 of the subject of the rights of daughters is concerned, no reasons are given for altering the statement of custom as given in the vernacular Riwaj-i-am. It is, therefore, difficult to say whether the change was intentional. In order to determine whether the vernacular or the English version contains a correct statement of custom it will be useful to refer to the compilations of Customary law prepared at the previous Settlements of the district. As pointed out in A I R 1936 Lah 68⁸ the earliest Riwaj-i-am generally serves as a useful check on subsequent Riwaj-i-ams and may be considered as the most important document in which custom was recorded. For the earliest Riwaj-i-am was prepared at a time when the villagers were less sophisticated and less likely to be influenced by interested motives in giving their replies to the enquiries as regards customs governing them.

In the present instance it appears that the earliest compilation of custom in this district of which evidence has been produced was that of the year 1867. The defendants have produced a copy of question 151 and the answer thereto which relates to the rights of daughters (see Ex. D-8). It appears from this answer that in the event of a contest of the rights of daughters by collaterals, only collaterals up to the fourth degree were to be taken into consideration. (*Chahar pusht tak jaddi samjhe janven*). The learned Counsel for the appellants urged that this question merely related to the rights of collaterals to contest alienations. But the wording used appears to be general and the question was apparently taken to cover the right of succession also in

4. Mt. Chiragh Bibi v. Umar Din, A I R 1936 Lah 594=165 I C 553.

5. Jawala Singh v. Mt. Santi, A I R 1936 Lah 802=167 I C 314.

6. Kartar Singh v. Mt. Banto, A I R 1936 Lah 804=17 Lah 296=38 P L R 300.

7. Aishan Bibi v. Allah Ditta, A I R 1934 Lah 432=155 I C 861.

8. Kesar Singh v. Achhar Singh, A I R 1936 Lah 68=161 I C 692=17 Lah 101=38 P L R 502.

126 P R 1890.⁹ This view also receives support from the answer to Question 1 relating to the rights of daughters at p. 10 of the Customary law of the Lahore District prepared at the next Settlement and published in 1894. The question and answer are as follows :

Question 1.—What are the rights of daughters to inherit their father's property or of sisters to inherit their brother's property in the absence of male lineal descendants and widows ?

Answer.—Among Jats the daughter or sister has no rights of inheritance. Rajputs, Dogars and Arains say that a daughter or sister succeeds to the property if there is no male collateral nearer related than in the fifth generation.

The interpretation to be placed on the expression 'nearer related than in the fifth generation' is not perhaps free from difficulty. The answer to question 2 in the Customary law of the Lahore District prepared in 1892 is inconsistent and throws little light on the subject. The mode of reckoning generations usually adopted in such cases is explained by Plowden, J. in 126 P R 1890,⁹ and according to the usually accepted method the above expression would mean that collaterals in the fifth generation (i. e., those descended from a common ancestor who is in the fifth generation upwards counting from and including the deceased person whose property is in dispute) are excluded by daughters in the matter of succession to property. In the preface the author of the 'Customary law of the Lahore District' published in 1894 remarks that other tribes allow sisters and daughters to inherit if there are no male collaterals nearer than 6th degree. The expression 'other tribes' would seem to include 'Rajputs,' but it does not appear on what material this general remark was based, and it cannot be given more weight than the specific answer to question 1 referred to above.

Coming now to the last Settlement, Mr. Bolster, the author of the Customary Law published in 1916, remarks in his introduction as follows :

In 1856 daughters were absolutely excluded from inheritance by collaterals ; 12 years later in the 1868 Settlement there appears among the Arains of the Lahore and Kasur Tahsils and the Awans and Rajputs of the Lahore Tahsil a relaxation in their favour allowing parents to make them gifts of small areas ; finally in the 1892 Settlement and now among Rajputs, Dogars and Arains daughters are held entitled to exclude collaterals five degrees remote, while in the neighbourhood of Lahore, where disturbing

causes naturally³ have largest play and customs change much more rapidly than among the Arains of the Sutlej Bank, Arain daughters exclude their cousins in the first degree.

Similar remarks occur in the vernacular *riwaj-i-am* prepared at the same Settlement showing that there was a gradual relaxation of custom in favour of daughters owing to the growth of the individualistic notion of property. If then collaterals of the fifth degree were excluded by daughters in the matter of succession in 1868 and 1892, as found above, it is very unlikely that they could have been found to exclude daughters in the year 1916. If any such change had taken place the fact would surely have been specifically noted and one would have expected to find numerous instances in support of it in the appendix to the Customary law prepared in 1916, where instances in support of the answers given in the body of the book are collected. But no such clear instance of preference given to collaterals is to be found in the instances relating to succession of daughters amongst Rajputs : *vide* p. 26 of the appendix. It does not appear from the remarks column of this appendix in what degree the collaterals were related. In one instance no collateral existed ; in another the collateral was the husband of the daughter and in a third instance the collaterals, for some reason or other, did not contest the succession. There is, therefore, nothing in the instances cited to show that there was any evidence of a change in custom as regards the degree of the collaterals who were excluded by daughters in the matter of succession. In view of the above facts it seems to me that the correctness of the statement of custom in the vernacular *Riwaj-i-am* prepared at the last Settlement of the Lahore District is open to doubt. I would, therefore, raise no presumption in favour of the plaintiffs on the basis of the vernacular *Riwaj-i-am* of 1916.

Treating the question as an open one, the burden of proof lay on the plaintiffs to prove the custom alleged by them. We have, therefore, to see how far they have discharged the onus which lay upon them. Both parties have produced oral as well as documentary evidence. I do not attach importance to the oral evidence in so far as it is unsupported by documentary evidence in the shape of orders on mutations by Revenue Officers, or judgments by Courts, where such evidence could

⁹ *Ladhu v. Mt. Daulati*, (1890) 126 P R 1890.

have been produced. The oral statements of witnesses are moreover mostly vague as regards the degree of relationship of the collaterals concerned and it seems very unsafe to base any conclusion on such statements.

Coming to the documentary evidence, the instances relied on by the parties will be found exhibited in two charts A and B attached to the judgment of the trial Court. The learned counsel for the plaintiffs has relied before us on instances Nos. 3, 5, 7 and 9 in chart A and also the instance in Ex. D/2. In instance No. 3, however, the mutation was effected at first in favour of the daughter as the contesting collaterals were apparently of the 8th degree and were clearly excluded according to the *Riwaj-i-am* which was referred to by the Revenue Officer in his order (*vide* Ex. P/4). This order is said to have been reversed on appeal, but no copy of the appellate order is produced and it is not known on what grounds it was based. Possibly it may have been based on a compromise; for even according to the vernacular *Riwaj-i-am* of 1916, on which the plaintiffs mainly rely, collaterals of the 8th degree have no right to succeed in preference to daughters. The same remark would apply to instance No. 7 where the collaterals were of the 7th degree. Further, in the case of this instance the mutation order does not show whether any daughter was in existence at all (*see* Ex. P/6). Reliance is placed in this respect chiefly on the statement of Mohammad Ali (P. W. 16), but his evidence is far from convincing. The mutation (Ex. P/6) shows that the property was mutated in favour of Muhammad Ali and Shah Muhammad in equal shares, while Muhammad Ali states that it was mutated in the names of Shah Muhammad and Sher. Instances Nos. 7 and 9 related to collaterals of the 5th degree. But the former was a case of sisters. It appears from Ex. P/9 which relates to this instance, that the claims of the sisters were rejected merely on the ground that the Customary law prepared in 1916 did not show that sisters could succeed in preference to collaterals. In answer to question 71 in this book it is, however, stated that sisters stand on the same footing as daughters. This answer was apparently overlooked by the Revenue Officer who sanctioned the mutation in Ex. P/9. Ex. P/11 which relates to the next

instance (instance No. 9) shows that only one Choghatta contested the claim of the reversioners on the basis of a will but he was unable to produce any will and his claim was, therefore, rejected. It was stated in the mutation order that the daughters were in possession of the movable property of the deceased and that they were not entitled to culturable land. But the daughters did not apparently appear and no inquiry was made into their rights.

The last instance relied on by the counsel for the appellants was that in Ex. D/2. But here, too, the contesting collaterals were of the 8th and 9th degrees and the Tehsildar, before whom the mutation came up at first, ordered the land to be mutated in favour of the daughter. On appeal there was a compromise and half of the land went to the daughter and half to the reversioners. This instance being based on a compromise is obviously of little assistance. It will thus appear that the plaintiffs have not produced any clear instance where the right of collaterals of the 5th degree was admitted after contest or after proper inquiry. The *Riwaj-i-am* of the years 1868 and 1894 and the English version of the Customary law of the Lahore District published in 1916 are against them as already pointed out while the statement of custom recorded in the vernacular *Riwaj-i-am* prepared in 1916 is open to doubt for reasons already stated. If that statement were correct, the plaintiffs should have been able to produce clear evidence in the shape of instance in support of it; but they have entirely failed to do so.

The learned counsel for the defendant Mt. Anayat Bibi has relied on instances Nos. 3, 5, 6, 11, 12 and 13 in chart B, which are supported by documentary evidence. In instance No. 3 a daughter succeeded in preference to a collateral of the 4th degree. This goes further than the custom stated in any of the *Riwaj-i-ams* and seems to be an exceptional case. Ex. D/3 on which reliance is placed does not give reasons for rejection of Ahmad Din's claim and no copy of the other mutation on which the order is based was produced. In instances Nos. 5 and 6, no collateral was apparently alive to contest the claim of the daughter when the mutations came up for orders. In instance No. 12 the claim was based on a will, while in instance No. 13 the collaterals

were more distantly related than in the fifth degree. In instance No. 11 it was held after inquiry that collaterals beyond the 4th degree were not entitled to succeed in preference to daughters, but it was further held that the plaintiffs had failed to prove that they were collaterals. The finding on the question of custom was, therefore, obiter.

It will thus appear that the defendant's documentary evidence is also not very helpful. The learned counsel for Mt. Anayat Bibi has relied on some of the oral evidence also, but for reasons already stated I do not consider it safe to base any conclusion on it. However, as the plaintiffs have failed to prove the custom alleged by them, the weakness of the defendants' evidence cannot help them. After considering the whole of the evidence relied on I am of opinion that the appeal must fail and I would, accordingly dismiss it with costs.

Coldstream, J.—I agree.

B.D./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 463

DIN MOHAMMAD, J.

Emperor

v.

Nawab—Accused.

Criminal Revn. Petn. No. 593 of 1936, Decided on 11th September 1936, from order of Sess. Judge, Sialkot, D/- 26th January 1936.

Criminal P. C. (1898, as amended in 1923), S. 239(e)—Joint trial—Accused under S. 457, Penal Code, can be charged and tried with another, charged under S. 411, I. P. C.

Section 457, Penal Code, includes theft and a person accused of an offence under S. 457 can by virtue of S. 239 (e), Criminal P. C. (1898 as amended in 1923), be legally charged and tried with persons accused of receiving or retaining stolen property under S. 411, Penal Code: 51 P R 1905 Cr. held out of date; A I R 1929 Lah 142, Disting. [P 463 C 2; P 464 C 1]

Sardar Sahib Jhanda Singh—

for the Crown.

Roop Chand for Ajit Ram—

for Opposite Party.

Order.—This order will dispose of Criminal Revisions Nos. 593 and 594 of 1936. These petitions have been presented to this Court by the Local Government against the order of the Sessions Judge directing a retrial. The facts bear-

ing upon the point of law involved in this case are these: One Nawab was sent up along with one Khushia to stand his trial under S. 457, I. P. C., in two different cases. The trial Magistrate, however, in both cases framed a charge under S. 457, I. P. C., against Nawab while against Khushia a charge, under S. 411, I. P. C., was framed. In both cases Nawab was convicted but Khushia was acquitted. Nawab appealed to the Sessions Judge who allowed his appeals, set aside his convictions and ordered a retrial in both cases on the ground that a joint trial of a person charged under S. 457, I. P. C., with a person charged under S. 411, I. P. C., was illegal. In this connexion he relied on 51 P R 1905 Cr¹ and 112 I C 584.² I have no hesitation in saying that the order of the Sessions Judge is wrong. Prior to 1923, when the Criminal Procedure Code was amended, the position was as stated by the Sessions Judge, but with the amendment of S. 239, Criminal P. C., the law was changed. The Sessions Judge has referred to Cls. (d) and (f), S. 239, but neither of these is relevant to the point. This case is governed by S. 239 (e) which says that,

persons accused of an offence which includes theft... and persons accused of receiving or retaining... property possession of which is alleged to have been transferred by any such offence committed by the first named persons...

may be charged and tried together. The Sessions Judge appears to have been influenced by the two judgments referred to above but 51 P R 1905 Cr¹ was clearly out of date as the law had been amended since and 112 I C 584² appears to have been misappreciated by the Sessions Judge. The question in that case was whether offences described in Ss. 457 and 436 could be jointly tried with offences under Ss. 411 and 414, I. P. C., with which different persons were charged. The learned Judge came to the conclusion that they could not be tried together and the *ratio decidendi* of his judgment was that S. 436, I. P. C., did not include theft or extortion, although S. 457, I. P. C., did. This distinction appears to have been overlooked by the Sessions Judge in this case. S. 457, I. P. C., includes theft and a person accused of an offence under S. 457 can, by virtue of S. 239 (e), be legally charged

1. Jagga v. Crown, (1905) 51 P R 1905 Cr=3 Cr L J 76=165 P L R 1905.

2. Sultan Ahmad v. Emperor, A I R 1929 Lah 142=112 I C 584=29 Cr L J 1080.

and tried with persons accused of receiving or retaining stolen property. I, therefore, allow these petitions, set aside the order of the Sessions Judge and direct him to dispose of the two appeals of Nawab in accordance with law.

U.S./K.S.

Petitions allowed.

* A. I. R. 1937 Lahore 464

BHIDE, J.

Firm Buja Mal-Gainda Mal —

Plaintiff — Appellant.

v.

Mukta Parshad and another —

Defendants — Respondents.

Second Appeal No. 1198 of 1936, Decided on 27th January 1937, from decree of Addl. Dist. Judge, Gurgaon, D/- 23rd May 1936.

* (a) Limitation Act (1908), S. 4—Suit in wrong Court of first instance—Plaintiff is not entitled to deduction under S. 4.

What is necessary in view of the wording of S. 4, Lim. Act, is that the plaint must have been presented to the proper Court. Where, therefore, a plaintiff presents a plaint to a wrong Court of first instance, he is not entitled to any deduction on account of holidays under S. 4 : 36 *Mad* 131; 36 *Mad* 482 ; A I R 1921 *Mad* 654 ; A I R 1923 *Mad* 114 ; A I R 1929 *Lah* 877 ; A I R 1929 *Lah* 425 and A I R 1935 P C 85, *Rel. on.*

[P 465 C 1]

(b) Civil P. C. (1908), O. 7, Rr. 10 and 14—Suit on pro-note instituted in wrong Court — Plaint returned without endorsement required by O. 7, R. 10 — Pro-note not returned with plaint but couple of days later — Absence of endorsement held mere irregularity—Time required for obtaining pro-note also held could not be deducted under S. 14, Lim. Act, as plaintiff could have stated in list of documents to be attached to plaint that pro-note was in Court and not in his possession.

On a suit based on pro-note being instituted in a wrong Court, the Court returned the plaint for presentation to the proper Court but without any endorsement thereon as required by O. 7, R. 10, Civil P. C. The pro-note was not returned along with the plaint but it was returned a couple of days later and the suit was presented to the proper Court on the day next after receipt of the pro-note :

Held : that the absence of any endorsement on the plaint as required by O. 7, R. 10 was a mere irregularity and it could not be held that the proceedings had not still terminated merely because the necessary endorsement was not made on the plaint. The time which was taken by the plaintiff for obtaining the pro-note also could not be deducted under S. 14, Lim. Act, as it was open to the plaintiff to state in the list of documents to be attached to the plaint that the pro-

note in the Court was not in his possession : A I R 1933 Cal 914, *Disting.* [P 465 C 2]

*Tek Chand — for Appellant.**Achhru Ram and F. C. Mittal —*

for Respondent No. 1.

Judgment.—This is a second appeal arising out of a suit for the recovery of Rs. 819-14-6 on the basis of a pro-note dated 6th July 1930. The suit was originally instituted in the Court of the Subordinate Judge at Ambala on 8th July 1933. The Court held that it had no jurisdiction to try the suit and ordered the return of plaint for presentation to the proper Court. Against this decision an appeal was preferred to the District Judge who affirmed the order of the trial Court and dismissed the appeal on 13th November 1934. The plaint was accordingly returned to the plaintiff for presentation to the proper Court on 14th November 1934 but without any endorsement thereon as required by O. 7, R. 10, Civil P. C. The pro-note on which the suit was based was also not returned to the plaintiff till 16th November 1934. On receiving the pro-note on the latter date the plaintiff, went to Gurgaon and presented the plaint to the Court of a Subordinate Judge there on 17th November 1934. When the suit came up for hearing it was contended on behalf of the defendants that it was barred by time. This contention was rejected by the trial Court and the plaintiff was granted a decree. But on appeal the learned Additional District Judge held that the suit was barred by time and dismissed it accordingly. From this decision the present appeal has been preferred.

It has been stated above that the pro-note on which the suit was based was executed on 6th July 1930. The limitation for the suit was three years and expired on 6th July 1933. Sixth and seventh of July 1933 were, however, holidays and, therefore, the suit was instituted on 8th July 1933. The learned counsel for the respondents has urged that even excluding the time taken by the plaintiff in prosecuting his suit in the Court at Ambala, the suit must be held to be time-barred, because the plaintiff was not entitled to take advantage of S. 4, Lim. Act, in the circumstances of the case. It was urged that S. 4 applies only when the plaint is presented to the proper Court, and in the present instance, as the plaint was presented to a wrong Court in the first instance, the plaintiff is not

entitled to any deduction on account of the holidays under S. 4 in addition to the time which he claims under S. 14, Lim. Act. In support of this contention the learned counsel for the respondents has relied on 36 Mad 131;¹ 36 Mad 482;² 44 Mad 817;³ A I R 1923 Mad 114;⁴ A I R 1929 Lah 877⁵ and 11 Lah 12⁶ and a decision of their Lordships of the Privy Council reported in 62 I A 80.⁷ This ground was apparently not taken before the learned Additional District Judge but it is purely a question of law, and seems to be fully supported by the authorities referred to. It appears to me that the suit must be held to be barred by time on this ground alone. The learned counsel for the appellants was not able to cite any authority to the contrary. He merely contended that 6th and 7th July 1933, were holidays for the Court at Gurgaon also. But this does not appear to make any difference; what is necessary in view of the wording of S. 4, Lim. Act, according to the authorities referred to, is that the plaint must have been presented to the proper Court. In the present instance this was not done.

The learned counsel for the appellant then contended that as the plaint was returned in the first instance without any endorsement thereon as required by O. 7, R. 10, Civil P. C., the proceedings in the appellate Court at Ambala cannot be said to have terminated even now and, therefore, the suit was within time. In support of this contention reliance was placed on A I R 1933 Cal 914,⁸ but that ruling does not appear to me to support the learned counsel's contention. The only point decided in that case was that the plaintiff is entitled in a case of this

type to deduct under S. 14, Lim. Act, not only the period up to the date of the order but up to the actual return of the plaint. In the present instance it is not denied that the plaint was actually returned to the plaintiff for presentation to the proper Court on 14th November 1934. The absence of any endorsement on the plaint as required by O. 7, R. 10, Civil P. C., was a mere irregularity and it cannot be held that the proceedings have still not terminated merely because the necessary endorsement was not made on the plaint. The time which was taken by the plaintiff for obtaining the pro-note also cannot be deducted. It is true that according to O. 7, R. 14, Civil P. C., any document on which a suit is based has to be produced with the plaint, but in the present instance if the pro-note was in Court and not in possession of the plaintiff, it was open to him to state the fact in the list of documents to be attached to the plaint. For reasons given above I am of opinion that the suit was rightly held to be barred by time. I, therefore, dismiss the appeal but in view of all the circumstances I leave the parties to bear their own costs in this Court.

V.B.B./A.L.

Appeal dismissed.

A. I. R. 1937 Lahore 465

ADDISON AND DIN MOHAMMAD, JJ.

Sarab Sukh—Defendant—Appellant.

v.

Prem Datt and another, Plaintiffs and another, Defendant—Respondents.

Second Appeal No. 462 of 1936, Decided on 3rd November 1936, from decree of Dist. Judge, Gujranwala, D/. 20th April 1936.

(a) Civil P. C. (1908), S. 47 and O. 21, R. 16 (as amended by Lahore High Court)—Dispute between decree-holder and assignee does not come under S. 47 — Separate suit relating to validity of assignment is competent — Assignee of decree realizing decretal amount from judgment-debtor — Decree-holder executing decree—Assignee applying that decree is satisfied — Executing Court dismissing application finding assignment not valid — Suit by judgment-debtor to realize amount paid to assignee, making decree-holder and assignee defendants — S. 47 does not bar assignee from defending his assignment.

A dispute between an assignee and the decree-holder is not a dispute between the parties within the meaning of S. 47, Civil P. C., and a separate suit relating to the validity of the assignment is competent. This point is also clear by O. 21, R. 16

1. *Mira Mohideen v. Nalla Perumal Pillai*, (1909) 36 Mad 131=12 I C 58=21 M L J 1000.
2. *Seshagiri Rao v. Velayudham Pillay*, (1909) 36 Mad 482=14 I C 157=22 M L J 377.
3. *Ummathu v. Pathumma*, A I R 1921 Mad 654=63 I C 924=44 Mad 817=41 M L J 84.
4. *Govindasami Padayachi v. Sami Padayachi*, A I R 1923 Mad 114=69 I C 724=43 M L J 579.
5. *Surat Singh v. Mt. Nihal Kuar*, A I R 1929 Lah 877=117 I C 900.
6. *Dharman Ram Ladha Ram v. Ganga Ram*, A I R 1929 Lah 425=116 I C 314=11 Lah 12=31 P L R 396.
7. *Maqbul Ahmad v. Onkar Pratap Narain Singh*, A I R 1935 P C 85=155 I C 205=62 I A 80=57 All 242 (P C).
8. *Neerendrabhooshan v. Berhampur Oil Mills, Ltd.*, A I R 1933 Cal 914=149 I C 79=60 Cal 1122.

(as amended by the Lahore High Court), which makes a judgment-debtor no longer a necessary party to the application by the assignee of a decree for the judicial recognition of his assignment.

[P 467 C 2]

An assignee of a decree realized the whole amount of the decree from the judgment-debtor. Subsequently the decree-holder took out execution proceedings against the judgment-debtor. The assignee made an application alleging that he had realized the amount, but the executing Court dismissed it on the ground that no valid assignment had been proved. The judgment-debtor sued to recover money paid to assignee, making decree-holder and assignee as defendants. The assignee raised the plea that his assignment was valid :

Held : that the assignee was not barred under S. 47 from urging, in a suit in which his assignment was being challenged, that his assignment was valid. Though the executing Court had decided against him, it did not debar him from re-agitating the matter in a separate suit, and if he was not so debarred, he could surely defend his assignment in a suit in which he was impleaded as a defendant by the judgment-debtor: *A I R 1927 P C 108, Rel. on; Case law discussed.*

[P 467 C 2]

(b) Civil P. C. (1908), S. 47 — Judgment-debtor paying decretal amount to assignee from decree-holder—Assignment found to be invalid subsequently—Decree-holder realizing decretal amount—Judgment-debtor can recover amount paid twice over—S. 47 is no bar to such suit.

Where a judgment-debtor pays the whole of the decretal amount to an assignee of a decree, who is subsequently found by the executing Court to be without a valid assignment, and the decree-holder executes his decree and realizes the decretal amount, the judgment-debtor cannot be made to pay the sum twice over, and the law is not so helpless as to deny him the proper relief to claim refund of the extra amount realized from him and a suit to recover such amount is not barred by S. 47 : *A I R 1929 Rang 269 and A I R 1927 All 710, Rel. on.*

[P 468 C 1, 2]

Mehr Chand Mahajan, Shamair Chand and Yashpal Gandhi—for Appellant.

J. N. Agarwal, Gullu Ram and Manohar Lal—for Respondents.

Din Mohammad, J.—The facts of the case out of which this second appeal has arisen are these. Dr. Sukhdesh Lal obtained a decree for Rs. 4,824-13-4 against Pandit Hari Chand, who died some time after, leaving him surviving his sons Prem Datt and Gobind Ram. By an agreement privately entered into between Prem Datt and Gobind Ram, the liability for the decretal amount was accepted by Prem Datt. On 29th September 1932, he paid Rs. 1,000 to Pandit Sarab Sukh, Advocate, who was in possession of a letter of authority from the decree-holder and had represented himself to be an assignee from him. On 12th January 1933, he paid another sum of Rs. 1,025-13-0 to the same

gentleman and further negotiated in his favour a promissory note of the value of Rs. 2,500 and thus secured a complete discharge. In spite of this, on 8th August 1933, Dr. Sukhdesh Lal took out execution proceedings against both Prem Datt and Gobind Ram. In the course of those proceedings, Pandit Sarab Sukh made an application to the executing Court alleging that the decree had been assigned to him by the decree-holder on 12th November 1931, on the basis of which he had realized the entire decretal amount from Prem Datt, and praying that the said payment be certified under the provisions of O. 21, R. 2, Civil P. C. This application was resisted by the decree-holder.

On 18th December 1934, the executing Court dismissed this application on the ground, *inter alia*, that no valid assignment had been proved by the applicant. From this order the assignee preferred an appeal to the District Court but he withdrew it later. On 20th December 1934, Prem Datt instituted a suit for the recovery of money paid to Pandit Sarab Sukh on the ground that the original decree-holder had sued for the execution of his decree and that he was repudiating the assignment on the strength of which the decretal debt had been realized from him by Pandit Sarab Sukh. He also claimed some damages and interest on that amount. Both Pandit Sarab Sukh and Dr. Sukhdesh Lal were impleaded as defendants. Both the defendants resisted the suit but on different grounds. Dr. Sukhdesh Lal urged that the suit was barred by the provisions of S. 47, Civil P. C., on account of the previous decision of the executing Court, dated 18th December 1934, dismissing the assignee's claim. The Subordinate Judge framed the necessary issues arising from the pleadings of the parties, of which, in the present appeal, we are solely concerned with issue 4. This issue runs as follows :

What is the effect of the decision of the executing Court, dated 18th December 1934, on the pleadings of the parties ?

The Subordinate Judge held that the question of the validity of the assignment had already been decided against the assignee and could not be re-agitated by him. He, consequently, dismissed the suit against Dr. Sukhdesh Lal, but decreed it against Pandit Sarab Sukh. The claim for interest and damages was disallowed. On appeal by Pandit Sarab Sukh, the District

Judge affirmed the decision of the Court below on the question now before us. Hence this second appeal by Pandit Sarab Sukh. This appeal can be disposed of on the short question of whether in the suit by Prem Datt, the assignee could raise the plea that his assignment was valid, in spite of the finding of the executing Court against him. If the assignee's contention on this point succeeds, the case shall have to be remanded to the trial Court for further enquiry. Counsel for the appellant contends that the decision of both the Courts below on the question before us is legally erroneous. He urges that S. 47, Civil P. C., does not apply inasmuch as the question of the validity of the assignment did not arise between the parties to the suit or their representatives. He argues that sub-s. (3), S. 47, Civil P. C., is ancillary to sub-s. (1) of the same section and a dispute between a party and its own representative is not one contemplated by this section. In support of his contention he has referred us to 25 Bom 631,¹ A I R 1935 Lah 384,² A I R 1935 Lah 609,³ A I R 1933 Lah 473,⁴ 26 Mad 264⁵ and A I R 1929 Lah 51.⁶

In 25 Bom 631,¹ a Division Bench of the Bombay High Court observed that even if an auction-purchaser could be assumed to be a representative of the judgment-debtor, S. 244, Civil P. C., did not apply to a question between a party to the suit and his representative. In A I R 1935 Lah 384,² a Single Judge of this Court held that S. 47 (3), Civil P. C., must be read subject to sub-s. (1) of the same section and does not apply to a case in which the question is between the rival representatives of one party. In A I R 1935 Lah 609,³ an application for execution had been made by the assignee of the decree-holder and the judgment-debtor had contended that the assignment was not valid. On the assignment being upheld by the executing Court, the judgment-debtor, preferred an appeal to this Court. It was

held that the appeal was not maintainable as the judgment-debtor had no interest in the issue decided. He was entitled to get a discharge from the person entitled to the decree, but which of the rival claimants was so entitled did not concern him at all.

In A I R 1933 Lah 473,⁴ Sir Alan Broadway observed that an order passed by an executing Court under O. 21, R. 16 which deals with assignment, was not open to appeal. In 26 Mad 264,⁵ a Division Bench of the Madras High Court observed that a suit lies at the instance of the assignee of a decree for a declaration as to the validity of his assignment. This decision was followed in A I R 1929 Lah 51,⁶ where it was laid down that a judgment-debtor can maintain a suit for a declaration that the assignment of a decree against him by the decree-holder is invalid as being fraudulent. It follows from these authorities that a dispute between an assignee and the decree-holder is not a dispute between the parties within the meaning of S. 47, Civil P. C., and a separate suit relating to the validity of the assignment is competent. The point is made further clear by the amendment introduced by this Court in R. 16 of O. 21, Civil P. C. In the first proviso to this rule which provided for a notice of an application under R. 16 to be given to the transferor and the judgment-debtor, the words "and the judgment-debtor" have been omitted by this Court. The obvious effect of this amendment is that the judgment-debtor is no longer to be considered a necessary party to the application by the assignee of a decree for the judicial recognition of his assignment. Applying the principles of law enunciated in the judgments cited above and the amended rule to the facts of the present case, it is obvious that Pandit Sarab Sukh is not barred under the provisions of S. 47, Civil P. C., from urging, in a suit in which his assignment is being challenged, that his assignment was valid. The executing Court had no doubt decided against him but that will not debar him from re-agitating the matter in a separate suit, and if he is not so debarred, he can surely defend his assignment in a suit in which he is impleaded as a defendant by the judgment-debtor. Reference may in this connexion be made to 54 Cal 595.⁷ The question that

1. Maganlal Mulji v. Doshi Mulji, (1901) 25 Bom 631=3 Bom L R 255.

2. Chanan Singh v. Sardar Khan, A I R 1935 Lah 384=157 I C 73=37 P L R 145.

3. Achhru Ram v. Fazl Mohammad, A I R 1935 Lah 609=155 I C 974=37 P L R 498.

4. Niamat Rai v. Hotu Ram, A I R 1933 Lah 473=145 I C 891.

5. Bommanapati Veerappa v. Chinta Kunta Srinivasa Rau, (1902) 26 Mad 264.

6. Ishar Das Gorakh Ram v. Salig Ram, A I R 1929 Lah 51=117 I C 893.

7. Kalachand Banerjee v. Jaggannath Marwari, A I R 1927 P C 108=101 I C 442=54 I A 190=54 Cal 595 (P C).

arose for decision in that case was whether a decree obtained in the absence of a receiver of an insolvent's estate was not *res judicata* against him, so as to affect his right to redeem even if the Court in rejecting an application by him to be made a party, had heard and rejected his objections to the decree being made. Their Lordships of the Privy Council answered this question in the negative. Though the facts of that case are different from the facts of the case before us, the principle deducible from that decision does in a way apply to it. Counsel for the appellant has next contended that the rule of *res judicata* does not bar defence, even if it may bar an attack. He has relied on certain authorities of the different High Courts in India, but we do not propose to discuss that matter here as in view of our finding on the main question, this point does not arise. Moreover, there is a divergence of opinion on that question, and the point is not so clear as is stated by the appellant's counsel.

It has been urged on behalf of the decree-holder that the suit by Prem Datt was not competent inasmuch as it related to the execution, discharge or satisfaction of the decree and that such suits were barred by sub-s. (1) of S. 47, Civil P. C. He has not however been able to cite any authority in his favour, while as against him there is a clear authority in 7 Rang 310⁸ and 50 All 111.⁹ In 7 Rang 310⁸ a judgment-debtor had paid a certain sum towards the partial satisfaction of a decree and the decree-holder had failed to certify the payment and had executed the whole decree. On a suit by the judgment-debtor to recover the sum already paid by him, it was held that S. 47 did not bar such suits, as the claim was based on a failure to carry out the promise to credit the amount to the decree and although this had a bearing on the question of satisfaction, yet it was not a question directly relating to satisfaction of the decree. In 50 All 111,⁹ a judgment-debtor had made a part payment to a judgment-creditor out of Court and an application for its certification was resisted and ultimately rejected by the executing Court. It was held by a

Division Bench of the Allahabad High Court that although the payment, not having been certified, could not be taken into account as a part satisfaction of the decree, the plaintiff was entitled as the consideration for the payment had failed, to claim back the money which he had paid, as money in the hands of the defendant received by him to the use of the plaintiff. Here also it is admitted by Pandit Sarab Sukh that he had received the entire decretal amount from Prem Datt. It is also not denied that during the pendency of the suit, Dr. Sukhdesh Lal has also realized the decretal amount from the judgment-debtor. The judgment-debtor cannot be made to pay the same sum twice over and, in our view, the law is not so helpless as to deny him the proper relief to claim refund of the extra amount realized from him. On these grounds, we allow the appeal, set aside the decrees of the Courts below and remand the case under O. 41, R. 23, Civil P. C., to the trial Court for disposal in accordance with law. The court-fee on the appeal before us will be refunded to the appellant: costs will abide the event.

V.B.B./K.S.

Appeal allowed.

A. I. R. 1937 Lahore 468

COLDSTREAM AND BHIDE, JJ.

Diwan Singh and another — Defendants—Appellants.

v.

Natha Singh and others, Plaintiffs and another, Defendant — Respondents.

Second Appeal No. 160 of 1935, Decided on 3rd December 1936, from decree of Dist. Judge, Lyallpur, D/- 26th April 1934.

(a) *Riwaj-i-am*—Evidentiary value — Onus — Entry in *Riwaj-i-am* raises initial presumption of existence of custom—It is rebutted on showing that Customary law containing entry is imperfectly compiled document—Onus of proving custom re-shifts on party relying on that custom.

An entry in *Riwaj-i-am* as to custom, raises an initial presumption of its existence but the presumption is a rebuttable one. The presumption is rebutted if it is shown that the Customary law containing the entry of the custom is an imperfectly compiled document. Thereupon the onus of proving the custom re-shifts on the party relying on the existence of custom in its favour: *A I R 1918 Lah 228* and *A I R 1927 Lah 241, Ref.*; *A I R 1916 P C 129, Rel. on.* [P 470 C 1, 2]

8. A. K. R. M. M. C. T. Chetty v. Maung Tha Din, A I R 1929 Rang 269=119 I C 742=7 Rang 310.

9. Mahbub Ali v. Muhammad Husain, A I R 1927 All 710=104 I C 419=25 A L J 823=50 All 111.

(b) Civil P. C. (1908), S. 100 — Question of fact — Question regarding rebuttal of presumption is question of fact.

The question whether the presumption attaching to a document is or is not rebutted in a particular case is a question of fact and cannot be agitated in second appeal : *A I R 1930 P C 91, Rel. on.*
[P 470 C 1]

(c) Custom (Punjab)—Gujranwalla District — Custom as to preference of collaterals to daughter's son — Customary law containing said custom is imperfect and so unreliable document.

The Customary law of Gujranwalla District containing entry of custom of succession in favour of collaterals in preference to daughter's sons is an imperfectly compiled document and is not therefore reliable : *A I R 1918 Lah 228 and A I R 1933 Lah 466, Rel. on.*
[P 470 C 2]

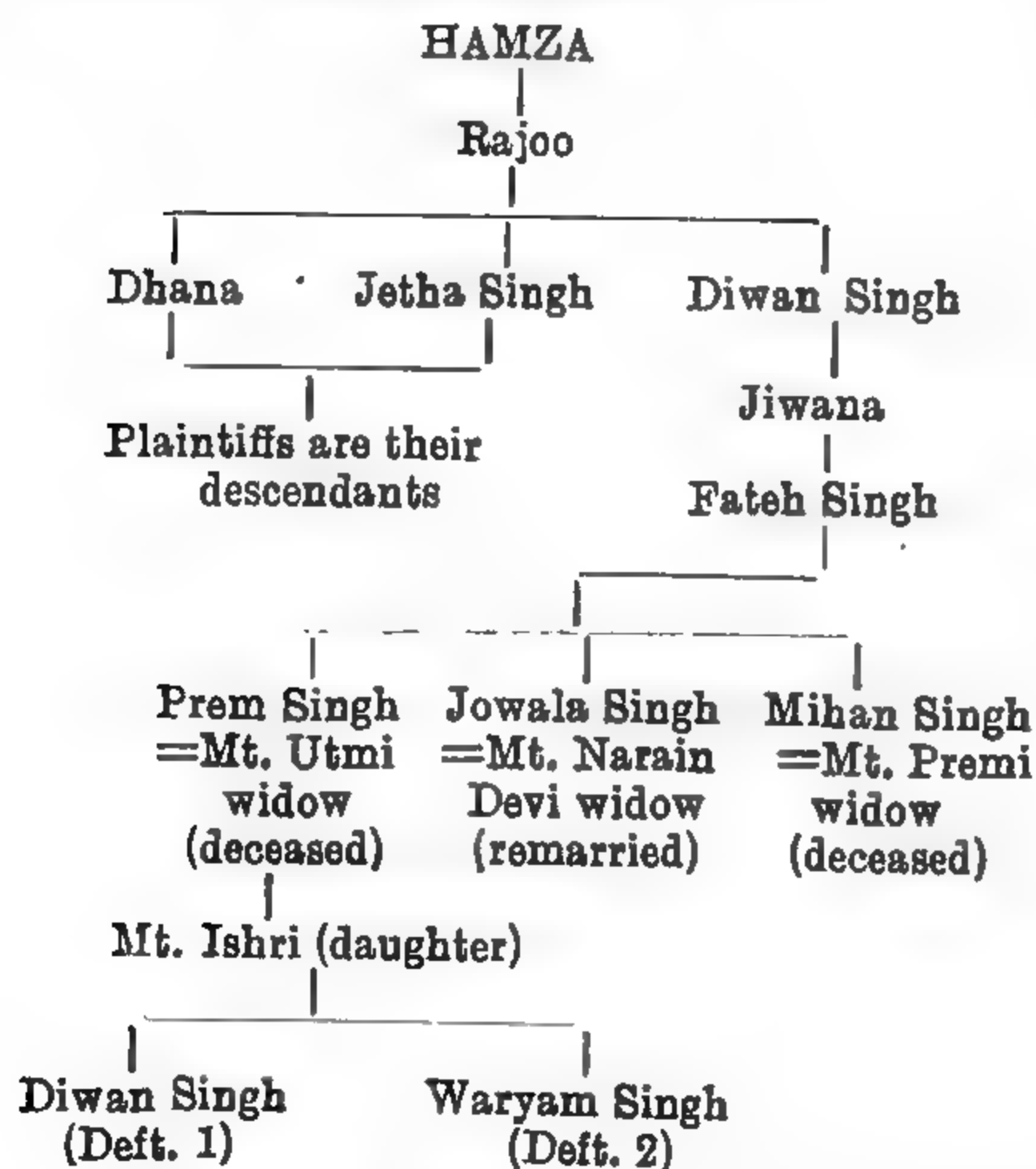
(d) Custom (Punjab) — Succession—Widow — Succession to husband's collaterals is as representative of her husband—On her death property is husband's.

Where a widow succeeds to her husband's brother's estate she does so as a representative of her husband; on her death the estate becomes an accretion to her husband's estate and will be treated as his property : *43 P R 1905; 51 P R 1909 and A I R 1924 P C 121, Rel. on; 134 P R 1907 (FB), Disting.* [P 470 C 2; P 471 C 1]

V. N. Sethi for *J. G. Sethi* — for Appellants.

Harbhajan Das and *Jagan Nath Talwar*—for Respondents (Plaintiffs).

Bhide, J.—The facts bearing on the only point of custom which calls for decision in this second appeal may be shortly stated. The parties to the suit are Labanas of Tahsil Shahdara in the Sheikhpura district and their relationship will appear from the following pedigree table :



The dispute between the parties relates

to the lands which were held by the three brothers, Prem Singh, Jowala Singh and Mihan Singh. On the death of Prem Singh, Jowala Singh and Mihan Singh, their lands were held by their widows on a life-estate. Thereafter Mt. Narain Devi widow of Jowala Singh, remarried and Mt. Premi, widow of Mihan Singh, died and the lands held by them passed to Mt. Utmi, widow of Prem Singh. Mt. Utmi transferred the lands held by her to her daughter and daughter's sons and mutations were effected in their favour. Mt. Utmi died sometime after 1925, and the plaintiffs who are the collaterals of Prem Singh, Jowala Singh and Mihan Singh in the 6th degree, instituted the present suit for possession of the lands originally held by the three brothers, on the allegation that Mt. Utmi, who held a life-estate in the lands, had no power to make a gift thereof in favour of her daughter and daughter's sons and that they were entitled to succeed to the land on her death. They relied on the *Riwaj-i-am* of the Gujranwala district (in which the village where land is situated was at first included but was then transferred to the Sheikhpura district), according to which daughters have no right according to custom to succeed to the land of a proprietor, whether ancestral or non-ancestral.

The Courts below found the land in suit to be non-ancestral and dismissed the suit with respect to the land originally held by Prem Singh but decreed it with respect to the land which had come to Mt. Utmi from the widows of Jowala Singh and Mihan Singh by survivorship. On appeal the decree was affirmed by the learned District Judge who held that the land held by Jowala Singh and Mihan Singh, which had come to Mt. Utmi, by collateral succession and was held by her on a life-estate, would be treated as the property of Jowala Singh and Mihan Singh and not of Prem Singh and hence the plaintiffs as collaterals had a preferential right to succeed to it. From this decision the defendants have preferred the present appeal supported by a certificate on the question of custom involved—viz., whether the land received by a widow by collateral succession shall for the purpose of succession after her death or remarriage be treated as the property of her husband. The plaintiffs also filed cross-objections, claiming the land of Prem Singh with res-

pect to which the suit had been dismissed. The finding of the Courts below that the property in dispute is 'non-ancestral' cannot be and is not challenged. The only point for decision in this appeal, therefore, is whether the plaintiffs, who are collaterals in the 6th degree, are entitled to succeed to non-ancestral land according to the custom governing the parties in preference to the defendants who are sons of the daughter of Prem Singh. The plaintiffs relied mainly on the answer to question 47 of the Customary law of the Gujranwala District published in the year 1914. This answer which is in favour of the plaintiffs is no doubt entitled to an initial presumption of correctness according to the rule laid down by their Lordships of the Privy Council in 45 P R 1917¹ but the presumption is rebuttable and in the present instance it has been found by the learned District Judge that the presumption has been rebutted by the fact that the aforesaid Customary law was an imperfectly compiled document.

This was the view taken of this compilation in 84 P R 1917² in which the answers to certain questions in it including the answer to question 47 were discussed at length. 84 P R 1917² was commented on in certain respects in 8 Lah 281,³ but that does not really affect the question now before us. The fact that the presumption attached to the entries in the *Riwaj-i-am* is a rebuttable one cannot be disputed and is indeed clear from the aforesaid Privy Council decision itself. The learned District Judge's view that the Customary law of the Gujranwala District in respect of the point of custom involved is not a reliable document is supported not only by 84 P R 1917² but also by a recent ruling of this Court reported in I R 1933 Lah 141.⁴ The question whether the presumption attaching to a document has or has not been rebutted in a particular case, is one of fact and cannot be agitated in second appeal: *cf.* 11 Lah

199.⁵ If the Customary law of the Gujranwala District on which the plaintiffs relied is excluded, there is practically no evidence to support their claim—the other evidence produced by them being worthless.

It is true that the initial onus on the question of custom was placed on the defendants; but that was only on account of the entries in the Customary law of the District discussed above. This evidence having been rebutted by the defendants by showing that the Customary law was an imperfect compilation and therefore an unreliable piece of evidence, the onus was re-shifted to the plaintiffs and as there is no other evidence worth the name to support their claim the plaintiffs must be held to have failed to establish it. The above finding is sufficient to justify the dismissal of the plaintiffs' claim but the dismissal can be supported by other reasons also. The fact that Mt. Utmi was allowed to succeed collaterally to the land left by Jowala Singh and Mihan Singh is not disputed. The main point which requires decision in the circumstances is whether on the death of Mt. Utmi this land should be treated as the property of her husband Prem Singh, or that of his brothers Jowala Singh and Mihan Singh, who were the actual last male holders of the land, in order to determine the line of succession on her death. The contention of the learned counsel for the appellants was that the land should be treated as an accretion to the estate of Mt. Utmi's husband Prem Singh, as she succeeded to it only as a representative of her husband's estate and not in any independent right of her own. There seems to be ample authority to support the contention of the learned counsel that when a widow succeeds collaterally as in this case, she does so as a representative of her husband and in the same way as he would have done if he were alive: *cf.* 43 P R 1905,⁶ 51 P R 1909.⁷ In 5 Lah 192⁸ it was held by their Lordships of the Privy Council that when a widow acquires property by adverse possession in her capacity as such,

1. *Beg v. Allah Ditta*, A I R 1916 P C 129=38 I C 354=44 I A 89=45 P R 1917=44 Cal 749 (P C).

2. *Wazira v. Mt. Maryan*, A I R 1918 Lah 228=42 I C 358=84 P R 1917=3 P L R 1918.

3. *Labh Singh v. Mt. Mango*, A I R 1927 Lah 241=100 I C 924=8 Lah 281=29 P L R 586.

4. *Ilahi Bakhsh v. Ghulam Nabi*, A I R 1933 Lah 466=141 I C 573=14 Lah 404=34 P L R 129=I R 1933 Lah 141.

5. *Wali Muhammad v. Mohammad Bakhsh*, A I R 1930 P C 91=122 I C 316=57 I A 86=11 Lah 199 (P C).

6. *Anar Devi v. Kanlan*, (1905) 43 P R 1905=112 P L R 1905.

7. *Gurdial Singh v. Arur Singh*, (1909) 51 P R 1909=2 I C 98=64 P L R 1909.

8. *Lajwanti v. Safa Chand*, A I R 1924 P C 121=80 I C 788=51 I A 171=5 Lah 192 (P C).

the property becomes an accretion to her husband's estate and will be treated as his property. I do not see why the same principle should not govern the present case.

The learned counsel for the respondents has referred to 134 P R 1907,⁹ a ruling of the Punjab Chief Court in which it was held that when a widow succeeds to the property of her son as his mother and then dies, her daughter cannot succeed to the property in preference to collaterals. The reason given was that she must be treated as the sister of the last male-holder, viz., the son and not as the daughter of the latter's father. Reliance was placed before the learned Judges who decided that case on certain rulings of the Chief Court in which it was held that when a widow succeeds to property on the death of her son, she succeeds not as a mother, but as the widow of her deceased husband. The learned Judges however, pointed out that the principle had been used in some rulings only to explain why women should lose their life-estates by re-marriage and they refused to extend it further as it would lead to absurd results as pointed out by them. The learned Judges therefore held that in the circumstances of the case the widow succeeded as a mother and therefore the last male-holder was her son and not her deceased husband. The case of a mother inheriting property on the death of her son obviously stands on a different footing and cannot, I think, be considered to be analogous to the present case. In the present instance, it seems clear that when the widow Mt. Utmi succeeded collaterally on the death of Jowala Singh and Mihan Singh, she succeeded to the estate as the representative of her husband and not of Jowala Singh or Mihan Singh. Consequently on her death the estate must, I think, be treated as though Prem Singh himself had succeeded to it. This was the view taken by a Division Bench of the Punjab Chief Court (Shadi Lal and Le Rossignol, JJ.) in Civil Appeal No. 1090 of 1912, decided on 6th May 1916, in which a similar question arose. The facts of that case were on all fours with the present case so far as the question of custom under discussion is concerned and I see no good reason to dissent from it. In view of the findings arrived

at above, I would accept the appeal of the defendants and dismiss plaintiffs' suit. As a result the cross-objections of the plaintiffs must also be dismissed. No order as to costs.

Coldstream, J. — The question of the evidentiary value to be attached to the statement regarding custom in the answer to question 47 of the Customary law of the Gujranwala District does not appear to me to arise in this appeal. The certificate granted to the appellants by the learned District Judge under S. 41 (3), Punjab Courts Act, relates solely to the question whether the land received by a widow by collateral succession after her death or remarriage is to be treated as the property of her husband. The question who is heir to that property, assuming that it is to be treated as the husband's, has been decided finally by the Court below. As regards the question laid open by the certificate following the view taken by the Punjab Chief Court in Civil Appeal No. 1090 of 1912 to which my learned brother has referred in his judgment I would hold that the land which had come to Mt. Utmi from the widows of Jowala Singh and Mian Singh must be regarded as part of her husband's estate in her hands, and accept the appeal as proposed by my learned brother Bhide.

W.D./A.L.

Appeal accepted.

A. I. R. 1937 Lahore 471

TEK CHAND, J.

Malik Jai Kishan Singh — Plaintiff
—Appellant.

v.

Parmeshri Das and others — Defendants
—Respondents.

Second Appeal No. 630 of 1936, Decided on 25th November 1936, from decree of Dist. Judge, Delhi, D/- 16th April 1936.

(a) Civil P. C. (1908), S. 66 — No retrospective effect—*J* purchasing property in execution sale in name of his wife *D* — Sale confirmed before Code of 1908 came into force—*R*, son of *J*, mortgaging to *G* his share in property purchased by *D*—*J* bringing suit in 1933 against *R* and *G* for declaration that purchase is benami and mortgage is invalid—S. 66 of Code of 1908 does not apply—S. 317 of old Code (1882) applies and suit against *R*, heir of certified purchaser, is maintainable.

J purchased certain properties in execution sale in name of his wife *D*. *R*, the son of *J*, mortgaged his one-sixth share in the property purchased to one *G*. The sale in favour of *D* was

⁹ Hamira v. Ram Singh, (1907) 134 P R 1907=74 P L R 1908=85 P W R 1907 (F B).

confirmed in 1906, when Civil P. C. of 1882 was in force. In 1933, *J* brought a suit against *R* and *G* for declaration that the mortgage was invalid and that the purchase was benami :

Held: that the provisions of S. 317, Civil P. C., 1882, and not S. 66, Civil P. C., 1908, applied to the case and it was open to the plaintiff to allege in the suit against a transferee *G* from *R* who claimed to be the heir of the certified purchaser *J*, that the purchase in favour of *D* was benami : *A I R 1920 Cal 435* and *4 P R 1904, Rel. on* ; *A I R 1929 P C 228, Ref.* ; *A I R 1914 All 552, Dissent.*
[P 474 C 2]

(b) Benami—Presumption—Advancement—Burden of proof—Husband purchasing property in name of wife by paying full consideration—Presumption is, purchase is benami—English rule of advancement does not apply to India—Burden is upon other party to rebut this presumption.

The rule of law of England that a purchase by a husband in the name of his wife is to be assumed to be a purchase for the advancement of his wife does not apply to India. Such a purchase is to be regarded as a benami transaction, by which the beneficial interest in the property is in the husband, although the ostensible ownership is in the wife.
[P 475 C 1]

Where a husband purchases certain property in the name of his wife by paying the full consideration money, the presumption is that the purchase is benami. The burden lies on the opposite party to rebut this presumption. A mere entry in Municipal house-tax register to the effect that the wife is the owner, is not sufficient to rebut the presumption when it is not shown that the tax was actually paid by the wife or by her heirs after her death : *A I R 1925 P C 181* ; *6 M I A 53 (P C)* ; *13 M I A 232 (P C)* and *A I R 1915 P C 96, Foll.* ; *A I R 1934 Mad 671, Disting.*
[P 475 C 1]

Qatul Chand for *Shamair Chand* and *Shamair Chand* — for Appellant.

Bishan Narain for *M. L. Puri* and *M. L. Puri* — for Respondents.

Judgment.—One Kalyan Singh, Khatri of Katra Nil, Delhi, died many years ago leaving two sons, Jai Kishan Singh, plaintiff and Jai Narain Singh. Jai Narain Singh had a son, Jai Gopal Singh, defendant 3. Jai Kishan Singh had married one Mt. Jawahar Devi, from whom he had six sons, one of whom is Ram Kishore, defendant 2. It is stated that he had two daughters also from Mt. Jawahar Devi but of this there is no definite proof on the record. Mt. Jawahar Devi died in 1914. In 1915 Jai Kishan Singh married Mt. Jas Kaur. From her, he has three sons and two daughters. Kalyan Singh owned three houses in Delhi which, on his death, devolved on his two sons, Jai Kishan Singh and Jai Narain Singh in equal shares. One Mohammad Riaz-ud-Din had a money decree against Jai Narain Singh, in execution of which he

got attached and sold Jai Narain Singh's one-half share in the aforesaid three houses. In the auction-sale, the property was purchased by Mt. Jawahar Devi, wife of Jai Kishan Singh. The auction-sale was held on 24th July 1906, and was confirmed on 10th August 1906. A sale certificate was issued by the executing Court in favour of Mt. Jawahar Devi on 24th August 1906.

As already stated, Mt. Jawahar Devi died in 1914. On 2nd August 1932, Ram Kishore (one of the sons of Jai Kishan Singh, plaintiff, by Mt. Jawahar Devi) describing himself as the owner of one-sixth share in the one-half of the three houses which had been purchased by Mt. Jawahar Devi, in the auction sale of 1906 mortgaged this share to Parmeshwari Das, defendant 1, for Rs. 1,500. On 7th October 1933, Jai Kishan Singh brought a suit for a declaration that the mortgage of the aforesaid share of the houses effected by Ram Kishore in favour of Parmeshri Das was invalid as he, and not Ram Kishore, was its owner. He alleged that the purchase of one-half of Jai Narain Singh's share in the three houses in the name of his wife Mt. Jawahar Devi in 1906 was benami, that the purchase price was supplied by him and that he had been in possession all along, i. e., in the lifetime of Mt. Jawahar Devi as well as since her death. He further pleaded that the mortgage in favour of Parmeshri Das was a fictitious transaction, having been brought about by Jai Gopal Singh, Parmeshri Das being merely a dummy mortgagee on his behalf. He claimed, in the alternative, that he had been in long and exclusive possession of the house and, therefore, was entitled to a declaration on the strength of his possessory title.

The suit was contested by Parmeshri Das, who pleaded that the auction-purchase by Mt. Jawahar Devi was not benami for the benefit of the plaintiff, but that Mt. Jawahar Devi was the absolute owner of the property purchased at the auction-sale, which on her death devolved on her sons, one of whom was Ram Kishore, mortgagor, who succeeded to one-sixth share in the one-half belonging to his mother. It was also alleged that the suit was not maintainable under S. 66, Civil P. C. It was further pleaded that the plaintiff was estopped from denying the title of Mt. Jawahar Devi or her heirs. It was claimed that the mort-

gage by Ram Kishore in favour of Parmeshri Das was a genuine transaction and was valid. The plaintiff's right to sue on the strength of the possessory title was also denied. The trial Judge found for the plaintiff on all points and passed a decree in his favour for the declaration claimed. On appeal by Parmeshri Das, the learned District Judge agreed with the trial Court in finding that the money for the auction-purchase of 1906 had been supplied by the plaintiff, but he held that in the absence of any further facts it must be presumed that it was given by the plaintiff to Mt. Jawahar Devi out of love and affection by way of 'advancement' and therefore it had not been proved that Mt. Jawahar Devi was a mere benami purchaser for the plaintiff. He further held that the suit was barred by S. 66, Civil P. C., 1908. With regard to the alternative claim the learned Judge held that the plaintiff had failed to prove such possession as would justify a decree being given in his favour on his alleged possessory title. On these findings he accepted the appeal and dismissed the plaintiff's suit, leaving the parties to bear their own costs throughout.

The plaintiff has come in second appeal, and on his behalf the judgment of the learned District Judge has been assailed on all the grounds on which it proceeds. The first question for consideration is whether the suit is barred by S. 66, Civil P. C., 1908, for if the learned District Judge is right on this point, it will be unnecessary to consider the question whether the transaction was benami. As already stated, the auction-sale was held and confirmed in 1906. The new Code of Civil Procedure was passed in 1908, and came into force on 1st January 1909. The present suit was brought in 1933. The question for determination is whether the plea in bar of the suit based on S. 66 of the new Code can be raised in this case. The corresponding provision in the Code of 1882, which was in force at the time of the confirmation of the sale was S. 317 of that Code. The terms of the two sections are materially different. S. 317 of the Code of 1882 laid down that:

No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of another person or on behalf of someone through whom such person claims.

Section 66 of the Code of 1908 is much wider in its terms and provides that :

No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims.

It will be noticed that while in S. 317 of the earlier Code, the suit was barred against the certified purchaser only, the new Code lays down that such suit cannot be maintained against any person claiming title under the sale certificate. There was a difference of opinion among the various High Courts under the Code of 1882 as to whether S. 317 was restricted to the certified purchaser himself or whether his heirs or transferees could also claim protection under it. The Calcutta, Madras and the Allahabad High Courts and the Chief Court of the Punjab took the view that the section must be construed strictly, that the protection given by it was limited to the case of certified purchaser himself, and that it did not preclude a suit against his assignee or representative. The Bombay High Court had taken the contrary view. The Legislature, in the Code of 1908, gave effect to the Bombay view and enacted S. 66 in clear terms so as to extend the protection to the heirs and assignees of the certified purchaser also. The leading Punjab case is reported in 4 P R 1904,¹ the correctness of which has not been challenged before me by the learned counsel for the plaintiff-respondent and which, if I may say so with all respect, lays down the law correctly.

The question however arises as to whether the suit is governed by S. 66 of the Code of 1908, which was in force in 1933, when the suit was instituted, or by S. 317 of the Code of 1882 under which the sale was held and confirmed in 1906. The respondents' learned counsel contends that this provision of the Code is one of procedure, and it is well settled that in all procedural matters, it is the law in force at the time of the suit which applies. In support of this contention he relies on 25 I C 821² where Sundar Lal, J., of the Allahabad High Court held that the special plea which was available to a certified purchaser at a Court sale against the actual purchaser under S. 317, Civil P. C., was a rule of procedure, and after the

1. Muhammad Furough v. Abdul Hakim, (1904) 4 P R 1904=28 P L R 1904.

2. Gaya Prosad v. Mt. Lareti Kuar, A I R 1914 All 552=25 I C 821=12 A L J 1145.

repeal of that Code it was no longer available by way of defence, as no one has a vested right in a particular form of procedure. He accordingly held that S. 66 of the new Code was applicable to suits brought in or after 1909 in reference to sales held and confirmed before this enactment and that under this section the plea was open not only to the certified purchaser personally but also to his heirs and assignees. The same view was taken by a Division Bench of the same Court in 43 All 416.³ There, however, the question was not discussed at any length and if I may venture to say, the reasoning is not very clear. The judgment of the High Court in that case was reversed on appeal by the Privy Council: see 51 All 675.⁴ Their Lordships however decided the case on another point, and expressly refrained from going into this particular question. The matter came up before a Full Bench of the Calcutta High Court in 47 Cal 1108⁵ where it was discussed at great length by Sir Asutosh Mukerjee, Offg. C. J. The Full Bench held that in a suit for a declaration of title, brought after 1909, against a purchaser at an execution sale and his assignee, where the sale took place and was confirmed before 1st January 1909, S. 317 of the old Code, and not S. 66 of the present Code, was applicable. It was observed that the matter was not one merely of a form of procedure but that it related to a serious restriction upon the title of the purchaser. It was accordingly held that in the absence of express words in the new Code its provisions could not be given retrospective effect so as to take away vested rights. The argument that this provision in the Civil Procedure Code embodied merely a rule of procedure was answered by the learned Judges as follows:

The respondent has argued that S. 66 of the Code of 1908, like S. 317 of the Code of 1882, embodies merely a rule of procedure and that as no litigant has a vested interest in the course of procedure, the new statute does not in fact take away a vested right. In our opinion, this contention is based upon a narrow and superficial view of the true effect of S. 66 of the Code of 1908 and S. 317 of the Code of 1882. Each of these

provisions, no doubt, finds a place in a code of procedure, but each imposes in essence a serious restriction upon the title of the real purchaser at the execution sale. As has been well-observed, of things that do not appear and things that do not exist, the reckoning in a Court of law is the same; a title which cannot be proved against an opponent in the eye of law, has in point of fact no existence in relation to that individual. It is consequently indisputable that both S. 317 of the Code of 1882 and S. 66 of the Code of 1908, operate to place a limitation upon the title of the purchaser, with this difference that the effect of S. 66 is to widen the fetter placed upon the title of the purchaser by S. 317. If we look at the matter from a different standpoint, the effect of S. 66 is to improve the position of the certified purchaser, and in effect to confer upon him a power of alienation he would not otherwise enjoy. If the certified purchaser alienated the property, the result, notwithstanding S. 317, would be that the title of the alienee could be forthwith defeated by the real owner. Under S. 66, on the other hand, the certified purchaser is enabled to confer a good title on the transferee, because the real owner is debarred from impeaching the title not only of the certified purchaser but also of the person who has derived title from him.

This argument appears to me unanswerable and I venture to express my respectful agreement with the view taken by the Full Bench of the Calcutta High Court. I hold accordingly that the matter must be decided in the light of the provisions of S. 317 of the Code of 1882, as interpreted by the Punjab Chief Court in 4 P R 1904.¹ It follows, therefore, that it is open to the plaintiff to allege in the present suit against Parmeshri Das, who is a transferee from Ram Kishore who claims to be the heir of the certified purchaser, Mt. Jawahar Devi, that the purchase in the name of Mt. Jawahar Devi was benami. The next question for consideration is whether in this case Mt. Jawahar Devi was a mere benami purchaser for the plaintiff. As already stated the District Judge, agreeing with the Court of first instance, has found as a fact that the money for the purchase of the property at the auction sale was supplied entirely by the plaintiff. The learned Judge has observed that nothing more than this has been proved by the plaintiff and that he has failed to show that 'he did not supply the funds to his wife out of love and regard for her for the purchase of the half share for her own benefit'. In this view of the law, the learned Judge held that the transaction could not be held to be benami. Now, there is little doubt that while dealing with this point the learned Judge entirely misdirected himself as to the law. He appears to have been misled by the rule

3. Mahomed Abdul Jalil Khan v. Mahomed Obedullah Khan, A I R 1921 All 165=62 I C 725=43 All 416=19 A L J 227.

4. Abdul Jalil Khan v. Md. Obaidullah Khan, A I R 1929 P C 228=120 I C 651=56 I A 330=51 All 675 (P C).

5. Promotha Nath v. Sorav Dasi, A I R 1920 Cal 435=58 I C 327=47 Cal 1108=24 C W N 1011=31 C L J 463 (F B).

of the English law relating to advancement in favour of a wife or child, which, however, has been held by the highest authority not to be applicable to transactions by Indians in respect of property situated in India. The latest pronouncement of their Lordships of the Privy Council on this point is contained in 48 Mad 605.⁶ At p. 608 their Lordships observed as follows :

There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a benami transaction by which the beneficial interest in the property is in the husband although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply to India.

Observations to the same effect will also be found in 6 M I A 53⁷ (at p. 74), 13 M I A 232⁸ and 37 All 557.⁹ The presumption, in this case arising from the finding that the consideration for the purchase was supplied by the plaintiff is therefore, in favour of the transaction being benami. It was accordingly for the defendant to rebut this presumption. He has not placed on the record any material from which the contrary may be inferred. The only circumstance, to which the learned counsel for the respondent was able to draw my attention, was that in the house-tax register maintained by the Municipality of Delhi, Mt. Jawahar Devi was shown as the owner. This circumstance however is of no consequence as the name was evidently entered in accordance with the sale certificate. It has not been shown that the house-tax was actually paid by Mt. Jawahar Devi, or after her death by her heirs. The learned District Judge has referred to a Single Bench ruling of the Madras High Court in A I R 1934 Mad 671,¹⁰ but there the husband had purchased the property in

the name of his junior wife with a view to defeat the claims of his elder wife and her son who would have succeeded to his property by survivorship. It was accordingly found that in the peculiar circumstances it must be held that the transaction was made with a view to make provision for the junior wife and for her benefit and, therefore, it was real and not benami. No such circumstances have been shown to exist in the present case. I accordingly hold that the property was purchased benami in the name of Mt. Jawahar Devi by the plaintiff for his own benefit. In this view of the case it is not necessary to examine the further contention of the learned counsel for the appellant that Ram Kishore was not one of the heirs to the stridhana property of Mt. Jawahar Devi, as she had left two daughters who had a preferential right of inheritance to such property. Nor is it necessary to go into the alternative claim put forward by the plaintiff, based upon his possessory title. I accordingly accept the appeal, set aside the judgment and decree of the District Judge and restore that of the Court of first instance. Having regard to all the circumstances I leave the parties to bear their own costs throughout.

K.B./A.L.

Appeal allowed.

A. I. R. 1937 Lahore 475

SKEMP, J.

*Mohammad Salabat — Convict —
Appellant.*

v.

Emperor.

Criminal Appeal No. 1409 of 1936, Decided on 1st March 1937, from order of Addl. Dist. Magistrate, Lyallpur, D/- 4th December 1936.

Evidence Act (1872), S. 159—Referring to statements in first information reports, medico-legal reports etc., as if they were evidence is not proper—Proper course is for witness to refer to document and state in Court everything material.

The practice of referring to statements in the first information reports, medico-legal reports, etc., as if they were evidence is not justified by law. The proper course is for witness to refer to the document which he has prepared at the time under S. 159, Evidence Act, and state in Court everything which the prosecution, or counsel for defence, or the trying Magistrate or Judge considers material. Hence anything in such a report which is not sworn to by the witness in Court cannot be referred to by the Judge. [P 476 C 2; P 477 C 1]

6. Lakshmiah Chetty v. Kothandarama Pillai, A I R 1925 P C 181=88 I C 327=52 I A 286=48 Mad 605 (P O).

7. Gopee Krist Gosain v. Gunga Persaud Gosain, (1854-57) 6 M I A 53=4 W R 46=2 Suther 13=1 Sar 493 (P O).

8. Moulvie Sayyud Uzbur Ali v. Mt. Bebee Ultra Fatima, (1869) 13 M I A 232=4 Beng L R P C 1=13 W R P C 1=2 Suther 279=2 Sar 522 (P C).

9. Mt. Bilas Kunwar v. Desraj Ranjit Singh, A I R 1915 P C 96=30 I C 299=42 I A 202=37 All 557 (P O).

10. Thulasi Ammal v. Official Receiver, Coimbatore, A I R 1934 Mad 671=153 I C 478=67 M L J 541.

Nand Lal — for Petitioner.

V. N. Sethi for Govt. Advocate —
for the Crown.

Judgment.—Mohammad, appellant, has been convicted under S. 376, I. P. C. of raping Mt. Khairan, wife of Taja and has been sentenced to five years' rigorous imprisonment.

The case for the prosecution, which has been believed by the Magistrate, is that Khairan Machhan, accompanied by her husband's sister also named Khairan, was going to the fields to bring fodder. The appellant Mohammad said he would give her fodder and as they were going through a chari field he suddenly raped her, although her monthly course was taking place at the time. She raised an alarm which brought her sister-in-law and two men, Ghulam, and Waryam. Mohammad's defence is that he previously had an unlawful intimacy with Khairan and used to give her fodder. On the date in question she came for fodder and he had sexual intercourse with her in the chari field with her consent. They were, however, discovered by the other Khairan. The sole point in this case is whether the sexual intercourse of Mohammad with Mt. Khairan (P. W. 1) was against her will or with her consent. The conviction really depends on the evidence of the two Khairans, P. W. 1, who says that she was raped and P. W. 2 who says that she actually witnessed the rape. The other eye-witnesses Ghulam and Waryam say that they came up shortly afterwards, saw the first Khairan half-naked, and Mohammad also half-naked running away. This evidence is compatible with sexual intercourse with consent except that they both say that the first Khairan said she had been outraged and that the second Khairan that she had witnessed the outrage.

The first information report made by the first Khairan corroborates her evidence in Court in detail. This is important as the offence is said to be committed at Rotiwela and the report was lodged at the police station distant eight miles at 7 p. m. the same evening. Most of the remaining witnesses are formal and in view of the accused's admission, of no importance. An exception is however the Civil Surgeon whose evidence will be discussed after that of the defence witnesses. There are three defence witnesses who

testify to a previous intimacy between Khairan and Mohammad. Two of them Kishen Singh and Lal Singh say that they saw Taja giving a shoe beating to his wife Khairan because of this intimacy. The only point against these witnesses is that they did not make any statement before the police. The third witness who also speaks of the intimacy said he had seen Khairan going to the square of Mohammad several times, and seen Taja finding fault with his wife in the bazar in respect of this. The intimacy is denied by most of the prosecution witnesses, but the patwari said:

I do not know of any scandal between Mt. Khairan and Mohammad accused, but people's tongue always wags about the reputation of Kamin women especially when they are new arrivals (as Khairan was) and Mt. Khairan was no exception.

The medical witness, Lt. Col. Dr. Jamal-ud-Din, I. M. S., Civil Surgeon of Lyallpur, said in his sworn evidence that he found no signs of rape on Mt. Khairan. He noted a slight swelling in the region of the elbow joint. No signs of other injuries on her person were found. The Magistrate said that Lt. Col. Jamal-ud-Din found no signs of rape but said that none could be expected in the case of a married woman which Mt. Khairan was. This is not in the evidence of Lt. Col. Jamal-ud-Din as given in Court. After saying that there were no signs of rape, however, he said, "The observations made are detailed in Ex. P. D., a carbon copy of medico-legal register". That is the only reference to the carbon copy and the medical witness was not even asked to depose formally that everything in the register was correct. The last para in the carbon copy is "Opinion: no signs of rape noted. She is married and used to sexual intercourse". This is what the Magistrate is referring to not very accurately in his judgment. There is a common practice in this province of referring to statements in the first information reports, medico legal reports and so forth as if they were evidence. This is not justified by law. The proper course is for the witness to refer to the document which he has prepared at the time under S. 159, Evidence Act, and state in Court everything which the prosecution or counsel for defence or the trying Magistrate or Judge considers material. That has not been done in this case, and the way in which the Magistrate used the report is not quite fair. If the Civil

Surgeon had been asked in Court what was the effect in his opinion of the fact that Khairan was married and used to sexual intercourse, we do not know what he would have said.

Mr. V. N. Sethi, who represented the Crown, wished to rely on another remark in the carbon copy in support of Mt. Khairan's allegation that she was menstruating at the time. If this allegation is true it is a circumstance obviously favouring the prosecution; but for the reasons already given I do not think that anything in the report not sworn to by the witness in Court can be referred to. Thus in support of the prosecution on the one point in issue we really have only the two Khairans. Sexual intercourse is admitted and there is evidence of fairly good quality as to the previous intimacy. The medical evidence does not support the theory of rape. Not only were no marks found on Khairan but none on Mohammad who was also examined two days after the alleged crime. I do not know what the truth of this case may be but the charge is certainly not proved beyond doubt. I accept the appeal of Mohammad and acquit him.

U.S./K.S.

Appeal allowed.

A. I. R. 1937 Lahore 477

COLDSTREAM AND BHIDE, JJ.

Milkha Singh—Defendant—Appellant.

v.

Suba Singh, Plaintiff and another,
Defendant—Respondents.

First Appeal No. 2103 of 1935, Decided on 14th December 1936, from decree of Sub-Judge, First Class, Amritsar, D/- 25th July 1935.

(a) Custom (Punjab)—Alienation—Necessity—Just debts defined—Large debts contracted by father and grand-father during short period—Family small and no evidence to show that extraordinary expenditure had to be incurred—Evidence showing father to be drunkard, thief and profligate—Debts held were incurred by way of reckless extravagance and not just.

The expression, 'just debt' means a debt which is actually due, and which is not immoral, illegal or opposed to public policy. It also means a debt not contracted as an act of reckless extravagance or of wanton waste, or with intention of destroying the interests of the reversioners. It need not be one incurred for a necessary purpose, but if a non-necessary debt is unreasonably large compared to the means and station in life of the proprietor, it cannot come under the definition of a

'just debt'. Similarly, if a number of comparatively small loans for non-necessary purposes are contracted within an unreasonably short period they collectively may amount to extravagance and may be excluded from the category of just debts. What is unreasonable or extravagant must depend upon the circumstances of each particular case and must be decided by the Court on fair and rational grounds. [P 478 C 2]

Large debts were contracted by grand-father and father during a short period of five years. The family was small and there was no evidence showing that they had to incur any extraordinary expenditure for any proper purpose; on the other hand there was evidence to the effect that the father was a drunkard, thief, and a profligate. In a suit by son for declaration that the debts were not binding on ancestral property:

Held: that the debts were incurred by way of reckless extravagance and were not just debts: 65 P R 1900 and 26 P R 1913 (P C), *Rel. on*; A I R 1917 Lah 428, *Ref.* [P 479 C 1]

(b) Custom (Punjab) — Alienation — Who can challenge—Son as reversioner deriving his right from common ancestor has independent right to challenge alienation by father and grand-father — Mortgage by grand-father with consent of father—Debts for immoral pursuits of father—Consent held not bona fide and alienation not binding on son.

Where grand-father mortgaged the ancestral property with the consent of the father but there was evidence that the debts were probably incurred for the immoral pursuits of the father and the son challenged the alienation:

Held: that the consent of father was not bona fide, and, therefore, could not be taken as presumptive evidence of necessity. The son had an independent right as reversioner to challenge the alienation as he derived his right from the common ancestor and the alienation, therefore, was not binding on son: 63 P R 1912, *Ref.*

[P 480 C 1]

Achhru Ram and *Indar Dev* — for Appellant.

Vishnu Datt and *S. L. Puri* — for Respondent (Plaintiff).

Bhide, J.—This appeal arises out of a declaratory suit by one Suba Singh to challenge the validity of a mortgage of ancestral property. The mortgage in question was created by Waryam Singh, grand-father of the plaintiff, by a deed dated 21st November 1912 for Rs. 6,000. An additional charge amounting to Rupees 6,735-12-0 was created by Waryam Singh by a deed dated 9th January 1917 and a further charge was created on Waryam Singh's death by Chuhar Singh to the extent of Rs. 2,000 by a deed dated 30th April 1926. The trial Court has upheld the mortgage and the additional charges as valid in part and granted a decree to that effect. From this decision the defendant has appealed. The only point argued in appeal was that of the

necessity and consideration for the alienation.

The details of the consideration of the mortgage and the additional charges are shown in a tabular form in the appendix to the judgment of the trial Court and a copy of the same is attached to this judgment for facility of reference. It will appear from the judgment of the trial Court that out of the mortgage charge of 1912, items 1, 2, 5 and 6 have been upheld as valid and the rest disallowed. Out of the additional charge of 1917, items 1 and 2 have been upheld wholly and item 3 has been allowed in part, while the other items have been disallowed. Lastly the whole of the additional charge of Rupees 2,000 created by Chuhar Singh in 1936 has been disallowed.

The main points urged by the learned counsel for the appellant were that the mortgage and the additional charges were very old and were not challenged by Suba Singh, plaintiff, till 29th November 1932, when limitation was about to expire, that there was no allegation as regards the bad character or extravagance of the alienors in the plaint, that most of the debts were due to third persons, and that in view of the great delay in instituting the suit and the other circumstances, the evidence on the record should have been held to be sufficient to establish necessity and consideration for the alienation. It was further urged that Chuhar Singh, father of the plaintiff having consented to the mortgage of 1912 and the additional charge of 1917, the plaintiff was debarred from questioning their validity. I shall now proceed to discuss the mortgage and the additional charges in their order. (After discussing the mortgage and the additional charges the judgment proceeded further.) It will appear from the above that the evidence relating even to the existence of some of the debts included in the items discussed above is not really satisfactory; but even accepting the evidence as sufficient for proving their existence, the question still remains whether they can be held to constitute 'valid necessity'. It is settled law that the payment of a 'just' antecedent debt constitutes valid necessity for alienation of ancestral property according to custom and the crucial point for decision, therefore, is whether the above mentioned debts can be held to be 'just'. In this connection it is necessary to bear in mind the definition of a 'just

debt' as given in the leading Full Bench case reported in 65 P R 1900,¹ which was approved by their Lordships of the Privy Council in 26 P R 1913.² That definition is to the following effect:

The expression, 'just debt' means a debt which is actually due, and which is not immoral, illegal or opposed to public policy. It also means a debt not contracted as an act of reckless extravagance or of wanton waste, or with intention of destroying the interests of the reversioners. It need not be one incurred for a necessary purpose, but if a non-necessary debt is unreasonably large compared to the means and station in life of the proprietor, it cannot come under the definition of a 'just debt'. Similarly, if a number of comparatively small loans for non-necessary purposes are contracted within an unreasonably short period they collectively may amount to extravagance and may be excluded from the category of just debts. What is unreasonable or extravagant must depend upon the circumstances of each particular case and must be decided by the Court on fair and rational grounds.

In the present instance, the debts contracted by Waryam Singh and Chuhar Singh during the short period from 1912 to 1917 appear to me to fall clearly within the category mentioned in the last portion of the above passage. I have already pointed out above that Waryam Singh had cleared his previous debts by the mortgage deed dated 21st November 1912, redeemed about 87 kanals of land and had obtained a lease of the rest on favourable terms. His family was apparently small and there is no evidence of his having had to incur any extraordinary expenditure for any proper purpose. It was urged that it is not necessary to inquire into the income of a male proprietor in considering the question of necessity. But the question does arise where the evidence shows *prima facie* that the debts in question were incurred by way of reckless extravagance (*cf.* definition of just debts given above and 76 P R 1917³). In such circumstances the mere proof of the existence of the debts

1. *Devi Ditta v. Sandagar Singh*, (1900) 65 P R 1900=32 P L R 1900.

2. *Kirpal Singh v. Balwant Singh*, (1913) 26 P R 1913=17 I C 666=40 Cal 288 (P O).

3. *Ram Kishen v. Mt. Hassi*, A I R 1917 Lah 428=39 I C 191=76 P R 1917.

cannot be held to be sufficient to prove that the debts were 'just'.

In the present case, in some of the documents the debts have been stated to have been incurred for necessary purposes such as payment of revenue, etc., but looking at the magnitude of the debts and the likely requirements of the family, these recitals cannot be accepted at their face value. There is, moreover, considerable evidence on the record to the effect that Chuhar Singh was a drunkard, a thief and a profligate. The evidence of the plaintiff's witnesses in this respect is supported even by some of the appellant's witnesses: see e. g., D. W. 3, D. W. 4, D. W. 6, D. W. 9, D. W. 13 and D. W. 17, etc. Some of the witnesses have stated that even Waryam Singh was a man of bad character, but the evidence on this point is not strong. Almost all the bonds and Bahi entries executed during the period 1912-17 were, however, jointly executed by father and the son. The father was old, and it seems probable that he was in the hands of the son and was compelled by him to incur these debts. It was argued on behalf of the appellant that there was no allegation in the plaint that either Waryam Singh or Chuhar Singh was a man of bad character. But this was not essential. The question whether a debt was incurred for immoral purposes or by way of reckless extravagance is always relevant for determining whether the debt falls within the category of 'just' debts. When, therefore, the appellant showed that certain debts were due, it was open to the respondents to rebut the evidence by proving that they had been incurred by way of reckless extravagance and were therefore excluded from the category of 'just' debts.

After carefully considering the magnitude and the other circumstances of the debts under discussion, I am of opinion that they were incurred by way of reckless extravagance. The creditors were living in the neighbourhood and must have been well acquainted with the circumstances of the debtors. They could not have therefore advanced these loans in good faith. These debts cannot, in view of all the circumstances, held to be 'just'. This finding, it will be observed, covers debts due to the alienee as well as to Chhajomal. For an antecedent debt, if it is not just, must be disallowed whether it is due to the alienee himself or a third person. As

was tersely put in 139 P W R 1909,⁴ the word 'just' used in this connexion has reference to the nature of the debt and not to the person who advanced the money.

In the end, I may refer to one or two other arguments which were put forward on behalf of the appellant. It was urged that the debts being very old, liberal allowance should be made in the matter of proof of necessity and even admissions of the borrower should be held to establish necessity. It was also urged that the alienations having been consented to by Chuhar Singh, father of the plaintiff, he could not challenge them. Reliance was placed on 107 P R 1916,⁵ 97 P R 1901⁶ and 68 P R 1912.⁷ As to the delay, it was chiefly due to the minority of the plaintiff. But due allowance has been made for the lapse of time in deciding the question of necessity where it seemed necessary. In dealing with the mortgage of 1912, for instance, most of the debts have been allowed, as several of the debts were very old and the circumstances of the family during the period preceding that mortgage were not clear. But during the period from 1912-17 the mortgagor had apparently sufficient means for the requirements of the family as pointed out above and there should have been no necessity to incur such large debts. He did not even pay rent for the land leased from the mortgagee. The documents relating to the debts throw little light on the question of necessity, and it does not appear that the alienee has been unable to produce evidence on the point owing to difficulties arising from the lapse of time, e. g., death of witnesses, etc., so far as this additional charge of 1917 is concerned. 97 P R 1901,⁶ which was cited for the appellant, was a case of revision which was decided on its own facts and laid down no general principle.

Finally as regards the consent of Chuhar Singh it must be remembered that the plaintiff as a reversioner has an independent right to challenge the alienation as he derives the right from the common

4. Runganath Das v. Ismail, (1909) 139 P W R 1909=4 I O 997.

5. Nidhan v. Buta, A I R 1916 Lah 370=36 I C 700=107 P R 1916.

6. Piran Ditta v. Moti, (1901) 97 P R 1901.

7. Habib Khan v. Muhammad, (1912) 68 P R 1912=16 I C 463=210 P L R 1912.

ancestor: 26 P R 1911.⁸ The consent of Chuhar Singh might have been taken as presumptive evidence of necessity if it had been given *bona fide*, as held in 68 P R 1912.⁷ But in the present instance the evidence relating to the character of Chuhar Singh suggests that the debts were probably incurred for his immoral pursuits. His consent cannot, therefore, be held to be *bona fide* in the circumstances of the case and is therefore not binding on the plaintiff. Lastly, I have to deal with the mortgage deed, dated 30th April 1926, by which Chuhar Singh himself created an additional charge of Rs. 2,000 on the land. This deed included only three items. The first and the third items go together. The learned counsel for the appellant frankly conceded that his client had failed to produce the necessary evidence in respect of these items and he did not press them. Item 2 consists of Rs. 405 said to be due to the alienee on account of Rabi 1982. It stands on the same footing as item 4 out of the additional charge of Rs. 6,735 created by Waryam Singh in 1917. In view of the fact that Chuhar Singh was a man of bad character and had sufficient means for his requirements, I think, this item was rightly disallowed. As the result of the above findings I would accept this appeal only to the extent of allowing an additional sum of Rs. 1,000 in respect of the first mortgage of 1912 and modify the decree accordingly. I would allow the appellant 1/10th of the costs of this appeal.

Coldstream, J.—I agree.

S.C./D.S. *Appeal partly allowed.*

8. Sundar v. Salig Ram, (1911) 26 P R 1911=9 I C 300.

A. I. R. 1937 Lahore 480

TEK CHAND, J.

Das Mal and another — Plaintiffs
— Appellants.

v.

Sundersingh, Defendant and others,
Plaintiffs — Respondents.

Second Appeal No. 674 of 1936, Decided on 26th November 1936, from decree of Senior Sub-Judge, Amritsar, D/- 13th March 1936.

Evidence Act (1872), S. 145 — Plaintiff's witness—Documents executed by such witness produced by defendant to contradict witness—Documents held admissible in evidence even though plaintiff not party to such documents.

Where a plaintiff brought a suit for declaration that a certain house was his and he examined as his witness his neighbour who had executed certain sale deeds in which the house in suit was stated to be that of defendant, and the defendant produced these sale deeds while cross-examining the said witnesses :

Held : that the documents were rightly admitted in evidence by the Court : A I R 1927 Lah 448, *Disting.* [P 480 O 2]

J. R. Agnihotri — for Appellants.

Indar Dev Dua for Achhru Ram —
for Respondent (Defendant).

Judgment.—The main question in this case was whether the house in dispute belonged to Guranditta, from whom the plaintiffs claim to have inherited it. The learned Senior Subordinate Judge disagreed with the finding of the Court of first instance, and came to the conclusion that the plaintiffs had failed to establish the ownership of the house by Guranditta. This is a finding of fact based upon a consideration of the evidence led by the parties and it is not open to attack on second appeal. The learned counsel for the appellant contends that the Senior Subordinate Judge had erred in relying upon Exs. P. W. 1/3, P. W. 1/4 and P. W. 1/5, which are sale deeds executed by a stranger in respect of a neighbouring house, in which this house is described as belonging to the defendant. He contends that these deeds, to which the plaintiff was not a party, were legally inadmissible, and the finding is vitiated by the circumstance that the Judge has considered these documents. In support of this contention the learned counsel relies on 8 Lah 651.¹ That case, however, is distinguishable as the executant of these documents, namely, Lalli, was examined by the plaintiff himself as a witness in this case, and in order to contradict his oral testimony, as given in examination-in-chief, the defendant produced these documents. The learned Judge, therefore, cannot be said to have erroneously taken into consideration these documents. The rest of the argument of the learned counsel for the appellant is a mere criticism of the view of the learned Senior Subordinate Judge, as to the credibility or sufficiency of evidence on the record. This however is a matter into which I cannot go in second appeal. The appeal fails and is dismissed. Having regard to all the circumstances, and especially the fact that the defendant denied

1. Lajput Rai v. Faiz Ahmad, A I R 1927 Lah 448=103 I C 889=8 Lah 651=29 P L R 74.

the relationship of the plaintiff with Guranditta and made scandalous and false allegations against the character of his widow, Mt. Atma Devi, I leave the parties to bear their own costs throughout.

W.D./A.L.

*Appeal dismissed.***A. I. R. 1937 Lahore 481**

JAI LAL, J.

Ghulam Hussain and another —
Appellants.

v.

Ida and another — Respondents.

First Appeal No. 141 of 1936, Decided on 5th November 1936, from decision of Sub-Judge, First Class, Gujranwala, D/- 7th May 1936.

Guardians and Wards Act (1890), S. 25 — Father's application for custody of his minor daughter — Daughter living with aunt since her mother's death and from infancy for about 12 years — No interest taken by father in her since then — Daughter attaining marriageable age at time of application — Father held should not be given custody of his minor daughter in view of minor's interest.

The father applied for the custody of his daughter, who was under the custody of her mother's sister since her infancy since the death of her mother. She thus lived with her aunt for 12 years. She even could not recognize her father. The father did not take any interest in her since she went to live with her aunt. At the time of the application the girl had attained marriageable age according to her personal law :

Held : that under such circumstances it was not in the interests of the minor girl that she should be given in the custody of her father : *A I R 1928 Lah 806, Disting.* [P 481 C 2]

Mukand Lal Puri — for Appellants.

*Jagan Nath Talwar—*for Respondents.

Judgment.—The respondent Ida made an application under the Guardians and Wards Act for the custody of his daughter Mt. Sakina Bibi. The girl is in the custody of her mother's sister and her son. These two persons were made respondents to the application, and they opposed it on the ground that the mother of the girl died when the latter was one year of age and since then, more than 12 years ago, the girl has been living with them and has been brought up by them as their own daughter. The allegation of the father was that the girl has throughout been living with him and that her aunt, the mother's sister, came on a friendly visit to him about a year or so before the application, and kidnapped the girl. The learned trial Judge has granted the appli-

cation by directing that the custody of the minor be given to the father.

Admittedly the girl is more than 14 years of age, somewhere near 15 years, and it is therefore obvious that the real object of the application is to secure her custody in order to give her away in marriage. The trial Judge has not given any definite finding whether the girl has been living with the appellants since the death of her mother, as alleged by them, or whether she was kidnapped, as alleged by the father. He seems to be inclined to the view that the story of the appellants is correct. I have examined the evidence recorded by the trial Judge and am of opinion that the statements of Ahmad Bibi, Faqir Hussain, Fateh Mohammad, Khair Din, Nabi Bakhsh and Ghulam Hussain prove that the girl has been with the appellants since the death of her mother, which was about 12 years ago, and that since then the father has taken no interest in her, and this is supported by the manner in which the evidence was given by Mt. Sakina Bibi, who absolutely declined to recognize her father. The evidence led on behalf of the father is not convincing. The appellants' case is further supported by a notice which was given by them on 11th August 1934; and to the allegations made therein, that the girl has been living with the appellants for about 11 years, no reply was given.

The question then is whether it is in the interests of the minor that her custody should be given to her father considering that she is living and has been living with her aunt, a sister of her mother, ever since she was an infant and now when she is of marriageable age. *A I R 1928 Lah 806*,¹ cited on behalf of the respondents, does not help the respondents' case. In that case the minor was living with strangers to the family and was about 12 years of age. In the present case she is living with her aunt and is according to her personal law, nearly of marriageable age. I do not consider that, under the circumstances, it is in the interests of the minor that her custody should be changed. I accept this appeal and set aside the order of the trial Judge. No order as to costs.

W.D./A.L.

Appeal allowed.

1. Wazir Khan v. Abdul Hamid Khan, *A I R 1928 Lah 806=112 I C 693.*

* A. I. R. 1937 Lahore 482

SPECIAL BENCH

COLDSTREAM, MONROE AND BHIDE, JJ.

Mahboob Ahmad — Petitioner.

v.

Emperor.

Criminal Original No. 3 of 1936, Decided on 15th May 1936.

* Press (Emergency Powers) Act (1931), S. 3—Notice under S. 3 served upon joint keeper of press — Joint keeper purchasing share of his partner and continuing it under different name by incorporating it with his other press—Press is liable to forfeiture even if no new notice is served.

A joint keeper of a press on whom a notice has been served under S. 3, Press Emergency Powers Act, cannot by purchasing the share of his partner escape liability to have his press forfeited when he continues to use the press under a different name by incorporating with it another press of his own by pleading that he, the present keeper, had not been given notice as required by the Act: *A I R 1935 Lah 338, Ref.* [P 482 C 2]

Shabbir Ahmed — for Petitioner.*Ram Lal (Diwan)* — for the Crown.

Coldstream, J. — On 18.9.1926 the petitioner Mahbub Ahmad made a declaration under S. 4, Press and Registration of Books Act, 1867, stating that he had a press in Multan called the "Mahbub-i-am Press". On 24th February 1928 Mahbub Ahmed jointly with Baha-ud-din made a similar declaration in respect of another press in a different street in Multan entitled the Iqbal Electric Press. On 5th July 1935 the Local Government acting under sub-s. (3), S. 3, Press (Emergency Powers) Act, 1931, called on Mahbub Ahmad and Baha-ud-din to deposit securities to the extent of Rs. 2,000 on 19th July. The security was not deposited and the Press was closed. On 27th July 1935 Mahbub Ahmad having purchased from Baha-ud-din the latter's share in the Iqbal Electric Press brought the Mahbub-i-am Press machinery to the room where the Iqbal Electric Press was located and started printing in the same premises, calling the press the Mahbub-i-am Press. In August Mahbub Ahmad began to use this press for printing. On 10th December 1935 the Local Government in exercise of the power given it by S. 12, sub-s. (2), Press (Emergency Powers) Act, 1931 declared the press to be forfeited to His Majesty. The police accordingly took possession of all this machinery and the other articles on the premises connected with the press.

The petitioner has appealed to this Court under S. 23 of the Act to have the

order of forfeiture set aside. The contention urged before us is that the management of the press having been changed and no notice having been served on the new management to deposit security the confiscation was *ultra vires* and illegal. I can see no force in this argument. It is not disputed before us that the press which has been forfeited was none other than the press which had been called the Iqbal Electric Press although it was working under the name of the Mahbub-i-am Press, parts of the machinery of which press had been incorporated with the Iqbal Electric Press. The petitioner was the keeper of this same press when notice to deposit security was served upon him on 5th July 1935 and was still its keeper when it was declared forfeited. I can see no good reason for holding that a joint keeper of a press on whom a notice has been served under S. 3 of the Act can by purchasing the share of his partner escape liability to have his press forfeited when he continues to use the press, by pleading that he, the present keeper, had not been given notice as required by the Act. 16 Lah 270¹ to which the petitioner's counsel has drawn our attention deals with a different case and does not appear to me to have any clear application to the present circumstances.

Secondly, it is contended that so much of the confiscated press as consists of machinery of the Mahbub-i-am Press cannot be confiscated. It is not, however, denied that the machinery of both the presses was being used for the same work and printing the same matter when the confiscation was made, and parts of the Mahbub-i-am machinery were being used to supplement that of the Iqbal Press. It is not shown that the Mahbub-i-am machinery or any part of it was being kept separate from and not being used in conjunction with the confiscated press. The only question for decision in this case appears to me to be one of fact, namely, whether the confiscated press is the Iqbal Electric Press in respect of which the petitioner was given notice on 5th July 1935. There can be no doubt that the confiscated press was in fact the Iqbal Electric Press. I would accordingly dis-

1. In the matter of Virjanand Printing Press, Lahore, *A I R 1935 Lah 338=1935 Cr O 572=156 I O 674=36 Cr L J 971=16 Lah 270=37 P L R 107 (S B).*

miss this petition with costs, fixing counsel's fee at Rs. 64.

Monroe, J.—I agree.

Bhide, J.—I agree.

K.B./A.L. *Petition dismissed.*

A. I. R. 1937 Lahore 483

ADDISON AND DIN MOHAMMAD, JJ.

Mihan Singh and others — Plaintiffs —
Appellants.

v.

Ram Singh and others — Defendants —
Respondents.

Second Appeal No. 452 of 1936, Decided on 11th November 1936.

(a) Custom (Punjab)—Succession — Ferozepore District — Widow, after colluding with daughter, alienating husband's patti in favour of persons other than collaterals—Patti not homogeneous—Pattidars are entitled to bring suit to set aside alienation.

In Ferozepore District a widow has simply a life-interest in the property of her husband. Although the daughter has a preferential right to succeed to the property of her father, where she consents to an alienation of her deceased father's property by her mother, thereby precluding herself from contesting the alienation, the pattidars have a right to bring a suit claiming that they are not affected by the alienation on the ground that the alienation is not in favour of collaterals or reversioners, even though the patti is not homogeneous: 9 P R 1898 (F B) and 16 P R 1912, *Rel. on.* [P 483 C 1; P 484 C 1]

(b) Custom (Punjab)—Riwaj-i-am

The burden is always on the person who alleges that custom is different to that stated in riwaj-i-am: A I R 1916 P C 129, *Foll.*

[P 483 C 2; P 484 C 1]

Roop Chand and R. L. Anand I —

for Appellants.

Nawal Kishore — for Respondent 1.

Addison, J.—The plaintiffs in this case were some of the pattidars of village Khai of Tehsil Moga in the Ferozepore District, the other pattidars being impleaded as defendants. The house and land in dispute belonged to Fateh Singh who died without male issue leaving a widow, defendant 1, Mt. Ratno. It is clear that under custom she had simply a life tenure in the property. Nevertheless, she gifted it to defendants 2 and 3 on the ground that they were her husband's near collaterals. The plaintiffs representing the pattidars of the village brought this suit on the ground that defendants 2 and 3 were not collaterals or reversioners of Fateh Singh and that, therefore, the plaintiffs were not bound by the gift after the death of the widow. They asked for a declaration to this effect. The trial

Court held that they were entitled to bring the suit although it was admitted that Mt. Premo, daughter of Fateh Singh, had a preferential right to succeed to the disputed property. The plaintiffs, it was held, had a right to bring the suit because Mt. Premo had consented to the alienation and had, therefore, precluded herself from suing to contest it. It was further found that the donees were not collaterals of Fateh Singh and that under custom all the pattidars were entitled to succeed after the death of Fateh Singh and that of Mt. Premo and her line. A decree was, therefore, granted by the trial Court to the effect that the alienation would not affect the rights of the pattidars to succeed whenever the succession to them opened out.

There was an appeal to the District Judge who merely held that under custom the pattidars were not entitled to succeed as the patti was not homogeneous. As this meant that the suit failed, he did not decide whether the donees were collaterals. He granted a certificate for a second appeal under S. 41, Punjab Courts Act, and it is now before us. The appeal must be accepted. The answer to question 63 of the Customary Law of Ferozepore District, 1914, is that the estate of a man who dies intestate leaving no relations will first become shamilat thulla; if there are no thullas, shamilat patti; and if there are no pattis, shamilat deh. One of the instances quoted under this answer is 9 P R 1898.¹ In that case it was held that the land became shamilat of the patti when a man died intestate without leaving any relations. Another similar case is 16 P R 1912,² although it arose in the Ludhiana District where, however, the riwaj-i-am was exactly the same as in the present case. It was there held that a pattidar who had purchased his rights in the patti had an equal right of succession with the other pattidars who were owners from the beginning. It was there said that the riwaj-i-am conferred the right of succession upon the pattidars pure and simple. This is so here also. Since the Privy Council decision in 45 P R 1917³ the burden is always on the person who

1. Sardar Sarup Singh v. Sundar, (1898) 9 P R 1898 (F B).

2. Umra v. Karim Bakhsh, (1912) 16 P R 1912 = 14 I C 492 = 86 P L R 1912.

3. Beg v. Allah Ditta, A I R 1916 P C 129 = 38 I C 354 = 44 I A 89 = 45 P R 1917 = 44 Cal 749 (P C).

alleges that the custom is different to that stated in the *riwaj-i-am*. It may be noted here that the answer to question (1) of sub-s. (F) of S. 1 of the 1890 Customary law of this District was the same. No instances to the contrary have been proved. We are aware that there are certain rulings in which it has been said that where the patti is not homogeneous, the pattidars are not entitled to succeed, but this was before the decision of the Privy Council referred to. We, therefore, do not attach any importance to them. It follows that after the death of the widow of Fateh Singh and of her daughter Mt. Premo and her line (if any), the plaintiffs are entitled to succeed under custom. As Mt. Premo colluded with the donor, the plaintiffs were entitled to bring the present suit as there is nothing on the record to show that it is speculative.

We must, therefore, accept the appeal, set aside the decision of the District Judge and remand the appeal to him to decide the other questions arising therein, for example, whether the donees are collaterals of Fateh Singh, in which case undoubtedly they would be preferential heirs to the pattidars and the suit would fail. The court-fee on the appeal in this Court will be refunded and other costs will abide the event.

V.B.B./D.S.

Appeal accepted.

* A. I. R. 1937 Lahore 484

JAI LAL, J.

Kundan Lal Munshi Ram —

Appellants.

v.

Rugh Nandan Lal — Respondent.

Second Appeal No. 589 of 1935, Decided on 4th December 1935.

* Contract Act (1872), S. 25—Promise to pay—Consideration—Agreement to pay debt due from another is good consideration—Defendant acknowledging debt due by his father to plaintiff—Suit by plaintiff on basis of such acknowledgment—Personal decree held could be passed against defendant as there was consideration for personal liability.

An agreement to pay a debt due from a third person is good consideration in law. [P 484 C 2]

A certain sum of money was owed by the defendant's father to the plaintiff. The defendant after his father's death signed an acknowledgment in respect of the money in the books of the plaintiff. Plaintiff brought a suit on the basis of such acknowledgment. The suit was decreed only against the estate of the defendant's father. A personal decree against the defendant was refused on the ground that there was no consideration for

the acknowledgment so far as the personal liability was concerned :

Held : that even if it could be assumed that the defendant and his father were not members of a joint Hindu family, defendant signed the balance presumably to save estate of his father from sale in execution of any decrees that might have been passed against such estate. Legally therefore there was consideration for the balance in suit and for assumption of personal liability by the defendant. A personal decree against the defendants could therefore be passed. [P 484 C 2]

*Shamair Chand — for Appellants.**Shambu Lal Puri — for Respondent.*

Judgment.—The appellant instituted a suit for recovery of money from the respondent. It has been decreed against the estate of defendant's father. It appears that money was due to the appellant from the father of the respondent and after the death of his father he signed an acknowledgment in respect of the money in the books of the appellant. The suit was on the basis of this acknowledgment.

The learned District Judge has held that under the circumstances the acknowledgment must be deemed to be without consideration so far as the personal liability of the respondent is concerned, but it is well recognized that an agreement to pay a debt due from a third person is good consideration in law. Moreover, in this case even if it be assumed that the respondent and his father were not members of a joint Hindu family, the respondent signed the balance presumably to save the estate of his father from sale in execution of any decrees that may have been passed against such estate. Legally therefore there was consideration for the balance in suit and for assumption of personal liability by the respondent. The point in my opinion is so clear that it need not be developed further. The respondent had prayed for instalments and in view of the dismissal of the plaintiff's suit as against him personally no order for instalments was passed. I accept this appeal and grant the plaintiff-appellant a decree for the amount decreed by the trial Judge with costs throughout personally against the respondent. The execution of this decree however will not take place if the respondent continues to pay Rs. 15 per month in satisfaction thereof commencing with 1st January 1936. If he makes default in payment of any instalment the decree shall become immediately executable.

K.B./A.L.

Appeal allowed.

* A. I. R. 1937 Lahore 485

JAI LAL, J.

Matu — Defendant — Appellant.

v.

Jati — Plaintiff and another —
Defendant — Respondents.

Second Appeal No. 691 of 1936, Decided on 3rd December 1936, from decree of Dist. Judge, Hissar, D/- 27th March 1936.

* Limitation — Minor — Minor, member of body of reversioners — Reversioner competent to sue allowing claim to be barred — Minor cannot avail of his minority — Claim becomes barred against all.

Minority of one of the reversioners cannot be taken advantage of to save limitation if at the time of alienation any of the reversioners was competent to sue, and has not sued allowing the claim to be barred : *A I R 1933 Lah 524, Disapproved but followed* ; *A I R 1925 Lah 654* and *A I R 1932 Lah 39, Disting.* [P 486 C 1]

Mukand Lal Puri and Qabul Chand Mital — for Appellant.

Parkash Chandra Jain for Shamair Chand and Shamair Chand — for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff, Jati, a minor son of Khubi, to set aside two alienations by way of mortgages effected by Khubi in favour of Matu. The learned District Judge has held that both the mortgages have not been proved to be for consideration and for necessity and to this extent his judgment is conclusive. But it is contended on behalf of Matu appellant, the vendee, that the suit in respect of one of the mortgages was barred by time; that mortgage was effected on 26th February 1926, and the suit was instituted on 9th June 1933. On the face of it the suit when brought was admittedly barred by time but exemption is claimed by the respondent, the plaintiff, on the ground of his minority. It is common ground that at the date of the alienation the plaintiff had been born. It is, therefore, claimed on his behalf that as he was under a disability owing to minority he had three years from the attainment of majority to institute the suit, and this apparently is the view of the learned District Judge. But the appellant relies upon a judgment of a Division Bench of this Court in *Civil Appeal No. 700 of 1926*,¹ decided on 21st February 1933, by a Division Bench consisting of Addison and Bhide, JJ. The following observation is

especially relied upon by the appellant (at p. 527 of A I R 1933 Lah) :

The proposition of law that a suit by a reversioner to challenge an alienation in cases of this type is a representative one is now well established and it follows almost as a corollary from this that if there is at the date of the alienation a reversioner who is competent to challenge it but fails to do so within the period of limitation, the result is binding on the whole body of reversioners. The learned counsel for the appellants did not attempt to challenge these propositions but merely sought to distinguish the present case on the ground of the minority of the plaintiffs. But the minority of the plaintiffs cannot help them as the period of limitation began to run against the whole body of reversioners, some of them at any rate being majors when the alienations were effected.

If this view of the learned Judges is correct then there is no doubt that the suit when brought was barred by time with regard to the mortgage of 1926. Reliance in support of this view is placed on three judgments of the Madras High Court and on a judgment of this Court in 6 Lah 405.² 6 Lah 405² is, however, distinguishable on the ground that the suit in that case was by a minor who was born after the date of the alienation. It was, therefore, held that the minority of the plaintiff did not extend the time because he was born after the cause of action had arisen and could not, therefore, take advantage of S. 6, Limitation Act. The cases decided under the Hindu law do not seem to have any direct bearing on the question involved. While I agree that a suit by reversioner is a representative suit, I am of opinion that the right of each reversioner to file a suit to set aside an alienation is an independent and individual right. Till a suit has been brought by only one reversioner each of the others has a right to file a suit. Consequently the omission by one reversioner to sue to set aside an alienation does not by itself debar the other reversioners. It is only when a suit has been brought and bona fide prosecuted that it becomes a representative suit and all the reversioners become bound by its result. Consequently, in my opinion, the plaintiff in this case being in existence at the date of the alienation, had an independent right to sue to set aside the alienation and as he was a minor on the date of the alienation he is, in my opinion, entitled to take advantage of S. 6, Limitation Act. It is also possible to distinguish the case

1. *Gajindar Singh v. Balwant Kaur, Reported in A I R 1933 Lah 524=149 I C 696.*

2. *Chirag Din v. Abdullah, A I R 1925 Lah 654=90 I C 1022=6 Lah 405=26 P L R 695.*

decided by the Division Bench on 21st February 1933 on the ground that the learned Judges were concerned with the effect of the saving provision in Punjab Act 1 of 1920, but the grounds on which their decision is based and which I have quoted above lay down definitely that, if one reversioner who is in existence on the date of the accrual of the cause of action was competent to sue and omits to sue within the prescribed time, all the reversioners are barred and this observation applies to the facts of this case. I am consequently bound to follow this judgment though with great respect I am of opinion that the observations of the learned Judges have laid down a much wider proposition than is justified by law. The respondent's counsel relied on A I R 1932 Lah 39.³ That case appears to have been decided under Hindu law and for that reason may not be applicable to the facts of this case. I am consequently constrained to accept this appeal and to set aside the decree of the District Judge with regard to the mortgage of 26th February 1926. The plaintiff's suit with regard to that mortgage shall be dismissed. The rest of the decree of the learned District Judge shall stand. The parties shall bear their own costs of this litigation throughout.

B.D./D.S.

Appeal allowed.

3. Wali Chand v. Punjab Singh, A I R Lah 1932 39=132 I C 665.

A. I. R. 1937 Lahore 486

COLDSTREAM AND BHIDE, JJ.

Dewa Ram — Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 704 of 1936, Decided on 27th October 1936, from order of Sess. Judge, Mianwali, D/- 21st May 1936.

Penal Code (1860), Ss. 84 and 302—Accused committing murder taking plea of insanity under S. 84—No evidence available as to state of mind of accused immediately before or after offence — Evidence adduced establishing that accused was suffering from grave mental depression and insomnia as result of his son's death, was subject to delusions and often became violent — No motive apparent for commission of crime—Case of accused falls under S. 84.

Section 84, Penal Code, requires it to be proved that, at the time when the offence was committed, the offender, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either

wrong or contrary to law. It would be obviously very difficult ordinarily to prove the precise state of an offender's mind at the time of the commission of an offence, but some indication thereof is often furnished by the words or the conduct of the offender while committing it, or immediately before or after the commission of the offence. Where, however, no such evidence is available and the evidence adduced established beyond doubt that the mind of the accused charged with having murdered his wife and daughter had been unhinged by the death of his son, that he was suffering from grave mental depression and insomnia and was subject to delusions and often became violent and the accused had no motive whatever for committing the offence, the conclusion is irresistible that he must have committed the offence without realizing the nature of his act and his case falls within the purview of S. 84: A I R 1927 Lah 674; A I R 1927 Lah 52 and 94 P L R 1909, *Disting.* [P 487 C 2; P 488 C 1, 2]

*Amolak Ram Kapur — for Appellant.**Des Raj Sawhney — for the Crown.*

Bhide, J. — Dewa Ram, appellant, a shopkeeper of the village Gangi in the Mianwali district, aged about 46, has been convicted in this case of the murder of his wife, Mt. Nihal Devi and his daughter, Mt. Bhirawan and of attempting to murder another daughter of his, named Mt. Shanti, and sentenced to transportation for life on each of the two murder charges under S. 302, I. P. C., and to rigorous imprisonment for seven years on the third charge under S. 307, I. P. C. The sentences have been ordered to run concurrently. The prosecution case was that the appellant Dewa Ram lost his son Amir Chand, aged about six or seven for whom he had great affection, some nine or ten months prior to the murders. This came as a great shock to the appellant which unhinged his mind and since then his behaviour was strange. He used to be moody, silent and did not work. He answered questions incoherently. He was generally sleepless at night. He tried at times to commit suicide by hanging himself. On the day preceding the murders he was found to be sitting on a tree and when questioned he said that he was sitting with his son Amir Chand who was there. On the night of 15th and 16th February 1936 he was at his house with his wife, the two daughters mentioned above and a boy aged about 21/4 years, when he is said to have committed the offences of which he has been convicted. There were no eyewitnesses and the matter came to light only when the appellant himself went next morning to the house of his brother Hukam Chand, P. W. 4, at

Mianwali (about 4 or 5 kos from Gangi) and told Bhoja Ram, P. W. 5, another brother of his, and Thakar Das, P. W. 7, son of Hukam Chand, that he had murdered his wife and one of his daughters and inflicted injuries with a wahola on the other, during the preceding night and that their bodies were lying in his house which he had locked. His clothes were stained with blood. He was then taken to the thana and the matter was reported to the police.

The fact that the appellant committed the murders and inflicted dangerous injuries on Mt. Shanti was admitted by the appellant at the trial. His plea was that he committed the offences unknowingly and only came to know what he had done when his face struck a wall after the deed and his nose began to bleed. In his written statement which was filed through his pleader it was stated that since the death of his son he frequently remained awake at night, lost control over himself and behaved like a madman. The learned Judge of the Sessions Court, however, considered the evidence on the record to be insufficient to bring the offence within the purview of the exception in S. 84, I. P. C., and convicted and sentenced the appellant as stated above. The only point urged on behalf of the appellant was that the evidence on the record leaves no doubt that the appellant committed the offences in a fit of insanity without knowing that he was doing anything wrong or contrary to law and that he should, therefore, have been acquitted. The facts that the death of his son had unhinged the mind of the appellant, that he often kept awake at night, was often silent or gave incoherent answers and attempted at times to commit suicide are proved by the evidence of a number of witnesses some of whom are quite disinterested, and there seems to be no good reason to disbelieve this evidence. He was apparently at times subject to delusions, also e. g., when on the day prior to the murders he was found sitting on a tree and stated that his son Amir Chand was with him. It appears that the appellant became violent at times. Thakar Das, P. W. 7, says that while he was under treatment at Mianwali prior to the murders, he became violent at times and had beaten him as well as Hukam Chand and Bhoja Ram. Tek Chand (D. W. 25), a brother of the appellant states that he was once accused by the appellant of the

murder of his son and was also assaulted by him. There is also evidence on the record that while the appellant was in jail as an undertrial prisoner, he once became violent and began throwing pitchers at other prisoners and had thereafter to be kept in a separate cell.

Unfortunately there is no helpful medical evidence available as regards the mental condition of the appellant before the murders. It appears that the only treatment given to him was that of a Hakim at Mianwali named Abdul Rahim Khan, P. W. 13. This Hakim deposed that sometime in December last the appellant was taken to him for treatment and he then found him to be suffering from neurasthenia and gave him a prescription. The Hakim was told that the appellant suffered from sleeplessness and he advised that the patient's head should be massaged. The appellant was able to answer the Hakim's questions at the time, though not fully. The Hakim deposed that a neurasthenic person is not insane, but there may be danger of his becoming insane. This is the only medical evidence on the record regarding the appellant's condition prior to the murders; when the appellant was in jail at Mianwali as an undertrial prisoner Rai Sahib Devi Dayal, Civil Surgeon, used to visit the jail almost daily and he used to see the appellant, along with the other prisoners. He found that the appellant looked sad and depressed, but he did not notice any indication of insanity. He did not, however, keep him under observation specially. The Civil Surgeon deposed that if a person were suffering from hallucinations as the appellant apparently did occasionally, e. g. when he thought that his son was sitting on a tree, he might be said to be subject to 'delusional insanity'. The Civil Surgeon is, however, apparently not a mental expert.

The question whether the case of the appellant falls within S. 84, I. P. C., has to be decided in the light of the evidence described above. I think the evidence establishes beyond doubt that the appellant's mind had been unhinged by the death of his son, that he was suffering from grave mental depression and insomnia, was subject to delusions and occasionally became violent. But S. 84, I. P. C. requires it to be proved that at the time when the offence was committed the offender by reason of unsoundness of mind

was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. It would be obviously very difficult ordinarily to prove the precise state of an offender's mind at the time of the commission of an offence, but some indication thereof is often furnished by the words or the conduct of the offender while committing it, or immediately before or after the commission of the offence. In the present instance, unfortunately no such evidence is available. For the offences were committed by the appellant in his own house and not only were there no witnesses to the offences, but none came to know of them till the next morning till the appellant went to Mianwali and disclosed them himself. The appellant had no motive whatever for committing the offences. In the first information report there is a recital that the appellant suspected that his daughter Mt. Bhirawan bore a bad character. This probably is a misstatement as Bhoja Ram who made the report disowns it and the evidence on the record shows that there was absolutely nothing against the character of girl, who was only 13 or 14 years. The alleged motive, moreover, could not account for the murder of the wife or the murderous assault on the other daughter. In committing the offences the appellant was injuring none more than himself; for these were his nearest and dearest relations, who were living with him and looking after him.

In the circumstances the conclusion seems irresistible that the appellant must have committed the offences without realizing the nature of his act. He has stated that he came to know what had happened only when he struck against a wall and his nose began to bleed. In the absence of any evidence to the contrary I do not see why this statement should not be accepted in the circumstances of the case. The appellant was constantly suffering from insomnia and it seems quite possible that he committed the offences under some delusion without realizing their nature. It is noteworthy in this connexion that on the very day preceding the murders he was found sitting on a tree under a delusion that his son was there. It seems very likely this delusional state of his mind developed and he committed the offences under some delusion or impulse of which he has now no recollection. The learned

counsel for the Crown tried to support the view taken by the learned Sessions Judge by citing 8 Lah 684,¹ 8 Lah 114,² and 11 Cr L J 105,³ but these cases are distinguishable as there was evidence in those cases to show that the accused had not lost his cognitive faculties when he committed the offences. In the present instance no such evidence is forthcoming and I think that the evidence relating to the previous condition of the appellant, the utter absence of any motive for committing the offences and the other facts discussed above justify in the circumstances of this case an inference that the appellant committed the offences without knowing the nature of his acts. I would, therefore, hold that the appellant's case falls within the purview of S. 84, I. P. C., and accepting the appeal acquit him. Under S. 471, Criminal P. C., I would direct that the appellant be detained in safe custody in the Punjab Mental Hospital at Lahore in accordance with the rules framed by the Local Government.

Coldstream, J. — I agree.

R.M./D.S.

Appeal accepted.

1. Tola Ram v. Emperor, A I R 1927 Lah 674 = 102 I O 774 = 8 Lah 684 = 28 Cr L J 598 = 29 P L R 104.
2. Mani Ram v. Emperor, A I R 1927 Lah 52 = 99 I O 328 = 28 Cr L J 120 = 8 Lah 114 = 27 P L R 823.
3. Chajumal v. Emperor, (1910) 94 P L R 1909 = 11 Cr L J 105 = 4 I O 985.

A. I. R. 1937 Lahore 488

ADDISON AND DIN MOHAMMAD, JJ.

Shiromani Gurdwara Parbandhak Committee—Objector—Appellant.

v.

Sardar Singh and another, Petitioners and others, Pro forma Objectors — Respondents.

First Appeal No. 77 of 1936, Decided on 3rd November 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/. 22nd November 1935.

Punjab Sikh Gurdwaras Act (8 of 1925), S. 18—Person doing service to Gurdwara acquiring occupancy lands—Occupancy rights belong to such person and not to institution—No presumption under S. 18 arises.

Where a person while occupying the office of mahant acquires occupancy land and occupancy rights thereof, and in the revenue records the acquisition is shown as a personal one, the occupancy rights acquired by such person are personal to him and not on behalf of the institution. The acquisition of such rights has been recognized to be a personal one even in case of grant by way of reward in recognition of services rendered to

Gurdwara. A presumption under S. 18 of the Act cannot therefore arise : *A I R 1930 Lah 609*; *A I R 1930 Lah 46*; *A I R 1930 Lah 757* and *A I R 1932 Lah 513, Rel. on.* [P 489 C 2; P 490 C 1]

Sardar Charan Singh and Sardar Narindar Singh — for Appellant.

Din Mohammad, J.—This judgment will dispose of Regular First Appeals Nos. 77 and 90 to 96 of 1936. These appeals have been preferred by the Shiromani Gurdwara Parbandhak Committee. Some of the respondents in Appeal No. 94 are admittedly the proprietors of the land in dispute. All the other respondents are alienees from the last Mahant. The controversy rages round the occupancy rights in 280 Kanals 17 Marlas of land in village Chak Darwesh in the district of Gujrat. The objectors claimed that these rights belonged to the Gurdwara at Guliana, but this claim was resisted by all the petitioners respondents except Hari Singh and Hakam Singh who admitted the claim. It was contended on their behalf too that the alienations in their favour have been effected for necessity. The main question that falls to be determined in these cases is whether the occupancy rights belonged to the Gurdwara or were vested in the Mahant in his personal capacity. After examining the various extracts from the revenue records, we have arrived at the conclusion that the occupancy rights in dispute belonged to the Mahant himself and did not vest in him by virtue of his being an office-holder of the Gurdwara. Even the Shiromani Gurdwara Parbandhak Committee itself is not in a position to urge that these rights had ever been shown in the name of the Gurdwara. The only contention raised on behalf of the Committee is that the Mahant came into possession of these rights by virtue of the office that he held in the Gurdwara and that consequently benefit of the presumption under S. 18, Sikh Gurdwaras Act, should be given to the institution. In support of this contention the appellant mainly relies on the fact that the muafi that was attached to the institution always descended from one office-holder to another and that consequently the occupancy rights too should be presumed to have been inherited by the incumbent of the office from his predecessor. This, however, cannot be. It is true that the muafi did descend from one office-holder to another, but this had not been so in the case of the occupancy rights.

The occupancy rights in dispute were created for the first time in 1857 as would appear from Ex. P. 16 which is a copy of the *chitha mozarian maurusi mauza* Chak Darwesh (statement of occupancy tenants, Chak Darwesh). Chanan Singh and others were shown as occupancy tenants under Jalal Din and others on the ground of continuous occupation and no reference whatever was made to these rights being attached to the office of mahant. The report of the Settlement Superintendent does refer to the muafi held by Chanan Singh and others, but this fact by itself will not afford any good ground to hold that Chanan Singh and others were being granted the occupancy rights on account of their connection with the Gurdwara. Moreover, there is no reliable evidence on the record to show that the income from these occupancy rights had ever been spent on the Gurdwara. Even if it be assumed for the sake of argument that the occupancy rights in dispute were granted to Chanan Singh and others on account of their rendering services to the Gurdwara, there is abundant authority in support of the proposition that a grant to a person by way of reward in recognition of services rendered to the Gurdwara always remains a personal one, *A I R 1930 Lah 609*.¹ Further, there is nothing inconsistent in a pujari or any other religious official holding property in his own name: *A I R 1930 Lah 46*.² Reference may also be made to *A I R 1930 Lah 757*,³ where in a case of a jagir, devolving from father to son and confirmed by the British Government at the time of annexation personally in the name of the man who was then enjoying the benefit, it was held by a Division Bench of this Court that the jagir was a personal grant even though the grantee happened to be a pujari and that no presumption under S. 18, Cl. (b) or (g), Sikh Gurdwaras Act, arose.

In *A I R 1932 Lah 513*,⁴ it was held by a Division Bench of this Court that

1. *Gurdwara Parbandhak Committee v. Sohan Singh*, *A I R 1930 Lah 609*=128 I C 492.
2. *Shiromani Gurdwara Parbandhak Committee v. Karam Singh*, *A I R 1930 Lah 46*=123 I C 835.
3. *Shiromani Gurdwara Parbandhak Committee v. Karam Singh*, *A I R 1930 Lah 757*=126 I C 71.
4. *Abdul Haq v. Shiromani Gurdwara Parbandhak Committee*, Lahore, *A I R 1932 Lah 513*=138 I C 387=33 P L R 730=14 Lah 156.

the primary authority on title consists of the Jamabandi, and their value is very much greater than that of any entry in any muafi register. The learned Judges further observed that, although in that case the words used in 1856 conveyed that the land was attached to the institution, this could in no way be taken as cancelling or reversing the entries consistently made from 1851 onwards in all the Jamabandis showing the mahant for the time being as the owner of the land in suit. This is on all fours with the present case in which, as already stated, the Jamabandis have always shown Chanan Singh or his descendants as the personal holders of the land. We have, therefore, no hesitation in affirming the decision of the Gurdwara Tribunal to the effect that the person shown as occupying the land in the revenue records was holding the land personally and not on behalf of the institution. In these circumstances no other question arises. We accordingly affirm the decree of the Gurdwara Tribunal and dismiss all these appeals. No costs will be allowed in Appeals Nos. 77, 90, 91, 92, 93, 95 and 96 as the respondents were absent. The contesting respondents in Appeal No. 94 will, however, get their costs from the appellant.

B.D./A.L. *Appeals dismissed.*

A. I. R. 1937 Lahore 490

JAI LAL, J.

Oma Shanker Das — Decree-holder — Appellant.

v.

Bhola Dass Mahant — Judgment-debtor — Respondent.

First Appeal No. 183 of 1936, Decided on 26th November 1936, from order of Senior Subordinate Judge, Delhi, D/- 14th January 1936.

Scheme suit — Decree setting out conditions of management — No provision to remove manager on failure to perform conditions — Mismanagement by manager — Application for execution is not competent to remove manager.

In the absence of a provision in the conditions of management set out in the scheme decree that the manager would be liable to be removed on his failure to perform the conditions, action cannot be taken to remove the manager even on proof of his mismanagement by means of an application for execution: 24 Bom 45; 28 Mad 319; A I R 1926 Nag 326 and A I R 1931 Bom 391, *Expl. and Disting.*; A I R 1936 Mad 581, *Rel. on.* [P 491 O 1]

D. N. Aggarwal — for Appellant.

Shamsher Bahadur — for Respondent.

Judgment.—Bhola Das, respondent, is the Mahant of the temple of Rup Ramji situated in Delhi. In 1897 two men instituted a suit for his removal for reasons with which we are not at present concerned. The suit was decreed in the Court of the District Judge of Delhi, but on an appeal to the Chief Court of the Punjab the decree of the District Judge was reversed and it was ordered that Bhola Das should continue to work on his post of Mahant subject to his complying with certain rules which are mentioned in detail in the decree passed by the Chief Court on 8th August 1904. One of the conditions was that the Mahant should keep proper accounts of the total income which were to be audited by persons appointed by the District Judge of Delhi in the manner mentioned in detail in the decree. Mahant Bhola Das has continued in his office up to this time. On 8th January 1935, an application for execution was presented in the Court of the Senior Subordinate Judge of Delhi by Kalian Das and Sri Kishen who claim to be the chelas of Mahant Data Ram, a Charandasi Sadhu. The application was mainly for the removal of the Mahant on the ground of mismanagement of the temple property by him and of its improper alienation and for other reasons. A prayer also was made that two respectable persons may be appointed to audit the accounts of the Mahant. This application has been dismissed by the Senior Subordinate Judge on the grounds: (1) that it is time-barred, and (2) that it is not open to the appellant to apply for the execution of the decree because there is no executable decree. Consequently this appeal has been presented against the order of the Senior Subordinate Judge.

Reliance is placed on 24 Bom 45,¹ 28 Mad 319,² A I R 1926 Nag 326,³ and 55 Bom 414.⁴ None of these judgments however supports the contention of the appellant that the decree in question is an executable decree and can be executed by him. In the decree of the Chief Court

1. Damodar Bhat v. Bhogilal, (1900) 24 Bom 45 = 1 Bom L R 509.

2. Prayagdossji Varu v. Srirangaacharu Varu, (1905) 28 Mad 319 = 15 M L J 133.

3. Ramu v. Puna, A I R 1926 Nag 326 = 94 I C 326.

4. Chandraprasad Ramprasad v. Jinabharti Narayanbharti, A I R 1931 Bom 391 = 133 I C 740 = 33 Bom L R 520 = 55 Bom 414.

and in the directions given by it relating to the management of the property of the temple by the Mahant, there is no condition that, on his failure to perform the duties imposed upon him, he should be removed. Further, there is no condition that the scheme can be altered on an application made to that effect. No authority has been cited in support of the proposition that in the absence of a provision in the conditions of management that the manager would be liable to be removed on his failure to perform the conditions, action can be taken to remove him even on proof of his mismanagement by means of an application for execution. It was held in 24 Bom 45¹ that when there is a clause in the scheme that it can be amended on application being made for the purpose, then the Court can incorporate a condition as to the liability of the Mahant to removal on breach of any of the conditions of the scheme and can then remove him on application for removal being made and breach of conditions being proved. The case does not lay down the further proposition propounded by the learned counsel for the appellant that even without the amendment of the scheme the Mahant could be removed on a breach of any of the conditions on an application being made for the purpose. 28 Mad 319² merely says that in the scheme framed by the Court provision may be made for the appointment of a new trustee in place of an old trustee on the happening of certain contingencies. A I R 1926 Nag 326³ lays down that a scheme once settled can be altered by the Court on an application. 55 Bom 414,⁴ it is claimed, lays down the proposition that a Court can amend a scheme even if no provision is made in it reserving liberty to persons concerned to apply for its amendment.

These matters do not arise before me in the present proceedings. Here there is no condition relating to the removal of the Mahant and therefore no application for execution is competent to remove him. Whether an application to amend the scheme is competent in this case is a matter with which I am not concerned and on which I express no opinion one way or the other: nor on the question whether if the scheme is amended and it is provided that the Mahant is liable to be removed on breach of any of the conditions imposed upon him, he can be

removed on an application for his removal, because these matters do not now arise on the present application. In 59 Mad 751⁵ it was held a decree of this description is not capable of execution so far as the removal of the Mahant is concerned. The Senior Subordinate Judge is correct therefore that no decree capable of execution by removal of the Mahant was passed by the Chief Court of the Punjab in this case. But there is another prayer of the appellant and that is to appoint two auditors. An application to appoint auditors can be made by persons mentioned in the third condition. The persons mentioned are "the plaintiffs or any sadhu attached to the temple." If the appellant can establish that he is attached to the temple he is competent to make an application for the appointment of auditors to audit the accounts of the temple. But this application must be made to the District Judge according to the express directions contained in the condition, and the present application, even if it be assumed that the form of application is immaterial, was made to the Senior Subordinate Judge, who had no jurisdiction to entertain it.

I decline to entertain the prayer of the appellant's counsel that this application may be transferred to the Court of the District Judge for the reason that the application is not merely for the appointment of auditors, but contains the principal prayer, which is not entertainable, at the present stage at any rate, and it may lead to complications if the application for execution is transferred to the District Judge. If so advised, the appellant can make a fresh application and then his competency to present the application can be adjudicated upon and proper orders passed by a competent Court. This appeal, in my opinion, must fail and I dismiss it with costs.

V.B.B./D.S.

Appeal dismissed.

5. Vaithilinga Mudaliar v. Theyagarajaswami Devasthanam, A I R 1936 Mad 581=165 I C 820=59 Mad 751=71 M L J 87.

A. I. R. 1937 Lahore 492

ADDISON AND DIN MOHAMMAD, JJ.

Dwarka Dass — Defendant—Appellant.
v.*Municipal Committee, Amritsar* —
Plaintiff — Respondent.

First Appeal No. 176 of 1936, Decided on 8th December 1936, from decree of Sub-Judge, 1st Class, Amritsar, D/- 22nd February 1936.

(a) Punjab Municipal Act (3 of 1911), S. 56 (1) (f)—Land in possession of and vesting in Municipal Committee — Dispute regarding land between Municipal Committee and Government—Municipal Committee still has *locus standi* to institute suit against trespasser.

Where a Municipal Committee is in possession of land few months prior to date of suit which has vested in them under S. 56 (1) (f), Municipal Act, the Municipality has a *locus standi* to institute a suit for possession against a trespasser although there is a dispute regarding it between the Government and the Municipality.

[P 492 C 2]

(b) Adverse Possession—User of land by granting lease for grazing cattle during rainy season—Such user is common in India and is not sufficient declaration of ownership so as to amount to adverse possession.

Where in a claim for title by adverse possession against Municipal Committee the claimant produced a document purporting to be a rent deed executed in his favour, whereby he had given the property on rent to the lessee to graze his cattle in rainy season :

Held : this was not such a declaration of ownership as would become apparent to the Committee or put them on their guard. User of this sort was common in India and excited no particular attention and it was neither intended to denote nor understood as denoting a claim to the ownership of the land. This obviously was not an act which was sufficient to give title by prescription : 16 Bom 338 ; 33 Bom 712 and 63 P R 1913, Rel. on.

[P 493 C 1, 2]

Dev Raj Sawhney and *Lala Achhru Ram*—for Appellant.

M. L. Puri and *Sham Dass* — for Respondent.

Addison, J.—The Municipal Committee of Amritsar sued Mahant Dwarka Das for possession of 24975 square yards of land outside the Sultanwind Gate, comprising field No. 1526 of the revenue papers. They claimed that it was nazul or Crown land under the charge and management of the Municipal Committee and they further stated that the Committee was in possession up to a date some eight months before the suit was brought and they therefore, also relied on their possessory

title. The defendant pleaded that the land in question was owned by the temple, of which the defendant is the mahant, and that in any case he had been in proprietary and adverse possession for more than 60 years. In a statement before issues were framed, the defendant further stated that the land had been given to the temple by Maharaja Ranjit Singh, a grant which was confirmed by the British Government after the Sikh Raj came to an end. The following issues were framed : 1. Whether the land in dispute is Khasra No. 1526. 2. If so, whether the plaintiff is not entitled to bring the suit. 3. If the land be found to be Khasra No. 1526, does it belong to the defendant or has he had possession of it for more than 12 years?

The trial Court held that Khasra No. 1526 had been established to be nazul or Crown land and that the plaintiff was entitled to bring the suit on the basis of their possessory title as well as on the ground that it was vested in them by reason of S. 56 (1) (f), Municipal Act. It was further found that there was no adverse possession and that the plaintiffs had been in possession up to 4th January 1934. On these findings the suit was decreed and the defendant has appealed.

It was not disputed before us and it is clear from the evidence that the land in dispute comprises Khasra No. 1526 which is nazul or Crown land. It was contended, however, that the plaintiff was not entitled to bring the suit. Reliance was placed in this connection upon the statement of the Secretary of the Municipal Committee who said as a witness that the ownership of the site was in dispute between the Municipality and the Government. He admitted, however, that it was nazul or Crown land which was under the Municipality's management. As it is established that the Municipal Committee was in possession upto 4th January 1934 and as in any case the land vests in them under S. 56 (1) (f), Municipal Act, it is obvious that the Municipality had a *locus standi* to institute the suit; in fact the revenue papers show that the Crown is the owner but that the land is in the occupation and under the management of the Municipal Committee.

The next contention was that on the allegations in the plaint it was for the Municipal Committee to prove that they had been in possession of the land within limitation and that Art. 142, Lim. Act,

applied and not Art. 144. In the first place no objection was taken to the form of issue 3; secondly, even if the contention is correct it is established by the evidence of Mohammad Shafi (P. W. 1) that this was vacant Crown land in the occupation of the Municipality and that the first encroachment made upon it by the defendant was on 4th January 1934. On that date when the witness was going his rounds he found that the defendant had started to build on part of the site without permission of the Municipality and that he had enclosed it with a wire fencing. It was after this report that the suit was instituted. The defendant produced certain witnesses who said that the defendant had been in possession for 14 or 15 years while one witness Ram Charan Das (D. W. 5) stated that the defendant had been in possession of the land for the last 32 years. His source of knowledge as to this was the Mahant, that is, the defendant. This evidence is worthless. On the other hand it has been established that this was vacant land, the title of which was in the Crown and the occupation and management of which were with the Municipal Committee. Although before the issues the defendant stated that the land had been granted to the temple in the time of Maharaja Ranjit Singh he produced a document as a witness namely, Ex. D-1, bearing date 5th February 1873 to the effect that certain land had been gifted to the Mahant of the temple by Devi Sahae and others. This is a position inconsistent with the position he took up before issues and further there is nothing to establish that the land gifted is the same as the land in dispute. No boundaries are given in the document. On the other hand it is clear that the land in dispute is entered in the revenue papers as belonging to the Crown and managed by the Committee.

It was, however, contended that the Mahant had been in adverse possession and in this respect reliance was placed upon a rent deed, dated 10th April 1904, executed by one Gobind Ram in favour of one of the Mahants. By this deed 13 bighas of land were given by the Mahant to Gobind Ram for the rainy season for grazing cattle. Now, if this deed be taken as proved, this was not such a declaration of ownership as would become apparent to the Committee or put them on their guard. The land was

vacant land and cattle, etc., used to graze over it. In 16 Bom 338¹ where a privy and sheds for cows, etc., and a hut for a cartman—all, however, structures of a flimsy and purely temporary character, were constructed and maintained for many years on a piece of land, it was held that such user did not amount to adverse possession and was insufficient to give a title to the land by prescription. User of this sort is common in India and excites no particular attention and it is neither intended to denote nor understood as denoting a claim to the ownership of the land. A similar view was taken in 33 Bom 712² and 63 P R 1913.³ This obviously was not an act which was sufficient to give title to the Mahant by prescription. No other point was argued before us. The case is perfectly clear and we dismiss the appeal with costs.

B.D./D.S.

Appeal dismissed.

1. Framji Cursetji v. Goculdas Madhowji, (1892) 16 Bom 338.
2. Ganapati Ambadas v. Raghunath Anant, (1909) 33 Bom 712=4 I C 244=11 Bom L R 1087.
3. Rahmatullah Khan v. Secy. of State, (1913) 63 P R 1913=18 I C 799=113 P L R 1913.

A. I. R. 1937 Lahore 493

SKEMP, J.

Dial Singh — Plaintiff — Appellant.
v.

Surain Singh, vendee and another,
vendor, Defendants — Respondents.

Second Appeal No. 774 of 1936, Decided on 4th December 1936, from decree of Addl. Dist. Judge, Ferozepore, D/- 7th May 1936.

Custom (Punjab) — Alienation—Ancestral land—Necessity—Sale of ancestral land by father to purchase land in Bikaner and Gwalior — Elder son attesting deed at the time of registration—Father actually spending some money in buying land in Gwalior—Suit by minor son for declaration that sale is without necessity — Sale held to be for necessity.

One B sold ancestral land for Rs. 1,500, the entire consideration being paid to him before the Sub-Registrar. B's elder son was present before the Sub-Registrar and attested the deed. The object of the sale was the purchase of land in Bikaner and Gwalior States. B spent actually some money in purchasing land in Gwalior. A suit was brought by his minor son for declaration that the sale was without necessity :

Held: that the sale by B in the presence of his elder son was an act of good management and

was for necessity: A I R 1925 Lah 396; A I R 1934 Lah 452 and A I R 1938 Lah 388, Rel. on; A I R 1935 Lah 927, Ref. [P 494 C 1,2]

J. L. Kapur — for Appellant.

Krishan Swarup for *Jhanda Singh* —
for Respondent No. 1.

Judgment. — The sole point in this second appeal is whether a sale of ancestral land was for necessity. It has been found by the Courts below that on 3rd April 1934 Bhagwan Singh sold ancestral land for Rs. 1,500, the entire consideration being paid to him before the Sub-Registrar. Bhagwan Singh's elder son was present before the Sub-Registrar and attested the deed. The object of the sale was the purchase of land in Bikaner and Gwalior States and actually since the sale Bhagwan Singh spent Rs. 160 in buying about 100 bighas of land in Gwalior. The suit was brought by Bhagwan Singh's younger son, a minor, through his mother, on 12th February 1935. The lower Courts concurrently found that the sale was for necessity. Before the District Judge it was urged that the money had not been actually spent on the purpose for which it was raised. But the learned District Judge held and this is admitted to be correct, that all the alienee has to do is to see that the money is required for a legitimate purpose. Further, the alienor was not given very much time between the alienation and the suit to carry out that purpose. The sole question, therefore, is whether his sale in order to buy land in Gwalior and Bikaner is an act of good management which is regarded as necessity.

Several rulings were quoted not all of which are relevant. In 6 Lah 137¹ a Division Bench held that an item of Rs. 1000 in a sale to enable the vendor and his family to proceed to China was for necessity. In A I R 1934 Lah 452² Bhide, J. held that it was an act of good management where a resident of the Multan District sold land situate in the Ferozepur District which had long been under mortgage and was difficult to manage. In 34 P L R 161³ a Division Bench in peculiar circumstances upheld

the sale of ancestral land for the purpose of investing the purchase money in mortgages. They held that ordinarily this would not be justifiable but in that case again there was a change of residence justifying the particular sale. A Division Bench in A I R 1935 Lah 927⁴ held that where two squares were situate in the same village, one ancestral and one non-ancestral, it was not an act of necessity to sell the ancestral square to pay off the mortgage of the non-ancestral one. In my opinion in this case no sufficient reason has been shown for dissenting from the concurrent findings of the Courts below that the sale of the land by Bhagwan Singh in the presence of his elder son was for necessity. I reject this appeal with costs.

K.B./A.L.

Appeal dismissed.

4. Muhammad Bashir v. Sawal Singh, A I R 1935 Lah 927=161 I C 361=38 P L R 367.

A. I. R. 1937 Lahore 494

ADDISON AND DIN MOHAMMAD, JJ.

Sohna Mal and others — Creditors —
Appellants.

v.

Sardar Gian Singh, Official Receiver
and another—Respondents.

Letters Patent Appeal No. 101 of 1936,
Decided on 14th January 1937, from
judgment of Agha Haider, J., D/- 23rd
April 1936.

Provincial Insolvency Act (1920), S. 2(1) (e).
—Word 'holding' connotes idea of mortgage,
charge or lien which exists and not one
which is to come into existence in future.

The word 'holding' used in the definition of the
term 'secured creditor' as given in Cl. (e), sub-
s. (1) of S. 2, Provincial Insolvency Act, is in the
present tense and thus necessarily connotes the
idea of a mortgage, charge or lien which exists
and excludes that of the mortgage, charge or lien
which is to come into existence at some future
time. [P 495 C 1]

Hargopal for *M. L. Puri* — for
Appellants.

Ghulam Mohi-ud-Din, *J. L. Kapur*
and *Yashpal Gandhi* — for Res-
pondents.

Din Mohammad, J.—This appeal can
be disposed of on the short ground that
the appellants on their own showing could
not in any circumstances be termed
'secured creditors' on the day when the
District Judge, passed orders giving prio-
rity to certain Government dues outstand-

1. Jai Singh v. Darbara Singh, A I R 1925 Lah 396=89 I C 302=6 Lah 137=26 P L R 329.

2. Mohammad Chiragh v. Fatta, A I R 1934 Lah 452=148 I C 209=15 Lah 694=36 P L R 525.

3. Nur Din v. Fazal Din, A I R 1938 Lah 388=144 I C 266=34 P L R 161.

ing against the insolvent. The document on which the appellants relied was executed on 4th July 1930. It was to all intents and purposes a bond evidencing an unsecured loan and was intended by the parties to be treated as such for a period of six years from the date of its execution. Under its terms the creditors could neither follow the person of the debtor nor his property before the expiry of the said period and had to remain content merely with a right to add unpaid interest to the principal sum. It was only after the expiration of this period that, in case of non-payment of principal and interest, the simple money bond was to be converted into a mortgage bond conferring upon the creditors the privilege of enjoying the usufruct of the land specified in the deed for a period of twenty years towards the full satisfaction of their loan. The word 'holding' used in the definition of the term 'secured creditor' as given in Cl. (e), sub-s. (1) of S. 2, Provincial Insolvency Act, 1920, is in the present tense and thus necessarily connotes the idea of a mortgage, charge or lien which exists and excludes that of the mortgage, charge or lien which is to come into existence at some future time. By the terms of the document before us no mortgage was created at the time when it was executed and if the debtor had repaid the loan within six years no mortgage would have come into existence at all. Counsel for the appellants has not been able to refer to any authority which lends support to his contention and permits the use of the term 'mortgage' in relation to such transactions. He has, however, urged that the transaction in question falls within the ambit of Cl. (b), sub-s. (i) of S. 6, Punjab Alienation of Land Act, 1900, but a mere perusal of the clause would be sufficient to expose the hollowness of this argument. Apart from all other considerations, that clause at the outset contemplates a transaction which is a mortgage at its very inception, and by no straining of language can the document executed in favour of the appellants fulfil this requirement. We accordingly affirm the judgment of Agha Haider, J., and dismiss this appeal, but allow only one set of costs to the respondents.

S.O./D.S.

*Appeal dismissed.***A. I. R. 1937 Lahore 495**

BHIDE, J.

*People's Bank of Northern India Ltd.,
Lahore — Petitioner.*

v.

*Seth Yusuf Ali Ismail Ji — Opposite
Party.*

Civil Revn. No. 892 of 1936, Decided on 14th January 1937, from order of Dist. Judge, Rawalpindi, D/- 13th July 1936.

Provincial Insolvency Act (1920), S. 6 (b)—Applicability — S. 6 (b) applies only when transfer is with intent to defeat or delay all creditors — Debtor transferring his property to third person and paying some of his creditors out of sale proceeds—Transfer not being one with intent to defeat or delay all creditors, S. 6 (b) does not apply.

Section 6 (b), Prov. Insol. Act, applies only when a debtor transfers his property with a view to defeat or delay all the creditors. Where therefore a debtor transfers his property not to a creditor of his and pays out of the sale proceeds some of his creditors, the transfer not being one with intent to defeat or delay all the creditors, the transfer does not amount to an act of insolvency on the part of the debtor within the meaning of S. 6 (b) of the Act: *A I R 1934 Rang 242* and *A I R 1935 Rang 281, Rel. on; A I R 1935 Sind 53, Ref.* [P 496 C 1]

Bhagwat Dayal — for Petitioner.

Mehr Chand Mahajan —

for Opposite Party.

Order.—This is a second appeal arising out of the insolvency proceedings. One Yusuf Ali was adjudged insolvent on a petition by the Liquidator of the People's Bank of Northern India. The allegation of the Liquidator was that Yusuf Ali had sold his house on 1st May 1934 for Rupees 15,000 with the intention of injuring the petitioning creditor and to give fraudulent preference to other creditors. The Insolvency Judge held that the sale by Yusuf Ali amounted to an act of insolvency under Cl. (c), S. 6, Prov. Insol. Act, and he, therefore, adjudged him insolvent. The learned District Judge took a different view on appeal. He was of opinion that Cl. (c), S. 6, Prov. Insol. Act, was not applicable inasmuch as the transfer was not in favour of a creditor. As regards Cl. (b), S. 6, he held that the clause was not applicable as the transfer was not made to defeat or delay all the creditors, it being admitted that the sale proceeds of the house had been utilised towards the payment of debts of other creditors. The learned District Judge accordingly accepted the appeal and set aside the order of adjudication. From the above decision the present appeal has been preferred.

According to S. 75, Prov. Insol. Act, a second appeal does not seem to be competent, but a point of law is involved and I shall therefore hear the appeal as a petition for revision.

The learned counsel for the petitioner has urged that the interpretation placed by the learned District Judge on Cl. (b), S. 6, Prov. Insol. Act, is not correct. He has contended that it is not necessary under that clause that there should be an intention to defeat or delay the creditors generally and that even if there was no intention to defeat or delay any of the creditors, the act would amount to an act of insolvency. In support of this contention the learned counsel cited: A I R 1935 Sind 53.¹ The learned counsel for the respondent on the other hand, relied on A I R 1934 Rang 242² and A I R 1935 Rang 281,³ which support the view taken by the learned District Judge. The latter case deals with Cl. (d), but the wording there is the same as in Cl. (c). In the Sind ruling the insolvent had alienated practically the whole of the property and the case appears to have been decided really on its own facts. The case was under the Presidency Towns Insolvency Act. The wording of S. 9 (b) of that Act is similar to that of S. 6 (b), Prov. Insol. Act. But the ruling does not discuss the question of interpretation and it seems to be more or less assumed that S. 9 (b) would apply even if there was an intention to defeat or delay some of the creditors. If there is an intention to delay or defeat some of the creditors only, the case would seem to be one of preference given to some creditors at the expense of others. Cl. (c), S. 6 deals with transfers resulting in preference to creditors but in view of its wording the present case does not appear to fall under that clause. When there is a separate clause dealing with transfers resulting in preference to some of the creditors, it does not seem likely that the Legislature could have intended to include any of such cases under Cl. (b) as well. As at present advised, I consider the interpretation placed upon S. 6 (b), Prov. Insol. Act, which is supported by the Rangoon authorities to be correct and

dismiss the petition. In view of all the circumstances, I leave the parties to bear their own costs in this Court.

K.B./A.L.

Petition dismissed.

A. I. R. 1937 Lahore 496

BHIDE, J.

Daulat Ram — Decree-holder —

Appellant.

v.

Sardar Khan — Judgment-debtor —

Respondent.

Second Appeal No. 1460 of 1936, Decided on 25th January 1937, from Order of Dist. Judge, Gujranwala, D/- 14th August 1936.

Punjab Debtors' Protection Act (2 of 1936)—Applicability—Executing Court granting lease—Act coming into force subsequently — Appellate Court applying Act and setting aside lease—Order held was wrong.

A lease was granted by the executing Court. Subsequently the Punjab Debtors' Protection Act came into force and the appellate Court at the time of hearing applied the Act and set aside the lease :

Held : that the appellate Court's order was wrong. The Judge had only to see whether the order of lease was correctly passed on the day on which it was passed : A I R 1937 Lah 52, *Distinguishing*. [P 496 C 2]

Arjan Dass — for Appellant.

Bashir Ahmad — for Respondent.

Judgment.—This is a second appeal from the order of the District Judge, Gujranwala, setting aside a lease granted by the executing Court on 28th May 1936. The learned Judge has held that because Punjab Act 2 of 1936 had come into force when the appeal was heard therefore the provisions of that Act were applicable. No authority has been cited in support of this view and it seems to me to be erroneous. A I R 1937 Lah 52,¹ which is referred to, is clearly distinguishable. In the present case, the learned Judge had only to see whether the order of lease was correctly passed on the date on which it was passed. It is not disputed that Punjab Act 2 of 1936 was not in force on 28th May 1936 when the order was passed. In the circumstances, the learned Judge was not right in setting aside the order. I accept the appeal and restore the order of the executing Court with costs.

S.O./D.S.

Appeal allowed.

1. Jethanand Murijsal v. Ghanshamdas, A I R 1935 Sind 53=159 I O 745=29 S L R 265.

2. Ko Po Yin v. Daw Hnin Thet, A I R 1934 Rang 242=153 I C 146.

3. Maung Nyun Tin v. Saw En Hoke, A I R 1935 Rang 281=158 I O 610.

1. Bishen Chand v. Bakhshish Singh, A I R 1937 Lah 52.

* * A. I. R. 1937 Lahore 497

SPECIAL BENCH

YOUNG, C. J., MONROE AND

DIN MOHAMMAD, JJ.

In the matter of *Lala Harkishen Lal*.

Criminal Misc. No. 273 of 1936, Decided on 16th October 1936.

(a) Contempt — High Court — Even non-presidency High Courts have inherent right to punish for contempt.

A non-presidency High Court is a superior Court of Record and this being so, the jurisdiction to punish for contempt of itself is inherently vested in every High Court; and it is a necessary incidence of this jurisdiction that such contempts are punishable summarily by committal. [P 498 C 1]

* (b) Contempt — Powers of High Court — Inherent power of High Courts to punish contempt of themselves is not taken away by Contempt of Courts Act.

The inherent power of the High Courts as superior Courts of Record to punish contempt of themselves has not been taken away by the Contempt of Courts Act; it has been left undisturbed and consequently the High Courts in India continue to have power to deal with contempt of themselves in the same manner as a Court of Record has under the Common law of England. [P 499 C 1]

(c) Interpretation of Statutes — Statement of Objects and Reasons which accompanies draft bill cannot be referred to in interpretation of Act.

It is not permissible in India to refer to the Statement of Objects and Reasons which accompanies the draft bill when it is first introduced in the legislative body. Unlike the preamble, the headings and the marginal notes, the Statement of Objects and Reasons is no part of the Act as passed by the Legislature. Similarly the debates in the Assembly cannot be referred to in the interpretation of an Act: *A I R 1930 All 225*; *A I R 1928 Lah 35*; *A I R 1928 Lah 337*; *A I R 1929 Bom 274* and *22 Cal 788 (P C)*, *Rel. on*.

[P 499 C 2]

* * (d) Contempt — Powers of High Court — High Court's power in matter of punishment is unlimited — Person sentenced for contempt can be jailed even for indefinite period.

There is no limitation imposed on the High Courts in the matter of punishment for contempt. Hence an order committing a person to custody in jail until such time as he apologises to the High Court and pays into Court the moneys received in defiance of the orders of the High Court is not *ultra vires*: *A I R 1929 Pat 72*; *A I R 1918 Cal 713* and *In re Bahama Islands*, (1893) *A C 138*, *Rel. on*. [P 498 C 1; P 500 C 1, 2]

Abdul Haya — for Petitioner.

Dewan Ram Lal — for the Crown.

Young, C. J. — Lala Harkishen Lal was committed for contempt on four different occasions mentioned below: (1) On 1st November 1935 he was awarded one month's imprisonment as, in spite of personal service, he absented himself without any lawful excuse on a date fixed for his

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appearance in this Court. (2) On 6th December 1935 he was awarded two months' imprisonment for disobeying the order of Lala Ganga Ram, Subordinate Judge, Lahore, restraining him from receiving certain moneys due to him from the various concerns in which he was interested. (3) Again, on the same date, for wilfully disregarding the injunction of this Court prohibiting him from withdrawing any moneys due to him from his concerns, he was committed to custody in jail until such time as he apologised to this Court and further purged his contempt by paying into this Court the sums of money received in defiance of this Court's injunction. (4) On 16th July 1936, he was committed to jail for three months for refusing to answer questions in proceedings under S. 196, Companies Act, the sentence to come into effect at the expiry of his previous sentences.

He has now presented this petition praying for the review of the above orders on the ground that they were illegal. Counsel for the petitioner has conceded at the outset that the petitioner's committal under the orders mentioned at Nos. 1, 2 and 4 above cannot be attacked on any ground. He has however contended that the order of committal passed on 6th December in respect of the contempt of this Court is unsustainable on the grounds: (1) That as the petitioner had been sentenced on the same day to two months' imprisonment for receiving moneys from different companies, he could not be convicted a second time for doing the same thing in disregard of the injunction of this Court, and (2) that the sentence passed on him being indefinite was illegal. We have no hesitation in saying that the first ground of attack is altogether untenable, inasmuch as the petitioner had, in flouting the authority of this Court, committed a distinct offence and was consequently liable to be punished separately on that account, even though he had already been punished for disobeying a similar order by the Subordinate Judge. The injunction of this Court was issued much later than the order of the Subordinate Judge and was more extensive in its terms. It could not, under any circumstances, merge in the order of the Subordinate Judge so as to absolve the petitioner from the consequences of disobeying it.

In support of the second ground the petitioner's counsel has, in the first

instance, urged that the Presidency High Courts alone had the right to punish for contempt having inherited it from the Supreme Courts to which they had succeeded. Counsel has next argued that even if there was vested in the High Courts any inherent right to punish for contempt of themselves prior to the passing of Act 12 of 1926, they became subject to that Act which it is argued, clearly defines and limits the powers of the High Courts in relation to punishments for contempt, whether of themselves or of the subordinate Courts, and that consequently this Court was not empowered to pass any sentence which was not authorized by that Act. In other words, counsel contends that the maximum sentence permissible under S. 3 of the Act being six months' imprisonment, an order committing the petitioner to custody in jail until such time as he apologised to this Court and paid into Court the moneys received in defiance of the orders of this Court was *ultra vires*.

There can be no doubt that this Court, and every other non-presidency High Court in India is vested with an inherent right to punish for contempt of the Court itself. It cannot be disputed that a non-presidency High Court is a Superior Court of Record, and, this being so, the jurisdiction to punish for contempt of itself is inherently vested in every High Court. It is a necessary incidence of this jurisdiction that such contempts are punishable summarily by committal. The question that really arises in this case is, whether the inherent jurisdiction of the High Courts has been taken away or in any wise limited by Act 12 of 1926. Now, it is well settled that statutes which limit or extend Common law rights or which limit or take away any jurisdiction vested in a High Court must be expressed in clear and unambiguous language. It becomes necessary therefore to examine the Act to see whether the language used justifies the construction sought to be placed upon it by the petitioner's counsel.

The Act consists of a preamble and three sections. The preamble is divided into two paragraphs. Para. 1 refers to doubts that had then arisen as to the competency of a High Court to punish contempt of Subordinate Courts. The opening sentence of para. (2) refers to the resolving of those doubts and then, with-

out any break in the sentence, proceeds as follows:

and to define and limit the powers exercisable by High Courts and Chief Courts in punishing contempts of Court.

Section 1 gives the title of the Act and provides for its extent and commencement. Sub-s. (1), S. 2 deals with the powers of the High Courts established by Letters Patent to punish contempt of Courts subordinate to them. Sub-s. (2) of the same section deals with the powers of the Chief Court to punish contempt of itself. Sub-s. (3) of the same section prohibits the High Courts from taking cognizance of contempt of the Subordinate Courts punishable under the Penal Code. S. 3 is the penal section and limits the punishment for contempt of Court to six months' imprisonment or Rs. 2,000 fine. This analysis of the Act clearly indicates three things:

(1) So far as the High Courts are concerned, it merely deals with their powers to punish contempt of the Courts subordinate to them, and does not, either expressly or impliedly, make any provision for the High Court to deal with contempt of themselves. By sub-s. (1) of S. 2, it empowers the High Courts to punish contempt of the Subordinate Courts and by sub-s. (3) of the same section it prohibits them from taking cognizance of contempt of the subordinate Courts which is punishable under the Indian Penal Code.

(2) The Act presumes that the power of the High Courts to punish contempt of themselves does already exist and consequently empowers them to exercise the same jurisdiction, power, and authority in accordance with the same procedure and practice in respect of contempt of subordinate Courts "as they have and exercise in respect of contempts of themselves".

(3) In the matter of the Chief Court, the Act confers upon it the same jurisdiction, power and authority in accordance with the same procedure and practice in respect of contempt of itself as is possessed by a High Court. It is significant that the Act does not confer any power on the Chief Court to punish contempt of Courts subordinate to it and limits its power to punish contempt of itself alone. It is for this reason that the words "Chief Court" find no place in either sub-s. (1) of S. 2 or sub-s. (3) of the same section.

Evidently, therefore, S. 3 provides a penalty for those contempts only which are specifically made punishable by the

Act and does not affect those contempts which were already punishable. From this it naturally follows that the inherent power of the High Courts as superior Courts of Record to punish contempt of themselves has not been taken away by the Act; it has been left undisturbed and consequently the High Courts in India continue to have power to deal with contempt of themselves in the same manner as a Court of Record has under the Common Law of England. Counsel for the petitioner has urged that as both in the preamble and the penal section the words 'contempts of Court' have been used without any qualification, they are wide enough to cover all contempts. This is clearly an erroneous conception of the Act. There is no magic in these words. It is significant that these very words are used in the marginal note to S. 2 which in relation to the High Courts deals with contempt of subordinate Courts only and in relation to the Chief Court with contempt of itself; and this is the only reasonable interpretation that can be put upon these words wherever they have been used. Counsel has next contended in this connection that if it had been the intention of the Legislature to limit the operation of the Act to contempt of the subordinate Courts only the word 'such' would have been used before the word 'contempts' in para. 2 of the preamble. This argument too proceeds on a wrong view of the Act, as, firstly, counsel overlooks that the Act was dealing with another contempt also, that of the Chief Court and, consequently, it would have been incorrect to make it appear that the Act was limited to contempt of the subordinate Courts only by the use of the word 'such'. Secondly, the context does not justify the use of this word as the Chief Courts have been mentioned there along with the High Courts, and the Legislature was not conferring on the Chief Courts power to punish contempt of the Courts subordinate to them. The fact that we have had to consider minutely the construction of Act 12 of 1926 shows conclusively that there is no clear and unambiguous enactment taking away the existing jurisdiction of this Court. In support of his contention that the inherent power of the High Courts to punish contempt of themselves has been taken away by Act 12 of 1926 counsel wished to refer to the Statement of Objects and Reasons appended to the Bill as origi-

nally drafted by its author, as well as to the debates that followed in the Legislative Assembly. This we did not allow. In A I R 1930 All 225¹ a Full Bench of the Allahabad High Court held that it is not permissible in India to refer to the Statement of Objects and Reasons which accompanies the draft Bill when it is first introduced in the Legislative body. Unlike the preamble, the headings and the marginal notes, the Statement of Objects and Reasons is no part of the Act as passed by the Legislature. Similarly the debates in the Assembly cannot be referred to in the interpretation of an Act, 9 Lah 260² 9 Lah 689,³ 53 Bom 627,⁴ and 22 I A 107.⁵ From the various judgments cited at the Bar it is abundantly clear that every High Court in India has in spite of this Act always relied on its inherent powers. In 117 I C 724,⁶ which was decided by the Madras High Court on 28th March 1928, a party in contempt was not allowed to proceed with his appeal. This could not have been possible under Act 12 of 1926. It could be done only under the inherent powers vested in the High Court as a Court of Record.

In 103 I C 775,⁷ which was decided by this Court on 21st June 1927, it was held by a Bench of five Judges that this Court had jurisdiction to proceed summarily in cases of contempt of its authority, and this, as stated above, is an incidence of the inherent jurisdiction vested in the High Courts. In 129 I C 366⁸ a Division Bench of the Calcutta High Court, in a case decided on 29th May 1930, remarked as follows :

1. Shanta Nand Gir v. Basudeva Nand Gir, A I R 1930 All 225=125 I C 477=52 All 619=1930 A L J 402 (F B).
2. Rajmal v. Harnam Singh, A I R 1928 Lah 35=104 I C 661=9 Lah 260=28 P L R 595.
3. Gurdial Singh v. Central Board & Local Committee, Amritsar, A I R 1928 Lah 337=113 I C 769=9 Lah 689.
4. Ratansi Hirji v. Emperor, A I R 1929 Bom 274=1929 Cr O 41=120 I C 356=31 Cr L J 103=53 Bom 627=31 Bom L R 581.
5. Administrator-General of Bengal v. Premlal Mullick, (1895) 22 Cal 788=22 I A 107 (P O).
6. Palaniappa Chetty v. Raman Chetty, A I R 1929 Mad 672=117 I C 724.
7. *In re* Muslim Outlook, Lahore, A I R 1927 Lah 610=103 I C 775=28 Cr L J 727=29 P L R 294.
8. Supdt. and Remembrancer of Legal Affairs, Bengal v. Khagendra Nath, A I R 1930 Cal 759=1930 Cr O 1159=129 I C 366=34 C W N 928=32 Cr L J 352=58 Cal 458.

The power of the High Court to commit for any contempt of itself is inherent in the Court and arises from the fact that it is a Court of Record. The power is one that is ancillary to the exercise of the various jurisdictions of the High Courts and it may be expedient to exercise it in or in relation to one of those jurisdictions.

The inherent power not having been affected by the Act, the only question that remains to be decided is whether a sentence in the terms in which it was passed, could be inflicted on the petitioner. On this question too, there is ample authority against the contention of the petitioner. In 8 Pat 323⁹ in a case which was decided in August 1928, a Bench of five Judges of the Patna High Court passed a sentence on the party in contempt that :

He pay a fine of Rs. 500 and that in default of such payment he be confined in the Patna Jail until such fine shall have been paid.

In the case reported in 44 I C 930,¹⁰ which, though decided on 24th April 1869, is a leading authority on the subject of contempt, Sir Barnes Peacock passed the following sentence on the offender :

That you stand committed for one month to the civil side of the Presidency Jail and that you pay a fine of Rs. 500 and that you be further imprisoned till the fine be paid.

In 6 Lah 528,¹¹ the sentence imposed on the offender was that "he will remain in prison until such fine and costs are paid". From all these sentences passed by the various High Courts in India it will be evident that there is no limitation imposed on the High Courts in the matter of punishment. The period in default of payment of fine was not defined in any of these judgments and a person sentenced under them could have remained in jail for an indefinite period even for life if he had not paid the fine. We may also refer to the famous case in (1893) A C 138.¹² In that case a sentence of imprisonment "during the pleasure of the Chief Justice" had been passed on the offender, and the question of the legality of the sentence was referred to by the Secretary of State for the Colonies to the Privy Council. Eleven members of the Judicial Committee considered the point

and came to the conclusion that the sentence was in accordance with law. The sentence passed upon the petitioner by this Court for contempt was therefore in accordance with law. There is one further question to be considered, that is, whether the ends of justice require that Harkishen Lal should be kept indefinitely in jail. On each occasion on which his case has been before the Court he has been invited to express his regret : he has on each occasion refused to do so : and it seems to us that there is no prospect of any change in his outlook. We have to consider, therefore, what is a sufficient punishment for his offence. Taking into account his age and what appears to us to be a mental infirmity—an incapacity to admit that he had done wrong—we think that if he is confined till the 15th November, he will have been sufficiently punished. We direct that he be released from prison on that date.

P.R./D.S.

Order accordingly.

A. I. R. 1937 Lahore 500

JAI LAL AND ABDUL RASHID, JJ.
Bhai Asu Ram — Appellant.

v.

Bulagi Das and others — Respondents.

First Appeal No. 1384 of 1935, Decided on 9th February 1937, from decree of Senior Sub-Judge, Multan, D/- 17th June 1935.

(a) Custom (Punjab)—Succession — Amarpuri Arora of Multan town governed by Hindu law—No evidence to prove that such person went to reside in village and adopted professions and habits of agriculturist—According to Customary law of Multan District succession to such person dying sonless is governed by his personal law—Sons of married daughter of such person take in preference to son of deceased's brother.

According to the Customary law of the Multan District in the Punjab, the custom amongst the Aroras who are the residents of villages and have adopted the professions and habits of agriculturists, is that in the case of the sonless male proprietors, the collaterals within the fourth degree exclude the married daughters. But it is expressly stated there that the Aroras of the towns follow their personal law. Therefore sons of the married daughters of a deceased Amarpuri Arora of Multan town and governed by Hindu law take the estate of the deceased in preference to the son of the brother of the deceased, in the absence of evidence that the deceased had gone to reside in a village and had adopted the professions and habits of an agriculturist. [P 502 O 1; P 503 O 1, 2]

(b) Transfer of Property Act (1882), S. 51—Compensation for improvements—Decree for possession of certain property in favour of plaintiff, he having better title as against

9. Emperor v. Murli Manohar Prasad, A I R 1929 Pat 72=117 I O 180=30 Cr L J 741=8 Pat 323=9 P L T 837 (S B).

10. *In re William Tayler*, A I R 1918 Cal 713=44 I O 930=19 Cr L J 402=26 O L J 345.

11. *In re Habib*, A I R 1926 Lah 1=89 I O 833=26 Cr L J 1409=26 P L R 772=6 Lah 528 (S B).

12. *In re Bahama Islands : In re Moseley* (1893) A C 133=62 L J P C 79=68 L T 105=57 J P 277.

defendant in possession of such property—Defendant though in possession of such property for long time, not keeping any accounts of income derived from it—No proof of present value of improvements made by him—Defendant held not entitled to compensation for improvements on eviction by plaintiff.

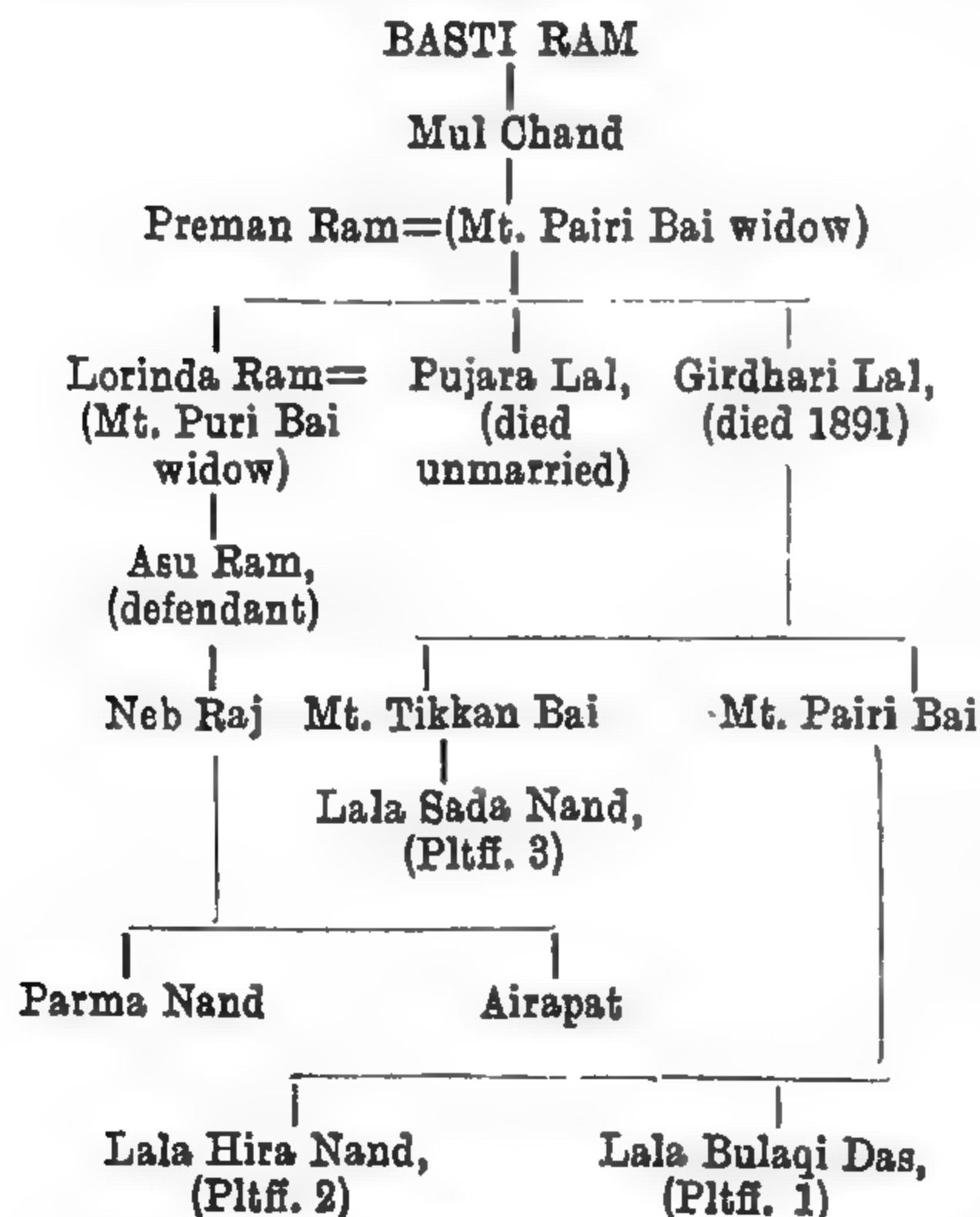
Where the plaintiff obtained a decree against the defendant for the possession of certain property in the possession of the defendant, on the ground that the plaintiff was entitled to it as against the defendant, and the defendant claimed to be compensated by the plaintiff for the improvements effected by him in the property but the defendant did not produce any accounts of the income he derived from the property during the period of his possession and there was nothing on record to show the present value of the improvements effected by him :

Held : that under such circumstances the defendant was not entitled to any compensation for the improvements alleged to be effected by him in the property. [P 504 C 1]

Jagan Nath Aggarwal and Shambu Lal Puri — for Appellant.

Mehr Chand Mahajan, Inder Dev Dua and Yashpal Gandhi — for Respondents.

Jai Lal, J.—This appeal is by Bhai Asu Ram defendant. It is against a decree for possession of property granted against him by the Senior Subordinate Judge of Multan in a suit brought against him by the three respondents Bulaqi Das, Hira Nand and Sada Nand. The following is the pedigree of the parties :



The original owner of the properties in dispute, according to the plaintiffs was Girdhari Lal, who died in 1891 leaving two daughters Mt. Pairi Bai and Mt. Tikkan Bai, and a brother Lorinda Ram.

On his death, Lorinda Ram took possession of the entire property in dispute apparently claiming that he was entitled to it either by survivorship or by inheritance. No claim to it however was preferred in his time by the two daughters of Girdhari Lal, Mt. Pairi Bai and Mt. Tikkan Bai. Mt. Tikkan Bai, the last of the two surviving daughters died on 25th September 1931, and consequently the suit out of which this appeal has arisen was instituted on 26th August 1932, by the sons of Mt. Pairi Bai and Mt. Tikkan Bai. They claimed that the parties, who are Amarpuri Aroras of Multan, are governed by the Hindu law and according to that law, on the death of Girdhari Lal, his two daughters were entitled to inherit his property and on the death of the surviving daughter they, the plaintiffs, are his heirs, that Lorinda Ram had taken illegal possession of the property on the death of Girdhari Lal, and therefore the plaintiffs are entitled to a decree for possession. The property described in the plaint of which possession was claimed consists of six items : (1) one-third share of the land at Maswanwala well, (2) land attached to Nebh Rajwala well, (3) one-half of a house situated in mohalla Amarpurian, inside Delhi Gate, Multan City, (4) one-half of a house situated in mohalla Amarpurian inside Delhi Gate, Multan City, (5) one-half share of a shop with house situated in Sikandrabad, tahsil Shujabad, district Multan, and (6) one-half of a house situated in Sikandrabad. The defendant Asu Ram, who is the son of Lorinda Ram, pleaded that the parties are not governed in matters of succession by the personal law, that is to say, the Hindu law but by custom, according to which married daughters are not entitled to inherit in the presence of collaterals of the fourth degree. He also alleged that the two houses in Multan and the two houses and the shop in Sikandrabad were not owned by Girdhari Lal at all, that is to say, he had no share in them, but that they were owned by Lorinda Ram alone. He also claimed that in case a decree for possession be granted to the plaintiffs, he should be awarded a sum of Rs. 7,000 on account of improvements effected by him to the property in dispute when it was in his possession.

On these questions the parties went to trial and the learned Senior Subordinate Judge has held that they being originally

residents of Multan are governed by the Hindu law and consequently that the plaintiffs are entitled to inherit the property. He has held that the entire property claimed by the plaintiffs belonged to Girdhari Lal and also that the defendant did effect improvements to the property, the value whereof is Rs. 1,050. This improvement consists of the sinking of a well in the year 1912 at a cost of Rs. 800 and repairs effected to the same well in the year 1928 at a cost of Rs. 250. He has, however, declined to award any compensation to the defendant on the main ground that he was a trespasser in possession and is not, therefore, entitled to any compensation. I may mention here that one more plea was taken on behalf of the defendant that the suit was barred by time. This also was decided by the Senior Subordinate Judge against the defendant and it is conceded before us by Mr. Jagan Nath Aggarwal, who appeared for the appellant, that this plea of limitation cannot be sustained. He has not consequently addressed us on the question of limitation and no decision need be given on this aspect of the case. The main controversy before us has centred round the question whether in matters of succession the parties are governed by the Hindu law or by custom propounded by the appellant. A statement of this custom is to be found in Emerson's Customary Law of the Multan District prepared during the settlement of 1924-25. It is stated there *inter alia* that with regard to Aroras who are residents of villages and have adopted the profession and habits of agriculturists, the custom is that in the case of sonless male proprietors collaterals within the fourth degree exclude the married daughters. With regard to the Aroras of the towns, it is expressly stated there that they follow their personal law.

The case for the respondents was that Girdhari Lal and Lorinda Ram and their ancestors resided in Multan, that about 50 years ago Lorinda Ram and probably Girdhari Lal left Multan and settled down in Sikandrabad, which is a village about 13 miles from Multan. It appears from the evidence that Girdhari Lal was a Hakim by profession; Lorinda Ram apparently was a shopkeeper, though the appellant's case is that he used to cultivate land with his own hands when residing at Sikandrabad. The appellant denies that this family ever resided in

Multan and asserts that Sikandrabad is the original home of the family. This, however, cannot be. This is the only family of Amarpuria Aroras residing at Sikandrabad and it is not shown that the village was founded by his ancestors or that they settled in it with its founders. They must therefore have come to live in it at some later date. The defendant has not been able to explain from where his ancestors came to Sikandrabad. On the side of the respondent-plaintiffs nine witnesses have appeared and given evidence that both Girdhari Lal and Lorinda Ram originally resided in Multan in mohalla Amarpurian, where the family owns two houses still. The existence of these two houses in the mohalla is not denied by the appellant, but he claims that he acquired them by purchase. Of this, there is no proof. It is possible that the witnesses for the plaintiffs, when they stated that Girdhari Lal and Lorinda Ram went from Multan to reside in Sikandrabad about 50 years ago, are not quite correct and it may be that they went more than 50 years ago. But this matter, in my opinion, does not affect the question before us.

A very important piece of evidence produced on behalf of the plaintiff is the statement of Roda Ram, a pandah from Hardwar. He has produced his books in which there are entries signed by Lorinda Ram, by Asu Ram, by Asu Ram's sons and his grandsons, in which the family is described as of Multan. This pandah appears to be the purohit at Hardwar of the Amarpuri Aroras, and in the book produced by him are to be found entries relating to Amarpuri Aroras residing in Bahawalpur and other places, whose original home is described to be in Multan and the family of the parties also is mentioned as one of such Amarpuri Aroras. Some of the entries, no doubt, are not in the hand-writing of Roda Ram, but he has deposed that they are in the hand-writing of his father and his uncle. Two of these entries are not the original entries. They have been copied from another book, but the entries are copied by the father and the uncle of Roda Ram, who both are deposed to have died more than 15 years ago. There can, therefore, be no doubt as to the genuineness of these entries. We have examined the originals and have no doubt that the trial Judge has come to the correct conclusion that they are

genuine entries. The reason why these two entries have been copied from another book is that previously when fewer number of men used to visit Hardwar the entries were made in chronological order of all the visitors whether they belonged to one caste or family or not, but when a larger number of persons began to visit the place the pandah found it necessary to have separate entries on separate pages relating to each caste or each family, and in order to start entries in this manner the previous entries relating to this family were copied in a new book in which separate pages were assigned to the Amarpuri Aroras of Multan.

Now Asu Ram was questioned as to the signature of his father Lorinda Ram and his own signature. He professed inability to recognize both on the ground that he had a cataract in his eye. His son and his grandsons were not produced to deny the signatures which were deposed to be theirs. Under these circumstances, in my opinion, these entries must be held to be genuine and to bear the signatures of Lorinda Ram and Asu Ram and his son and his grandsons. They clearly describe the family as belonging to Multan. It must therefore be held that the family belongs to Multan and that for the sake of livelihood or for some other reason Lorinda Ram and Girdhari Lal both began to reside in Sikandrabad, 13 miles from Multan. Their original ancestral home was at Multan and it is in evidence that they still have kept up their connexions with Multan. Marriage ceremonies in the family are celebrated in Multan. It is not therefore the case of Aroras who are residents of a village and who have adopted agricultural habits and customs. On the other hand, the parties still profess to belong to Multan and must be held to be governed by their personal law and not by custom.

In view of this finding, it is unnecessary to discuss the several instances that have been given by the witnesses of the parties and which are summarized at the end of the judgment of the trial Judge, specially as it is conceded by Mr. Jagan Nath Aggarwal that if it be found that the parties are governed by the law applicable to the Arora residents of Multan, then the plaintiffs are entitled to the decree which has been granted to them. His sole contention is that, in the circumstances, it must be held that they were never resi-

dents of Multan and even if they were residents of Multan that they have relinquished all connexions with that place and have adopted all the habits and customs of agriculturists of Multan. It is not necessary also to determine what the custom regarding succession among the Aroras of the Multan District, who have adopted the habits and customs of the agriculturists, is. I would therefore hold that the conclusion of the learned Senior Subordinate Judge that the parties are governed by the personal law is correct, and consequently he has rightly decreed the plaintiffs' suit with regard to the property which was left by Girdhari Lal. Now as I have already stated the appellant claimed that the two houses in Multan were the sole property of Lorinda Ram, but evidence on the record is overwhelming that the two houses in Multan are the ancestral property of Girdhari Lal and Lorinda Ram. It was contended on behalf of Asu Ram that these two houses had been acquired by purchase by his father, but no reliable evidence was pointed out to us to support this assertion. If Lorinda Ram had acquired these houses such evidence would have been available to the appellant but none was produced. In the face of the plaintiffs' evidence given by a large number of witnesses that these are ancestral houses of the family, Girdhari Lal must be held to be an owner of one-half share in them and a decree for that share alone was claimed by the plaintiffs in this case.

The matter of the house with a shop and another house situated at Sikandrabad stands, however, on a different footing. The burden of proving that Girdhari Lal had a share in this property was on the plaintiffs. They have given no evidence. Asu Ram has claimed that there was a partition between Girdhari Lal and Lorinda Ram about 40 years ago and this statement is supported by the evidence of Thakar Das, a witness for the plaintiffs. It cannot therefore be assumed and indeed it is not asserted by either party that Girdhari Lal and Lorinda Ram were members of a joint Hindu family when Girdhari Lal died. On the other hand, there is evidence to show that Lorinda Ram lived in Sikandrabad in his own house and Girdhari Lal lived at the Maswanwala well. He subsequently went to Sikandrabad and lived in a hired house. If he was a joint owner in the house

occupied by Lorinda Ram, it does not stand to reason why he should hire a house for his own residence in Sikandrabad. Not only therefore there is no proof that Girdhari Lal and Lorinda Ram acquired property jointly at Sikandrabad, on the other hand, circumstances negative any inference that Girdhari Lal was a co-owner with Lorinda Ram in the houses and the shop in dispute. This leaves the question of improvement.

I have already stated that the appellant's claim is that he spent Rs. 800 on sinking a well in the year 1912. It appears that in 1928 he effected repairs to this well, it is alleged, at a cost of Rs. 250. But it is clear that at that time he got concessions from the revenue authorities in the form of remission of land revenue on account of the repairs on the well and since the repairs have been done, he has used the well for about eight years. It must also be remembered that ever since the death of Girdhari Lal, Lorinda Ram and after the death of Lorinda Ram Asu Ram has been realizing the income of the entire property in dispute. No accounts of the income so derived have been rendered and there is no proof on the record as to the present value of the improvements alleged to have been effected by Lorinda Ram. The burden was on him to establish this. In the absence of any such proof and having regard to all the circumstances, in my opinion, the learned Senior Subordinate Judge has rightly declined to award anything to the appellant on account of the improvements.

The consequence of the above discussion is that, in my opinion, this appeal should be accepted only to the extent that the decree of the Senior Subordinate Judge with regard to the house with shop and the second house situated at Sikandrabad must be set aside and the rest of the decree must be affirmed. I would order accordingly. The appellant shall pay half the costs of the respondents throughout.

Abdul Rashid, J.—I agree.

W.D./A.L.

Order accordingly.

A. I. R. 1937 Lahore 504

ADDISON AND DIN MOHAMMAD, JJ.

Kidar Nath and others — Defendants—Appellants.

v.

Bagh Singh, Plaintiff and others,
Vendors—Defendants—Respondents.

First Appeal No. 73 of 1936, Decided on 9th October 1936, from decree of Addl. Dist. Judge, Ferozepore, D/- 31st January 1936.

(a) Punjab Pre-emption Act (1 of 1913), Ss. 4 and 14—Sale of agricultural land by member of agricultural tribe — Vendees although proprietors in the estate not members of agricultural tribe—Member of alienor's tribe has preferential right of pre-emption to that of vendees.

A member of an alienor's tribe has a preferential right, in respect of a sale of agricultural land by a member of an agricultural tribe, to that of vendee, who, though a proprietor in the estate, is not a member of an agricultural tribe. Right of pre-emption is primarily and essentially a right of priority to buy and such right under such circumstances is conferred by law on a member of the agricultural tribe only and not upon a mere agriculturist or proprietor in the estate: 101 P R 1907 and 23 P R 1908, *Rel. on.* [P 505 C 2; P 506 C 1]

(b) Interpretation of Statutes — Duty of Courts—Courts have to administer law as they find it—They are not concerned with policy of administration or effect of particular legislation on any section of society.

The Judges, sitting as Courts of law, are not concerned with the policy of administration nor with the effect of a piece of legislation on any section of the society. They have to administer the law as they find it and they cannot twist the language of any enactment to avoid any real or imaginary hardships in which it may result. [P 506 C 1]

(c) Pre-emption—Suit for—To deprive person of right of pre-emption, there must be clear and cogent evidence justifying that course—Mere oral statements by few witnesses showing that pre-emptor had knowledge of sale do not prove relinquishment of right by him.

To deprive a person of any legal right that he possesses, there must be clear and cogent evidence on record justifying that course. [P 506 C 1]

In a suit for pre-emption, the mere oral statements of a few witnesses deposing to certain circumstances from which it may be possible to infer that the prospective pre-emptor had knowledge of the sale would not be enough to prove that he had positively relinquished the enforcement of his right. [P 506 C 1]

Badri Das, Achhru Ram and Inder Dev Dua — for Appellants.

Mehr Chand Mahajan and Dev Raj Sawhney — for Respondents.

Din Mohammad, J.—On 22nd February 1933, Kartar Singh and Gulzar Singh,

Jats of Mouza Moga Mehla Singh, sold 22 kanals and 11½ marlas of land to Kidar Nath, Shiv Dat Rai and Rameshar Das, Aggarwals of the same place, for Rs. 2,428. On 20th February 1934, Bagh Singh another Jat proprietor of the same mouza, instituted a suit for possession by pre-emption of the land on the ground that he being a member of an agricultural tribe had a preferential right over the vendees who were non-agriculturist Mahajans. He challenged the price also but with that aspect of the case we are not concerned in this appeal. The vendees raised various pleas. Among other grounds, it was contended that the plaintiff's right of pre-emption was not superior to that of the vendees, inasmuch as they were also khewatdars in the village, that the plaintiff had waived his right, that the plaintiff's conduct barred the present suit and that the vendees had effected improvements to the value of Rs. 2,900. They further added that the land had been purchased for charitable purposes and that that fact also operated as a bar to the present suit. The trial Judge framed the following issues:

(1) Whether the plaintiff has a right of pre-emption as against the vendees? (2) Whether the sum of Rs. 300 in dispute was actually paid? (3) What is the market value of the land in suit? (4) Whether the plaintiff has lost his right to sue? (5) Whether any improvements have been made and whether the defendants are entitled to claim the cost of those improvements? If so, what is the cost of the improvements? (6) Whether the purchase was made for building a dharamsala and hence no suit for pre-emption is competent?

Issues 2 and 3 were given up by the plaintiff and hence they were decided against him. On issue 1 the finding of the trial Judge was that the right of the plaintiff was superior to that of the vendees. On issue 4 the trial Judge came to the conclusion that waiver had not been established. So far as improvements were concerned, a sum of Rs. 2,186 was allowed to the vendees. The balance of Rs. 314 was disallowed, which was claimed as the price of some parallel and horizontal bars fixed in the ground, as well as of a few benches that were placed there, a hand pump that was put up there for drawing drinking water and a few fruit trees that had been planted there. Issue 6 was also decided against the vendees, inasmuch as S. 5, Pre-emption Act, was held inapplicable to the case. The vendees have appealed. The main contentions raised on behalf of the vendees before us

are that they can resist the plaintiff's right of pre-emption and that the plaintiff had waived his right, if any. We take up first the question whether the plaintiff could under the law oust the vendees. The plaintiff relies on S. 14, Pre-emption Act, which reads as follows:

No person other than a person who was at the date of sale a member of an agricultural tribe in the same group of agricultural tribes as the vendor shall have a right of pre-emption in respect of agricultural land sold by a member of an agricultural tribe.

The plain language of the section clearly helps the plaintiff; but counsel for the appellants has contended that this section does not debar the vendees from resisting the plaintiff's claim on the ground that they are proprietors in the estate and thus claim an equal right with the pre-emptor. He has urged that the section is intended to apply to pre-emptors who appear in Court as plaintiffs and not to the vendees who are impleaded as defendants. This is obviously wrong. So long ago as 1907 this question was exhaustively discussed by a Division Bench of the Punjab Chief Court with reference to S. 11 of the old Pre-emption Act, and it was laid down that a member of the alienor's tribe had a preferential right of pre-emption in respect of a sale of agricultural land by a member of an agricultural tribe to that of a vendee who, though an agriculturist, was not a member of an agricultural tribe: see 101 P R 1907.¹ In the course of their judgment the learned Judges observed as follows:

It is true that the Punjab Alienation of Land Act justified a sale in favour of an agriculturist by a member of an agricultural tribe, and the sale therefore in the present case by a vendor to a vendee who is an agriculturist is legal and valid. But a right of pre-emption is primarily and essentially a right of priority to buy, and such right, under such circumstances, is conferred by law on a member of the agricultural tribe only and not upon a mere agriculturist. A right of pre-emption is a legal right such as need not be exercised at all. If therefore no suit to enforce the right were instituted, the vendee would be competent to retain his sale. But if a member of the agricultural tribe elects to exercise his prior right to buy, the law says he shall be entitled to exercise it.

The same principle was re-affirmed by another Division Bench of the Punjab Chief Court in 23 P R 1908.² We are in complete accord with the principle enunciated above. By S. 4, Pre-emption Act³

1. Mahmud v. Nur Ahmad, (1907) 101 P R 1907 = 174 P L R 1908.

2. Thakur Das v. Sahawa Singh, (1908) 23 P R 1908 = 123 P L R 1908.

the right of pre-emption is said to mean "the right of a person to acquire agricultural land.....in preference to other persons" and if a man vested with this right chooses to exercise it, the vendee who has already purchased the land cannot obviously resist it if his right is not on a par with the right of the person claiming the land. Counsel for the appellants has urged that this interpretation of S. 14 will work hardship on the non-agriculturists in certain cases, but sitting here as a Court of law we are not concerned with the policy of the administration, nor with the effect of a piece of legislation on any section of the society. We have to administer the law as we find it and we cannot twist the clear language of any enactment to avoid the real or imaginary hardships in which it may result. The plaintiff being a member of the same agricultural tribe as the vendors could under the law deprive the vendees (who are non-agriculturists) of the agricultural land they had purchased and if he elects so to do, no Court can stand in his way.

There now remains the question of waiver to be considered. In this respect the vendees have led evidence to show that the plaintiff had taken an active part in the negotiations relating to this sale, that he had sold some bricks which were used in the construction of a well sunk in this ground and that he had watched the construction of the buildings that had been raised on the land without any objection or protest and consequently he had abandoned his right and was even otherwise estopped from enforcing it. We have examined the evidence on this point but are not satisfied that the vendees have successfully established either waiver or estoppel. To deprive a person of any legal right that he possesses, there must be clear and cogent evidence on the record justifying that course and the mere oral statements of a few witnesses deposing to certain circumstances from which it may be possible to infer that the prospective pre-emptor had knowledge of the sale, would not be enough to prove that he had positively relinquished the enforcement of his right. In the end counsel half-heartedly claimed the amount of Rs. 314 which has been disallowed by the trial Judge from the cost of the improvements effected by the vendees on the land in suit. We are, however, not prepared to hold that the judgment of the trial Judge was

wrong on this point. We accordingly dismiss the appeal with costs. The plaintiff has also submitted cross-objections but they are not pressed. We dismiss them but make no order as to costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1937 Lahore 506**

SKEMP, J.

Sidhu Ram and others, Decree-holders
— Appellants.

v.

Nur Mohammad and others —
Judgment-debtors — Respondents.

First Appeal No. 193 of 1936, Decided on 5th February 1937, from order of Dist. Judge, Dera Ghazi Khan, D/- 29th June 1936.

Punjab Debtors' Protection Act (2 of 1936), Ss. 4 and 5—Generally Act governing procedure has retrospective effect—Ss. 4 and 5 relate to procedure and govern pending cases—Appeal in execution pending when Act came into force is governed by Ss. 4 and 5, as it is continuation of pending execution.

The general rule is that an Act governing procedure has retrospective effect. [P 507 C 1]

Sections 4 and 5, Punjab Debtors' Protection Act relate to procedure and govern pending cases. An appeal in execution proceedings pending at the time when the Act came into force is also governed by Ss. 4 and 5 of the Act inasmuch as the appeal is to be regarded as a continuation of the pending execution: *A I R 1937 Lah 52, Foll.*; *A I R 1916 Lah 146, Rel. on.* [P 507 C 1]

Hazara Singh — for Appellants.

Sayed Mohsin Shah — for Respondents.

Judgment.—The facts material to the present appeal are that in execution of a money decree against members of a notified agricultural tribe the decree-holders obtained a temporary alienation of the judgment debtors' land for a period of 20 years. The judgment-debtors appealed to the District Judge urging that all their land had been subjected to mustajari except about 40 kanals which was not cultivable. After the appeal was instituted, but before it was heard, the Punjab Debtors' Protection Act, 2 of 1936 came into force. This Act provides that whenever a Court orders that land be attached and alienated temporarily in the execution of such a decree the proceedings should be transferred to the Collector (S. 4) who shall exempt such portion as is sufficient to provide for the maintenance of the judgment-debtor and the members of his family (S. 5).

The District Judge accepted the judgment-debtors' contention that the new Act ought to govern matters even at the appellate stage and remanded the case for compliance with S. 5. The decree-holders have appealed against this order through Sardar Hazara Singh. Admittedly the general rule is that an Act governing procedure has retrospective effect; and in A I R 1937 Lah 52,¹ Bhide, J. has held that this Act has retrospective effect. This was in a case where the lower Courts had held that the Jat judgment-debtor's land was not sufficient for the maintenance of himself and his family and had refused to execute the decree against the land. Sardar Hazara Singh seeks to distinguish this case on the grounds that here the temporary alienation had already been effected: that the decree-holders have therefore obtained a vested right; and that the Act which does not specifically provide for retrospective effect in this respect ought not to have retrospective effect against such a vested right. He cited a number of rulings which however in my opinion can be distinguished. I notice that in one of them, 88 P R 1916,² it was held that the new Punjab Courts Act had retrospective effect with regard to the period of limitation of appeals.

I respectfully agree with the argument of Bhide, J. in A I R 1937 Lah 52,¹ that Ss. 4 and 5 relate to procedure and will govern pending cases. This appeal is to be regarded as a continuation of the pending execution. I therefore reject this appeal, but in the circumstances direct the parties to bear their own costs.

W.D./A.L.

Appeal dismissed.

1. Bishen Chand v. Bakhshish Singh, A I R 1937 Lah 52=39 P L R 109.

2. Asa Ram v. Budhu Mal, A I R 1916 Lah 146=35 I C 67=88 P R 1916=132 P L R 1916.

*** A. I. R. 1937 Lahore 507**

COLDSTREAM AND BHIDE, JJ.

Mr. Robert Hercules Skinner — Defendant—Appellant.

v.

Bank of Upper India Ltd., Plaintiff and *others*, Defendants — Respondents.

First Appeals No. 71 of 1931 and 755 of 1932, Decided on 11th November 1936.

(a) Interpretation of Statutes — Positive enactment of Indian Legislature on any sub-

ject — Its interpretation should not be influenced by English law on that subject.

When there is a positive enactment of the Indian Legislature on any subject, the proper course is to examine its language and ascertain its proper meaning, uninfluenced by any considerations of the English law on the subject: A I R 1928 P C 2, *Foll.* [P 510 C 2]

(b) Interpretation of Statutes—Enactment should be construed according to its plain meaning — Court cannot import additional words to remove possible hardship.

It is a cardinal rule of interpretation of statutes that an enactment ought to be construed according to its plain language and it is not for the Court to speculate as regards the intention of the Legislature or to import into the enactment words which do not exist there, in order to remove possible or supposed hardship. [P 510 C 2]

* (c) Limitation—Acknowledgment — Suit to enforce payment of money charged on immoveable property — Acknowledgment by mortgagor after sale of equity of redemption—Acknowledgment is binding on transferee and saves limitation.

A mortgagor is personally liable even if he has parted with the equity of redemption and it is therefore against his interest to extend the period of his liability. This being so, the acknowledgment made by the mortgagor after the sale of equity of redemption to a third person is binding on the transferee and saves limitation for a suit to enforce payment of money charged on the immoveable property: *Case law reviewed.*

[P 512 C 1,2]

Shamair Chand, J. L. Kapur, Parkash Chand and Yashpal — for Appellant.

Muhammd Amin Khan, Muhammad Din Jan and Sham Lal — for Respondents.

Bhide, J.—This judgment will dispose of the connected appeals, Regular First Appeals Nos. 71 of 1931 and 755 of 1932 which are from a preliminary and final decree in a suit on the basis of a mortgage. The pedigree table of the parties concerned in these appeals is attached to this judgment as appendix A*. It may be mentioned here that one branch of the family has become Mahomedan and members of this branch have been known by Muslim as well as Christian names.

On 7th May 1910 two brothers named Thomas Skinner (defendant 1) alias Sultan Mirza and Robert Skinner alias Sardar Mirza (who is now dead and is represented by defendants 2 and 3) mortgaged a $\frac{1}{2}$ share in the village Siswal in the Hissar District in favour of the Bank of Upper India (now in liquidation) for a sum of Rs. 40,000: *vide* Ex. P-11. The mortgage was a simple one and carried interest at 7 per cent. per annum, which was to be

* [Pedigree not given as being not necessary for purposes of this report.—*Ed.*]

either paid, or calculated and added to the principal every six months. The whole amount was to be repaid in four years in half-yearly instalments of not less than Rs. 5,000 each, commencing from 7th November 1910, i. e., by 7th May 1914. In default of payment of any instalment or breach of any other condition of the mortgage, the whole amount was to become due and payable at once.

On 30th May 1914, the mortgagors along with another co-sharer named George Skinner agreed to sell the above-mentioned half share in the village Siswal along with their land in certain other villages to Robert Hercules Skinner, defendant 4, for a sum of Rs. 4,23,000 : *vide* Ex. P-16. According to the terms of this agreement Rs. 5,000 was to be paid by way of earnest money. A sum of Rupees one lakh was to be paid into the Bank of Upper India on or before 18th June 1914 by the vendee and in default of such payment the sale was to become null and void. The vendee was also to arrange for the payment of the balance by transfer of accounts in the Bank of Upper India. The earnest money and the sum of one lakh were duly paid, but the balance was not paid. Possession of the property was however given to the vendee in pursuance of this agreement and mutation was also effected in his favour in spite of the objections of the vendors on 24th January 1915 : *vide* Ex. P-15. Intimation about the agreement of sale was given to the Bank of Upper India by the mortgagors on 5th June 1914.

Admittedly the mortgagors failed to pay the instalments as stipulated in the mortgage deed and the whole amount had become payable with interest on 7th May 1914. As the vendee (Mr. R. H. Skinner, the present appellant) failed to pay the balance of the purchase money, the vendors sued him for 'specific performance' of the agreement to pay the balance of Rs. 3,16,200 on the basis of the agreement of sale dated 30th May 1914. This suit (which is referred to as Suit No. 97 of 1918) was decreed on 9th June 1918, and the decree was affirmed on appeal by this Court on 26th November 1923. The vendee appealed to their Lordships of the Privy Council and they modified the decree of the trial Court so as to make it run as follows : That the appellant do pay to the respondents a sum by way of damages made up of Rs. 3,16,200 with interest at

7 per cent. per annum from 18th June 1914 until the date of payment, together with costs, and that except as to the payment of the said costs, execution ought to be stayed for six calendar months and if within that time without prejudice to any right that he may have to specific relief under Cl. 5 of the agreement dated 30th May 1914, after so doing, the appellant shall pay to the Bank of Upper India or their assigns, the said sum to be credited by them rateably in reduction of the principal and interest, the stay ought to be made permanent ; but otherwise execution ought to issue. This decree was passed on 16th December 1927, and the decision of their Lordships is reported in A I R 1928 P C 51.¹

In the meantime the Bank of Upper India had gone into liquidation on 16th July 1917 and Messrs. H. Hunter and C. H. Stuart had been appointed as liquidators with joint and several powers. At the time of liquidation the liquidators were authorized to enter into an agreement with the Trust of India Ltd., Simla, for the sale of the assets of the said Bank and accordingly an agreement for the sale of the assets was entered into on 16th July 1917. The Trust of India also went into liquidation on 2nd January 1923 and Mr. Damodardas and Mr. H. Hunter, were appointed its liquidators with joint and several powers. On 27th June 1927 Mr. H. Hunter, as liquidator of the Bank of Upper India and the Trust of India, instituted a suit for recovery of Rupees 1,29,435-0-9 against the mortgagors and their representatives-in-interest by the sale of the property mortgaged by Thomas Skinner and Robert Skinner in favour of the Bank on 7th May 1910. This suit (No. 47 of 1927) was contested by the principal defendant, Mr. R. H. Skinner, on various grounds, but was eventually decreed. A preliminary decree was passed on 27th August 1930 and was followed by a final decree for sale on 24th March 1932. From these decrees two appeals have been preferred, viz., Civil Appeals 71 of 1931 and 755 of 1932, by Mr. R. H. Skinner. A preliminary objection was raised in these appeals that the appeals were not properly instituted as the decree was amended after the institution of the appeal and no copy of the amended decree was filed by

1. Skinner v. Skinner, A I R 1928 P C 51=108 I C 350 (P C).

the appellant. There is no force in this objection, as the amendment was of a formal character and merely brought the decree into conformity with the judgment, so far as the right to a personal decree was concerned. The learned counsel for the appellant stated that he was not contesting at all the part of the decree which was thus varied and which made the appellant personally liable. In the circumstances the preliminary objection was overruled.

On the merits the learned counsel for the appellant confined himself to two points, viz., the *locus standi* of the Bank of Upper India to institute this suit and the question of limitation. As regards the first point, it was urged that the Bank, having sold all its assets to the Trust of India, Simla, before the institution of this suit had no *locus standi* to maintain it. It appears however that the Bank had only entered into an agreement for the sale of its assets. No deed of sale was executed. The Bank had its headquarters at Meerut and a sale of its assets could only be effected by a registered document, as the Transfer of Property Act is in force in the United Provinces in which Meerut is situated. The Trust of India was joined as plaintiff only as an interested party. Similarly Mr. Ashworth, liquidator of the Alliance Bank of Simla, was also made plaintiff, as an interested party, on an objection raised by the defendants during the pendency of the suit; for the Trust of India had issued debentures worth Rs. 50 lacs in favour of the Alliance Bank of Simla and these covered the assets of the Bank of Upper India which were to be transferred to the Trust of India. In my judgment the learned Subordinate Judge was right in holding that the liquidator of the Bank of Upper India had a *locus standi* to sue in the circumstances in spite of the agreement to sell the assets of the Bank, as the assets had not yet been legally transferred to the Trust of India. A similar question was raised as regards the status of this very Bank on the same facts in A I R 1935 P C 108,² and their Lordships of the Privy Council held that the Bank had a *locus standi* to sue.

I now pass on to the issue of limitation which was the main question agitated in

these appeals. It has been already mentioned above that the mortgage money became payable on 7th May 1914, while the suit giving rise to these appeals was not instituted till 27th June 1927. The suit being admittedly governed by the twelve years' limitation prescribed in Art. 132, Limitation Act, was *prima facie* barred by time; but the plaintiffs sought to bring it within limitation by claiming extension of time under S. 19, Limitation Act, on the basis of certain acknowledgments specified in para. 17 of the plaint. The learned Subordinate Judge has held the suit to be within time on the strength of one of these acknowledgments, viz., the one dated 10th March 1916, which is marked as Ex. P-10. The learned counsel for the appellant challenged the correctness of this finding. He contended firstly that the 'acknowledgment' in question was not genuine and was not proved by any reliable evidence and secondly that the 'acknowledgment' having been made by the mortgagors after they had sold the property to the appellant, could not avail to extend time under S. 19, Limitation Act. As regards the first point, the learned Senior Subordinate Judge has discussed the evidence relating to Ex. P-10 and I see no reason whatever to differ from his finding that the acknowledgment is genuine. The signatures of Thomas Skinner and Robert Skinner on Ex. P-10 have been proved by the evidence of Mr. H. K. Mukerjee, A. C. Banerjee and Lachman Prasad (P. Ws. 6, 7 and 8) which there is no good reason to disbelieve. The signatures appear to tally in most respects with those on Ex. P-9, the genuineness of which was not disputed. The main contention of the appellant was that the signatures on Ex. P-10 do not include the Muslim 'aliases' of the signatories; but even the widow of Robert Skinner (D. W. 4) admitted that the mortgagors did not always write their aliases when signing. The appellant himself had not the courage to deny the genuineness of the signatures when he was examined and merely contented himself with saying that he could not say whether the signatures were genuine or not. Lastly, it is significant that the appellant was not able to produce any evidence in rebuttal on this point. In view of all these facts I feel no hesitation in agreeing with the finding of the learned Subordinate Judge.

² Fanny Skinner v. Bank of Upper India Ltd., A I R 1935 P C 108=155 I O 743=62 I A 115=57 All 314 (P.O.).

As regards the second point, viz., the sufficiency of the acknowledgment for extension of time under S. 19, Limitation Act, the learned counsel relied chiefly on the judgment of Mukerjee, J. in 1 C L J 337,³ A I R 1925 Mad 1108⁴ and a recent decision of the Allahabad High Court reported in A I R 1936 All 636,⁵ which was followed by the Allahabad High Court in certain similar suits against the appellant arising out of the same transactions, which were tried in the United Provinces and were eventually dismissed as time-barred. The learned counsel for the respondents on the other hand relied on 32 Cal 1077⁶ (which was followed by the Calcutta High Court in 33 Cal 1278⁷) and 22 I C 510,⁸ 55 Mad 758,⁹ A I R 1935 Mad 899,¹⁰ A I R 1930 Oudh 56,¹¹ A I R 1932 Oudh 314¹² and 51 I C 829.¹³ The judgment of Mukerjee, J. on which the learned counsel for the appellant laid great stress is based chiefly on certain English decisions and considerations regarding the hardship likely to result if the acknowledgment of a person who has parted with his property is held to be binding on his transferee. The learned Judge also supports his view from the analogy of S. 11, Civil P. C. The analogy of the latter section is not very helpful as the two cases do not stand on the same footing as pointed out in A I R 1932 Oudh 1¹⁴ at p. 5. As regards English decisions it is conceded that the English Statutes are not in the same terms as S. 19, Limitation Act, and as pointed out by their Lordships of the Privy Council in A I R

1928 P C 2,¹⁵ when there is a positive enactment of the Indian Legislature on any subject, the proper course is to examine its language and ascertain its proper meaning, uninfluenced by any considerations of the English law on the subject. Now, the wording of S. 19, Limitation Act, so far as it is relevant for the purposes of the present case, is as follows:

Where before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

It will appear from the above that there is nothing in the wording of the section to support the contention that where the acknowledgment is made by a person from whom the defendant derives his title it must have been made before the transfer of the title. It is a cardinal rule of interpretation of statutes that an enactment ought to be construed according to its plain language and it is not for the Court to speculate as regards the intention of the Legislature or to import into the enactment words which do not exist there, in order to remove possible or supposed hardship. This was the view taken in the Calcutta and Madras cases relied on by the learned counsel for the respondents. It is true that the Calcutta cases relate mostly to S. 20, Limitation Act, which is differently worded. But S. 19 also was relied on in 32 Cal 1077⁶ and the learned Judges (Sir Francis Mac-lin, C. J. and Mitra, J.) held, in view of the precise language of the section, that an acknowledgment made by a mortgagor even after the sale of his equity of redemption was sufficient to save the limitation. This view appears to have been consistently taken in Madras except in A I R 1925 Mad 1108.⁴ The latter case was not followed in A I R 1935 Mad 899,¹⁰ in which the case law, including some English decisions, was fully considered and 32 Cal 1077⁶ was followed. The Chief Court of Oudh has also taken a similar view in two recent decisions reported in A I R 1930 Oudh 56¹¹ and A I R 1932 Oudh 314.¹² In 51 I C 829,¹³ a Division Bench of the Allahabad High Court, consisting of Walsh and Stuart, JJ. took the same view, but this case was dissented from by another

15. *Mt. Ramanandi v. Mt. Kalawati*, A I R 1928 P C 2=107 I C 14=55 I A 18=7 Pat 221(P.O).

3. *Surji Ram v. Barhamdeo Prasad*, (1905) 1 C L J 337.

4. *Yagnanarayana v. Venkata Krishna Rao*, A I R 1925 Mad 1108=86 I C 434.

5. *Ram Sarup v. Sahu Bhagwati*, A I R 1936 All 636=164 I C 725=1936 A L J 586=58 All 912.

6. *Krishna Chandra Saha v. Bhairab Chandra Saha*, (1905) 32 Cal 1077=9 O W N 868.

7. *Domi Lal Sahu v. Roshan Dubey*, (1906) 33 Cal 1278=11 O W N 107.

8. *Hem Chandra v. Purna Chandra*, A I R 1915 Cal 5=22 I C 510.

9. *Muthu Chettyar v. Muthuswami*, A I R 1932 Mad 516=55 Mad 758=63 M L J 111.

10. *K. M. Narayana v. N. Venkataramana Patnaik*, A I R 1935 Mad 899=161 I C 924.

11. *Nigah Ali v. Agilullah*, A I R 1930 Oudh 56=124 I C 435=5 Luck 444=6 O W N 1068.

12. *Ram Sahai v. Kunwar Sah*, A I R 1932 Oudh 314=139 I C 626=7 Luck 26=8 O W N 522.

13. *Arbindakeb Rai v. Jageshar Rai*, A I R 1919 All 242=51 I C 829=17 A L J 763.

14. *Amir Mirza v. Lachhmi*, A I R 1932 Oudh 1=138 I C 800=7 Luck 270=8 O W N 1160.

Division Bench consisting of Suleman, C. J. and Bennet, J. in A I R 1936 All 636.⁵ In the latter ruling it was pointed out that there was a difference in the wording of Ss. 19 and 20, and it was held, following another ruling of the Allahabad High Court reported in 41 All 111,¹⁶ and certain English decisions (some of which were also relied on in 1 C L J 337³) that an acknowledgment given by a mortgagor did not bind a subsequent transferee unless it was given before the transfer in favour of the latter. As regards 41 All 111,¹⁶ it may be mentioned that that case was a case of 'payment' and not of 'acknowledgment' and the remarks on the question of 'acknowledgment' therein are no more than *obiter dicta*. One of the Judges who was a party to that ruling was also a party to a later ruling reported in 51 I C 829,¹³ which was a case of an 'acknowledgment' and which supports the respondents in this case. It is true that the question is not discussed at length therein, but the learned Judges have given their reasons for not doing so.

As regards the English decisions, I have already pointed out that they are not really relevant as we are concerned here with the interpretation of an Indian Statute, while the English decisions are based on Statutes, the language of which is different to that of S. 19, Limitation Act. The English Statutes as well as the decisions based thereon were fully discussed in A I R 1932 Oudh 1,¹⁴ and the learned Judges stated their conclusion as follows:

Thus it seems to us that there is no complete harmony in the English decisions on the subject. The decisions are based upon the construction of statutes, the language of which is not identical with the language of S. 19, Limitation Act. They do not embody any general principle which can be regarded as of universal application. It has also to be borne in mind that there is a fundamental difference in the theory of acknowledgment according to the law in India as compared with the law of England. In England the acknowledgments or part payments in order to be effective must be such as to amount to a fresh promise to pay. Under the Indian law no promise to pay either express or implied is required. We are therefore of opinion that the English authorities cannot afford any guidance in determining the question, which must be decided on the proper construction of the provisions of the Indian Limitation Act.

The learned Judges of the Allahabad High Court who decided the case reported

in A I R 1936 All 636,⁵ have laid stress on the difference in the language of S. 19 and S. 20, but so far as I can see, the difference throws little light on the question of interpretation with which we are concerned. The words 'or by some person through whom he derives his title or liability' do not occur at all in S. 20. The main point for decision in the case before us is the interpretation to be placed on these words. In the case of a 'payment' by a mortgagor it is conceded that it does serve to extend the period of limitation against transferees even when the payment is made after the transfer. There seems to be no adequate reason in the circumstances why the same principle should not govern an 'acknowledgment' also. It was urged that 'payment' stands on a different footing from a mere 'acknowledgment', as the latter might be made fraudulently. But if there is a possibility of a collusive 'acknowledgment', there is also a possibility of a collusive 'payment'. For, a mortgagor might be induced to make small payments fictitiously or fraudulently. But it is really unnecessary to go into the question of fraud; for if an acknowledgment is not genuine it may possibly be ruled out of the purview of S. 19 for that reason as pointed out in 51 I C 829.¹³ Otherwise, an 'acknowledgment' is also against the interest of the mortgagor as it extends the period of his liability and there is, therefore, no reason why it should not serve to extend the period of limitation against a mortgagee in the same way and for the same reason as a payment falling within the scope of S. 20. Of course, an 'acknowledgment' of liability implies that the person who makes the acknowledgment is still liable and it is only to such cases that the section, I suppose, applies.

In 11 H L C 115,¹⁷ a case decided by the House of Lords in 1864, in which it was held that payment by a mortgagor to a mortgagee serves to extend time as against a purchaser of the equity of redemption of the mortgaged properties, a question having been raised as to whether a payment even by a stranger would serve to extend time, Lord Westbury remarked as follows:

It was said in argument, that if such an interpretation be given to the statute, it would be possible for a stranger to pay the interest to the

16. *Raushan Lal v. Kanhaiya* A I R 1918 All 61 = 47 I C 845 = 16 A L J 790 = 41 All 111.

17. *Chinnery v. Evans*, (1864) 11 H L C 115 = 4 N R 520 = 10 Jur (N S) 855 = 11 L T 68.

mortgagee, and thereby to keep alive the mortgage. It is hardly necessary to deal with such an improbable case as that; but the answer to it, I think, would be this: that money paid, that is money handed over, by a stranger to the contract under which it was paid, to the individual entitled to receive it, would not have the characteristics and the legal quality of payment. It would be a voluntary render; a gift or donation being made by a party not in any respect subject to liability, to the individual who would not be entitled to receive from the person so rendering it any part of the money which it is supposed would be paid.

The same remarks would apply to an acknowledgment if it is made by a person who is not himself liable. It would not have the 'legal quality' of acknowledgment. The learned Judges who decided the Calcutta case reported in 32 Cal 1077⁶ at p. 1081 held that the principle to be deduced from *Chinnery v. Evans*¹⁷ was that:

A mortgagee cannot, by the act of parties entitled only to the equity of redemption, be deprived of his right to resort to any estate comprised in his mortgage, so long as he has not released or given it up and so long as that mortgage is legally kept alive.

In the present instance the suit was to enforce payment of money charged on immoveable property (cf. Art. 132, Lim. Act) and the acknowledgment was by persons who were still liable for the payment. It is true that the mortgagors had parted with the security, but it must be remembered that a mortgagor is personally liable even if he has parted with the equity of redemption and it is therefore against his interests to extend the period of his liability; for if the discharge is delayed, the interest goes on accumulating and there is risk of his being held personally liable for a larger sum. The liability of the transferee on the other hand is confined to the secured property and he incurs no greater risk by the extension of time. The appellant in this case admittedly knew of the existence of the encumbrance when he purchased the property and he must be taken to have accepted it with all the incidents attached to it. In fact he had to pay the money required to redeem the prior mortgages. If an acknowledgment gives more time to the mortgagee to sue, it also gives more time to the mortgagor and the purchaser of the equity of redemption to redeem the property. As remarked by the learned Judges in A I R 1935 Mad 899¹⁰ at p. 901, col. 1:

The subsequent purchaser or encumbrancer who knows the existence of a mortgage ought also to know the possibility of the mortgage being kept

alive by acknowledgment or payment and as he purchased only the equity of redemption it cannot be said that he is disappointed. He gets what he bargained for. He has no right to expect that the mortgage would become barred and he can make a profit in the transaction.

It will thus appear that there is little to be said in favour of the appellant even on grounds of 'equity' (if they are relevant at all) on which stress was laid down by the learned counsel for the appellant. Indeed in the present instance, the whole litigation was due to the failure of the appellant himself to pay up, as he was bound to do, the balance of the mortgage money consisting of over three lacs which was to be utilized in paying up the prior encumbrances. It was in the year 1905 that the case reported in 32 Cal 1077⁶ referred to above which was followed in several subsequent rulings was decided. That case did not merely refer to a payment but also to an acknowledgment as has been pointed out already. 1 C L J 337³ which was decided in the same year, was cited in arguments before the learned Judges who decided 32 Cal 1077⁶ but they did not follow or refer to it. The opinion of Mukerjee, J. in 1 C L J 337³ was apparently not shared by his learned colleague Harrington, J., though he did not express his views on the point very definitely. The Limitation Act was amended in 1908, but the Legislature did not amend the wording of S. 19 and it has not thought it necessary to intervene up till now, although the view expressed in 32 Cal 1077⁶ has been followed in a number of subsequent rulings as stated above. The question is by no means free from difficulty but after a careful consideration of the wording of S. 19 and the decisions cited, I see no reason in the circumstances of the case to dissent from the view taken by the learned Subordinate Judge, which appears to be supported by the weight of authority.

Before concluding, I may mention one more point which was raised by the learned counsel on behalf of the plaintiff-respondent. It was urged by him that the sale was not completed in favour of the appellant by execution of a sale deed and the appellant's position was no better than that of a trespasser. It was therefore urged that he could not raise the question of limitation at all, as even his 'adverse possession' could not avail against the Bank, who was a simple mortgagee and was not entitled to immediate posses-

sion. Reliance was placed in support of the latter contention on 39 Mad 811.¹⁸ As regards this argument it will suffice to say that the contention that the sale was never completed and that the status of the appellant was no better than that of a trespasser was never taken up in the Court below. In para. 5 of the plaint it was clearly recited that on 30th May 1914 the property in dispute in the present case along with certain other properties was agreed to be sold to the appellant and that 'accordingly mutation was effected in favour of defendant 4 and possession of Siswal as well as of the other villages was given to him'. The following paragraphs recite further that defendant 4, i. e., the appellant R. H. Skinner, had sold portions of the property to other persons who were joined as defendants. There is no suggestion in the plaint at all that the sales in favour of the appellant or his transferees were incomplete or void. There was therefore no issue on the point and the plaintiff-respondent cannot be allowed to set up a new case at this stage. It may be noted here that though the document dated 30th May 1914 is inartistically drawn up, counsel for both parties agreed that it was no more than an 'agreement to sale'. It is true that no formal sale deed was drawn up as the appellant failed to pay the balance of the consideration; but the mutation proceedings show that a verbal sale was alleged to have taken place and the vendors themselves had apparently applied for the mutation to be attested. Such a verbal sale is permissible in the Punjab, where the Transfer of Property Act is not in force. On the above findings I would dismiss these appeals, but in view of all the circumstances leave the parties to bear their costs.

Coldstream, J.—I agree.

P.R./D.S.

Appeals dismissed.

18. *Viyapuri v. Sonamma Bai Ammani*, A I R 1916 Mad 990=31 I O 412=39 Mad 811=29 M L J 645 (F B).

**** A. I. R. 1937 Lahore 513
SPECIAL BENCH**

**YOUNG, C. J., ADDISON AND TEK
CHAND, JJ.**

Diwan Parkash Chand—Petitioner.

v.

Emperor.

Criminal Original No. 5 of 1936, Decided on 31st March 1937.

1937 L/65 & 66

**** (a) Press (Emergency Powers) Act (1931), S. 4**—Section 4 does not penalise speech or publication which brings into hatred ministers or other officials as distinguished from system of administration in State—Criticism of policy or administrative act of officer may come within mischief of S. 4 (1) (j).

Per *Tek Chand, J.*—In Cl. (j) of S. 4 (1), Press (Emergency Powers) Act, the words "administration established" are used in the same sense in reference to an Indian State as the words "Government established by law" are used in regard to British India, and have the same meaning as the later expression. S. 4 of the Act does not penalise a speech or publication which brings or attempts or tends, to bring into hatred or contempt, the Minister or Ministers, or other Officials, of an Indian State as such, as distinguished from the system of administration established in that State: *Case law discussed.* [P 518 C 1; P 520 C 1]

Per *Addison, J.*—Criticism of the policy or administrative acts of a particular officer or officers may be held to come within the mischief of S. 4 (1) (j). The question is one of fact whether the words employed, directly or indirectly, tend to bring into hatred or contempt, or to create disaffection towards the administration established in any State in India: [P 524 C 1, 2]

Held: (Per *Young, C. J.* and *Addison, J.*; *Tek Chand J. contra*) that the passages in question came within the mischief of S. 4 (1) (j). [P 515 C 1; P 522 C 1; P 525 C 2]

(b) Press (Emergency Powers) Act (1931), S. 4 (i) (j), Explan. 5—Malicious intention—Proof of—Whether necessary.

Per *Young, C. J.*—When there is an attempt to excite hatred and contempt against an administration it is not necessary to prove that there was malicious intention because normally the attempt is moved out of malice and not through affection. [P 515 C 1]

Per *Tek Chand, J.*—Under S. 4, Explan. 5, which governs Cl. (j) alone of the same section, a bona fide recital of facts, if made without malice and without an attempt to excite hatred, contempt or disaffection towards the administrator, is protected. In such a case it will be necessary for the Court to find that the writer was not acting bona fide but that he did the wrongful act wilfully and without just cause or excuse. [P 520 C 2]

Per *Addison, J.*—It is necessary for applicability of Explan. 5 to S. 4 that the objectionable statements are (a) statements of fact, (b) are made without malice and (c) are made without attempting to excite hatred, contempt or disaffection. If any one of these ingredients is lacking, the Explanation will not apply. [P 525 C 2]

(c) Press (Emergency Powers) Act (1931), S. 19—Local Government is not required to set out objectionable words and passages in notification—Mention of Clause of S. 4 (1) which has been contravened in notification is sufficient.

Per *Tek Chand and Addison, JJ.*—It is not obligatory on a Local Government under S. 19, Press (Emergency Powers) Act, to set out the words or passages in the book which in its opinion are of the nature described in S. 4. If it were so it would defeat the very object of the Act, for in that event the Local Government itself would be giving publicity, through its Official Gazette, to the words or passages which, in its opinion, offended against S. 4, and be thus perpetuating the mischief, which

it was the object of the order of forfeiture to prevent. All that S. 19 requires the Local Government to do is to state the grounds of its opinion. The mention of the particular clause of S. 4 (1) of the Act which has been contravened is sufficient.
[P 515 C 2; P 516 C 1]

(d) Lahore High Court Rules, Ch. 7-A, R. 10—Objectionable portions in forfeited book are not necessary to be stated in affidavit by petitioner or Government Advocate under R. 10.

Per *Tek Chand and Addison, JJ.*—R. 10, Ch. 7-A of the Lahore High Court Rules applies to any additional evidence, which the petitioner or the Local Government respectively wish to produce in support of, or against, the petition, and lays down that such evidence shall be in the form of affidavits. It does not require the petitioner to specify, by affidavit, the portions of the forfeited book or writing on which he relies to prove that the order of forfeiture was erroneous, nor does it require the Government Advocate to point out by sworn testimony particular words or passages, on which the Local Government had based its opinion that the provisions of S. 4 have been contravened: *In re R. V. Reeves*, 26 How St Tr 529, Ref. [P 516 C 1]

F. C. Mittal for Sham Lal —

for Petitioner.

Ram Lal (Dewan) —

for Opposite Party.

Young, C. J.—This is a petition by Dewan Parkash Chand praying this Court to set aside a Notification by the Local Government dated 22nd May 1936 declaring to be forfeited to His Majesty a book entitled "Report of the Enquiry Committee appointed by the Provincial Hindu Sabha Lahore to enquire in the Bahawalpur Affairs". The forfeiture was ordered by virtue of the powers conferred on the Local Government by S. 19, Press (Emergency Powers) Act, 23 of 1931, on the ground that the said report contained matter of the nature described in S. 4 (1) (j) of the said Act which enacts as follows:

Section 4 (1). Whenever it appears to the Local Government that any printing-press in respect of which any security has been ordered to be deposited under S. 3 is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs, or visible representations which.....tend, directly or indirectly.....(j) to bring into hatred or contempt or to excite disaffection towards the Administration established in any State in India.....
Expln. 2. Comments expressing disapprobation of the measures of the Government or Administration with a view to obtain their alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection shall not be deemed to be of the nature described in Cl. (d) or Cl. (j), of this sub-section. *Expln. 3.* Comments expressing disapprobation of the administrative or other action of the Government or administration without exciting or attempting to excite hatred, contempt or disaffection, shall not be deemed to be of the nature described in Cl. (d) or Cl. (j) of this sub-section.....*Expln. 5.* Statements of

fact made without malicious intention and without attempting to excite hatred, contempt or disaffection shall not be deemed to be of the nature described in Cl. (j) of this sub-section.

We have therefore to consider whether the report contains any words which tend directly, or indirectly, to bring into hatred and contempt, or to excite disaffection towards the administration established in Bahawalpur State. Before we were referred to the report itself counsel for the petitioner argued at some length that the term "administration" in sub-section (j) did not mean 'administration' in its ordinary sense, but the political system of administration as distinct from the group of human beings composing the "administration". Counsel based his argument on the meaning attached by Strachey, J. to the expression "The Government established by law in British India" in the well known *Tilak case*, 22 Bom 112¹ at p. (135). The above phrase according to Strachey, J., meant :

British rule and its representative as such—the existing political system as distinguished from any particular set of administrators.

Counsel also referred to 3 Lah 405² where Strachey, J.'s view on this point was followed and approved. In my opinion the meaning of the expression "the Government established by law in British India" can be of little assistance to us when we have to consider a very difficult expression, namely "the administration established in any State in India". Strachey, J. in any event appears to draw a distinction between the term "Government" and "Administrators," and the amendment of 1932 has added the words "or administration" after the word "Government" in Explns. 2 and 3, sub-s. 1 of S. 4 of the Act. Further in the Press Emergency Act we have to consider the Explanations to S. 4. On the point under discussion whether "Government" or "Administration" means some abstract conception of the actual Government or Administration composed of living human beings, the wording of the Explanations is illuminating :

Explanation 2.—Comments expressing disapprobation of the measures of the Government or Administration

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government or Administration

1. *Queen-Empress v. Bal Gangadhar Tilak*, (1898) 22 Bom 112.

2. *Raj Pal v. Emperor*, A I R 1923 Lah 61=71 I O 519=24 Or L J 167=3 Lah 405 (S B).

In my opinion, therefore reading S. 4 and the Explanations together the terms "Government" and "Administration" cannot mean some abstract conception, but refer to real, concrete, existing, bodies of human beings, capable of passing measures and performing administrative acts. Both in S. 124-A, I. P. C., existing in 1897 and in the Press Act of 1910, which were considered respectively in the *Tilak case*¹ and in the *Raj Pal case*,² there were at those dates explanations dealing with the "measures" of the "Government," but this aspect of the point under discussion appears not to have been noticed or considered. Another point taken by counsel was that under Expln. 5 malicious intention must be proved even though there might be an attempt to excite hatred and contempt. It is difficult to follow this argument. If there was an attempt to excite hatred and contempt, normally I would expect the attempt to be moved by malice and not by affection. Further, there is the word "and" between "malicious intention" and "without attempting," etc. It is clear therefore that if there is an attempt, to excite hatred etc. it would not matter what the intention was. I would be quite prepared however if the attempt was clear to infer the malice. In fact Expln. 5 does not appear to add anything useful to the Act. Coming to the Report itself, it is perfectly clear that it comes within the meaning of the words

tends directly or indirectly to bring into hatred or contempt or to excite disaffection towards the Administration established in

Bahawalpur. It attacks the "Administrators," the "Administration" and the "Durbar". It is not an attack upon the Prime Minister as argued by counsel, and even if it were I must not be understood to hold that such an attack might not be an attack on the "Administration". I may select one allegation, out of many made in this Report, as an example:—It is stated on p. 22 of the Report that Hindu children have been subjected by the administration to severe punishment and that Hindu boys were made to live and sleep in the same room as homosexuals. Nothing could be better calculated to bring the Administration into hatred and contempt and excite disaffection than allegations of this character. The application is dismissed with costs.

Tek Chand, J.—By Notification No. B. 13 (1).S.B. dated 22nd May 1936, the

Governor-in-Council, in exercise of the powers conferred by S. 19 of the Indian Press (Emergency Powers) Act, 23 of 1931, declared to be forfeited to His Majesty every copy, wherever found, of the "Report of the Enquiry Committee appointed by the Provincial Hindu Sabha, Lahore, to inquire in the Bahawalpur Affairs" printed and published by the petitioner at the Ranvir Printing Press, Lahore, inasmuch as it contained matter of the nature described in sub-s. (1) (j) of S. (4) of the aforesaid Act, as amended by S. 3, States (Protection) Act 1934. On 9th June 1936, the petitioner moved this Court under S. 23 of the Act to set aside the order alleging that the book in no way offended against the provisions of S. 4 (1) (j) that it did not contain any matter which brought into hatred or contempt, or excited disaffection towards the Bahawalpur Administration, but only contained statements of fact supported by evidence, that there was no malicious intention to excite hatred, contempt or disaffection towards this Administration, the object being only to bring the grievances of a section of His Highness's subject to the notice of the State with a view to have them redressed. It was, therefore, prayed that the order of forfeiture under S. 19 be set aside and all copies of the book forfeited to His Majesty may be returned to the petitioner. At the first hearing of the petition, counsel for the petitioner raised a preliminary objection that the notification issued by the Local Government was defective, inasmuch as it did not set out the words or passages in the book which, in its opinion, were of the nature described in S. 4. This objection appeared to us to be devoid of force, and after hearing counsel, we overruled it at the time. There is nothing in S. 19, which lays any obligation on the Local Government as is contended by the learned counsel. Indeed if it were so, it would defeat the very object of the Act, for in that event the Local Government itself would be giving publicity, through its Official Gazette, to the words or passages which, in its opinion, offended against S. 4, and be thus perpetuating the mischief, which it was the object of the order of forfeiture to prevent. All that S. 19 requires the Local Government to do, is to state "the grounds to its opinion", and it seems to me that this was sufficiently complied with by mentioning the parti-

ular clause of sub-s. (1), S. (4) which, in the opinion of the Local Government had been contravened.

The learned counsel further objected that in this case, the learned Government Advocate should not be heard, as he had failed to comply with R. 10, Ch. 7-A, of the Rules and Orders of this Court, inasmuch as the Government Advocate had not within fifteen days of the receipt of the notice of the filing of the petition, filed an affidavit by way of evidence against the petition. It was admitted that an affidavit sworn by the Chief Secretary to the Punjab Government on 24th July 1936, had actually been filed (*vide* pp. 3-4 of the Paper Book), but it was pointed out that all that it contained was a mere denial of the allegations in the petition and a bold statement that the book brought, or intended to bring into hatred and contempt, and excite disaffection towards the administration of Bahawalpur State. He contended that in this affidavit the Chief Secretary should have set out the passages in the book, which in the opinion of the Local Government were of this description. In reply, the learned Government Advocate stated that he did not propose to lead any further evidence in the case, and that he merely relied on the forfeited book itself, a perusal of which, he maintained, would show that the action taken by the Local Government was justified. R. 10 obviously applies to any additional evidence, which the petitioner or the Local Government respectively wish to produce in support of, or against, the petition, and lays down that such evidence shall be in the form of affidavits. It does not require the petitioner to specify, by affidavit, the portions of the forfeited book or writing on which he relies to prove that the order of forfeiture was erroneous, nor does it require the Government Advocate to point out by sworn testimony particular words or passages, on which the Local Government has based its opinion that the provisions of S. 4 have been contravened. Further, the contention of the petitioner's learned counsel is contrary to the well recognized principle, that in deciding cases of this kind the Court has to

consider the book or newspaper article as a whole, and in a fair, free and liberal spirit, not dwelling too much upon isolated passages, or upon a strong word here or there, which may be qualified by the context, but endeavouring to gather the general effect which the whole composition

would have on the minds of the public (per Lord Kenyon, C. J. in 26 How St Tr 529³ at p. 592).

This objection also was without force and was overruled. It may be stated, however, that for the convenience of the Court, the learned Government Advocate, actually marked a number of passages in the book which he contended supported the action taken by the Local Government and under orders of the Court a marked copy was supplied to the petitioner's counsel before arguments began. Before discussing the case on merits, it is necessary to set out briefly the circumstances in which the offending book was issued, as given by the authors themselves in its opening pages. It is stated that early in January 1936, the Secretary of the Hindu Sabha, Bahawalpur, was arrested and interned under Bombay Regn. 25 of 1927, and a few days later a number of other prominent Hindu subjects of the State were arrested. As a protest against these arrests, the Hindus of Bahawalpur observed a *hartal*, which was followed by certain measures taken by the State authorities. News of these happenings, it is stated, excited the sympathies of the Hindus of the Punjab. The Punjab Provincial Hindu Sabha, which is described in the report, as the accredited representative body of the Hindus of the Punjab through its President, sent a telegram to His Highness the Nawab of Bahawalpur to permit a deputation to wait on His Highness to put before him the grievances of the Hindus and to bring about better understanding between His Highness and his law abiding subjects. But it is stated, the prayer was refused. In the meantime, news came of further arrests and other measures taken by the State authorities, which are described in the report as 'repressive'. Accordingly, the Punjab Provincial Hindu Sabha appointed a Committee of some of its members to proceed to Bahawalpur "to enquire into the grievances of the Hindus". The following telegram was accordingly sent to the Bahawalpur Darbar :

Undersigned have been deputed by Punjab Hindu Sabha to visit Bahawalpur and investigate on spot conflicting reports (of) recent deplorable happenings. Pray State co-operation as we have open mind and are anxious for restoration of normal conditions. We are arriving Bahawalpur tomorrow first train.

It is stated that no reply was received to this telegram ; but at Lodhran, in Mul-

3. *In re* R. V. Reeves, 26 How St. Tr 529.

tan District, they were informed by letter from one of the Ministers of the State that:

The Bahawalpur Government cannot countenance the interference of Punjab Hindu Sabha or any similar body in State affairs, and cannot therefore, permit you to visit Bahawalpur.

The committee accordingly stayed at Lodhran for some days, and (so the Report says) there they "examined about 100 witnesses including about a dozen ladies," who had come down from Bahawalpur for this purpose. The committee then returned to Lahore and after a few days issued a Report, which was published in book form by the petitioner, who was one of its members. The first 24 pages of the book contains the "Report," and in Appendix 1 is printed the "evidence" of 86 persons, stated to have been examined by it. Appendix 2 purports to be a summary of the punishments, which are stated to have been inflicted on 76 state subjects; and Appendix 3 contains reprints of communiques issued by the State authorities. The Punjab Government being of the opinion that the Report contained matter of the nature described in S. 4 (1) (j), Act 23 of 1931, has forfeited it. That section, so far as is relevant to this case, reads as follows:

Section 4 (1). Whenever it appears to the Local Government that any printing press in respect of which any security has been ordered to be deposited under S. 3 is used for the purpose of printing or publishing any newspaper, book or other documents containing any words, signs or visible representation which tend, directly or indirectly (d) to bring into hatred or contempt His Majesty, or the Government established by law in British India or to excite disaffection towards His Majesty or the said Government or (j) to bring into hatred, or contempt or to excite disaffection towards the Administration established in any State in India the Local Government may declare all copies of such newspaper, book or other document, wherever found in British India, to be forfeited to His Majesty.

Explanation 2. — Comments expressing disapprobation of the measures of the Government or Administration with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, shall not be deemed to be of the nature described in Cl. (d) or Cl. (j) of this sub-section.

Explanation 3. — Comments expressing disapprobation of the administrative or other action of the Government or Administration, without exciting or attempting to excite hatred, contempt or disaffection, shall not be deemed to be of the nature described in Cl. (d) or Cl. (j) of this sub-section.

Explanation 5. — Statements of fact, made without malicious intention and without attempting to excite hatred, contempt or disaffection,

shall not be deemed to be of the nature described in Cl. (j) of this sub-section.

It will be noticed that Cls. (d) and (j) are very similar in their terms, the only difference being that the former refers, besides His Majesty the King-Emperor, to the "Government established by law in British India," and the latter to the "Administration established in any State in India." Further, while Explns. 2 and 3 govern both Cls. (d) and (j), Explan. 5 applied to Cl. (j) only. The points for consideration are whether the book in question tends, directly or indirectly, to bring into hatred or contempt, or to excite disaffection towards the "Administration established" in Bahawalpur State, and if so, whether it is protected by Explns. 2, 3 or 5. It has been conceded by the learned counsel for the petitioner that the Report criticizes in some places severely and in strong language certain administrative acts, for which the present Prime Minister and some of his colleagues and subordinates were responsible. But he contends, that in doing so it does not in any way attack His Highness the Nawab, nor does it attempt to bring into hatred or contempt, or excite disaffection towards the "administration established" in Bahawalpur, and that the intention of the signatories to the Report was to bring the grievances of a certain section of His Highness's subjects to his notice, with a view to their removal and with a prayer for the appointment of ministers, more keenly interested in the welfare of his subjects.

The learned counsel maintained that the words "administration established in any State in India" did not mean the ministers, or other officials for the time being, employed by the Ruler, but meant the political system of Government established in the State, and that an attack on the measures or policy of a particular set of administrators is not within the mischief of the section, unless it brings, or attempts to bring or tends to bring, into hatred or contempt, or excite disaffection towards the State itself. He urged that reading the Report as a whole it will be apparent that the writers were not actuated by any such intention, that they published the Report in good faith, and without malice towards the State or its Ruler. The learned Government Advocate contended, on the other hand, that the words "administration established in any

State in India," as used in this section, did not merely mean the Ruler, or the system of administration established in any State, but included the particular individuals who, at any given time, were in charge of the administration, and that an attack on these officers or their policy would bring the writing within S. 4 (1) (j) if the Court found that the words used tended, directly or indirectly, to bring them into hatred or contempt, or to excite disaffection towards them.

In this connexion, it will be useful to compare the wording of Cl. (d) and Cl. (j) of the section. The former clause deals with cases, where the offending words are directed to bring into hatred or contempt or excite disaffection towards, *inter alia*, "the Government established by law in British India" while Cl. (j) deals with similar writings which bring into hatred or contempt, or excite disaffection towards "the Administration established in any State in India". It may also be stated that Cl. (j) was not included in the Act as passed in 1931. The statute, as originally enacted, afforded protection only to the "Government established by law in British India". By the amending Act of 1934 the same measure of protection was extended to the "Administration established" in any Indian State, and attacks of the nature described in the section, made in British India against Indian States, were also penalised. It seems clear that in Cl. (j) the words "Administration established" are used in the same sense in reference to an Indian State as the words "Government established by law" are used in regard to British India, and have the same meaning as the latter expression. Now Cl. (d) of this section is substantially in the same terms as S. 124-A, I. P. C., which has been the subject of consideration in numerous cases by the High Courts in India. The leading case on the subject is 22 Bom 112¹ where Strachey, J. in his celebrated charge to the jury, observed as follows :

Lastly the authority or institution against which it is an offence to excite or attempt to excite disaffection is the Government established by law in 'British India'. What is the meaning of that expression? It means, in my opinion, the British rule and its representatives as such the existing political system as distinguished from any particular set of administrators (p. 135).

In that case, the accused was found guilty of exciting disaffection against

"Government established in British India" as above defined, and he was convicted and sentenced. Subsequently he applied for leave to appeal to His Majesty in Council, and one of the grounds taken was that Strachey, J., had misdirected the jury (*inter alia*) in interpreting the expression "Government established by law in British India". This application was heard by a Full Bench (Farran, C. J., Candy and Strachey, JJ.), and they in rejecting the application, observed that they could not see that there has been any misdirection as to the meaning of the word 'Government' (p. 151). The convict then applied to the Privy Council for special leave to appeal, and one of the points taken was the alleged misdirection to the jury as to the meaning of S. 124-A, I. P. C., in the summing up by Strachey, J. Lord Halsbury, in delivering the judgment of their Lordships, remarked that :

There is nothing in that summing up which calls upon them to indicate any dissent from it, or necessity to correct what is therein contained, looking at the summing up as a whole, and looking at each part of what was said by the light of what else was said : 22 Bom 528⁴ at p. 532.

It will thus be seen that the interpretation of Strachey, J. had the approval of a Full Bench of the Bombay High Court, and though impugned before their Lordships of the Privy Council, was not dissented from by them. Very soon after the *Tilak case*¹ another Full Bench of the Bombay High Court (Farran, C. J. Parsons and Ranade, JJ.) had to consider S. 124-A in 22 Bom 152.⁵ The learned Chief Justice held that :

An attempt to excite feelings of disaffection to the Government is thus equivalent to an attempt to produce hatred of Government as established by law, to excite political discontent and alienate the people from their allegiance,

and after considering the offending publication then in question he observed :

The article in the present case is not one which is concerned with any measure of Government. If libellous, it is by reason of its exciting feelings of disaffection to the Government, itself causing the people to hate the constitution under which they live and to desire to subvert and change it for another form of Government.

After these cases, S. 124-A was amended in 1898. The explanation of the section, as enacted in 1870, was replaced by the present Explanations Nos. 1, 2 and 3, so as to give legislative approval to the inter-

4. Bal Gangadhar Tilak v. Queen-Empress, (1898) 22 Bom 528=25 I A 1=7 Sar 270 (PC).

5. Queen-Empress v. Ramohandra Narayan (1898) 22 Bom 152 (F B).

pretation put upon the former by Strachey, J., and the other Judges, but it is significant that the Legislature did not make any change in the substantive part of the section and left untouched the words "Government established by law in British India". In 1906 the Bombay High Court had again to consider the amended S. 124-A in the case in 8 Bom L R 421.⁶ In his summing up, Batty, J. observed that by the expression 'the Government established by law in British India' is meant the person or persons collectively, in succession, who are authorized to administer Government for the time being. One particular set of persons may be open to objection, and to assail them and to attack them and excite hatred against them is not necessarily exciting hatred against the Government, because they are only individuals and not representatives of that abstract conception which is called Government. Individuals come and go, but the Government is supposed to remain. The individual is transitory and may be separately criticized, but that which is essentially and inseparably connected with the idea of the Government established by law cannot be attacked without coming within this section. And you do not need to be reminded that it is of the essence of Government in India that it is British Government and British Rule, and so long as it continues to be that, the Government remains unchanged, however much the persons administering it may change.

39 Mad 1085⁷ was a case under the Press Act, 1 of 1910, and the question was raised as to what the words "to bring into hatred or contempt the Government established by law in British India" as used in S. 4 meant. The majority of the Full Bench adopted the meaning put on these words in the Bombay cases cited above. Sir Abdur Rahim, Offg. C. J., held that :

Government denotes an established authority entitled and able to administer the public affairs of the country. On the other hand Government is not identical with any particular individuals, who may be administering the Government. Strachey, J. of the Bombay High Court defined it as 'British Rule and its representatives as such—the existing political system as distinguished from any particular set of administrators'.

After citing with approval, Batty, J.'s remarks in *Bhaskar's case*,⁸ the learned Officiating Chief Justice referred to an earlier Calcutta case, known as the *Bangobasi case*, 19 Cal 35⁸ and observed :

The same idea underlay Sir Comer Petheram's explanation of the phrase in 19 Cal 35,⁸ where he

says that 'British India is part of the British Empire and is governed like other parts of the Empire by persons to whom the power is delegated for that purpose. There is a great difference between dealing with Government in that sense and dealing with any particular administration'.

Similarly Seshagiri Iyer, J. (at p. 1156) remarked :

It is the system of Government that S. 4 contemplates, and not the persons who, for the time being, carry on the details of the administration.

The same view was taken by a Full Bench of our own Court (Shadi Lal, C. J., Scott-Smith and Martineau, JJ.) in 3 Lah 405,² which also was a case under the Press Act of 1910. The learned Judges cited with approval the *dicta* of Strachey, J. and Batty, J. referred to above, and observed that

it was necessary to draw a clear distinction between the Government and individual officers employed under the Government, and that words bringing the former into hatred or contempt constituted sedition, but similar words directed against the latter could only infringe the law of libel.

They also held that the phrase 'Government established by law in British India' includes

the collective body of men authorized to administer executive Government in British India, as distinguished from any particular set of administrators or individuals administering the country.

It will thus be seen that the consensus of judicial authority in India is against the interpretation of S. 124-A, Penal Code, and section of the Press Act, contended for by the learned Government Advocate. Indeed, his interpretation, if accepted, will lead to startling consequences. If that were the correct legal view, it would be indictable as sedition to criticise the policy or administrative acts of a particular officer or officers, e. g. the Executive Counsellors and Ministers of a Provincial Government under the existing constitution or the Ministry as a whole under the new constitution, if such criticism is couched in language, which brings, or attempts to bring into hatred or contempt, or excites disaffection towards, these particular officers, singly or collectively, as distinguished from the system of Governments established in the country. I have no doubt that this is not the law, as in force in India. In this connexion it might be useful to point out that the substantive part of S. 124-A, I. P. C., is substantially the same as the English Statutes dealing with seditious libels (60 Geo. III & 1 Geo. IV C. 8) where seditious libels have been defined as

6. Emperor v. Bhaskar, (1906) 30 Bom 421 = 4 Cr L J 1 = 8 Bom L R 421.

7. Annie Besant v. Government of Madras, A I R 1918 Mad 1210 = 37 I C 525 = 18 Cr L J 157 = 39 Mad 1085 (S B).

8. Queen-Empress v. Jogendra Chunder Ghose, (1892) 19 Cal 35.

libel tending to bring into hatred or contempt the person of the King, or his Government, or constitution as by law established, etc.

Similar words occur in Stephens' Digest of Criminal Law of England (Arts. 96-98), which contains an authoritative summary of the law of England bearing on the point. It is hardly necessary to say, that in England, the party in opposition is constantly criticizing the ministry in power for the time being, and by speeches and writings is trying to bring it, as well as its individual members, into hatred and contempt, so as to bring about their early downfall. And yet it has never been suggested that such speeches or writings are indictable as sedition. As pointed out by Odgers in his standard work on the Law of Libel and Slander (Edn. 6, p. 420) the word "Government" in these Statutes means

not so much a particular set of ministers as the political system settled by the constitution, the general order and discipline of the realm.

The learned author also observes that :

It is clearly legitimate and constitutional to endeavour by means of arguments, addressed to the people, to replace one set of ministers by another. And the precise object of such arguments is to bring the ministers now in office into disesteem, and to alienate from them the affections of the people.

This is the law in England. I have no doubt that the law in India is not different. I have dwelt at length on Cl. (d), because, as pointed out above, the protection afforded to the "administration" of an Indian State by Cl. (j) is analogous to that given to the "Government established by law in British India" in Cl. (d). And if the correct legal position as regards the writings directed against Ministers and Officials in British India is as stated above, the Ministers of an Indian State cannot, in the absence of any words to the contrary, be taken to be more favourably placed in respect of words or writings published in British India, which adversely criticise their policy or administrative acts. I hold, therefore, that S. 4 does not penalise a speech or publication which brings or attempts or tends, to bring into hatred or contempt, the Minister or Ministers, or other officials, of an Indian State as such as distinguished from the system of administration established in that State. And with regard to speeches or publications against such an administration itself, there is the further protection afforded by Explan. 5 of S. 4, which governs Cl. (j) alone. Under the explana-

tion, a bona fide recital of facts, if made without malice and without an attempt to excite hatred, contempt or disaffection towards the Administrator, is also protected. That is to say, in such a case it will be necessary for the Court to find that the writer was not acting bona fide but that he did the wrongful act wilfully and without just cause or excuse.

I shall now briefly consider the various passages which the learned Government Advocate has marked as containing matter of the nature described in S. 4 (1) (j). These passages are 24 in number, of which 23 marked (A to W) are to be found in the Report of the Enquiry Committee, and one (marked X) is a reprint of a communique issued by the State with certain headlines given to it. Now I may say at once that in the following passages, there is nothing whatever, which could justify the action of the Local Government even on the interpretation of S. 4 suggested by the learned Government Advocate.

C (p. 2).—This merely describes the activities of the Bahawalpur Hindi Sabha as "law-abiding" and "constitutional".

E (p. 6).—This gives the population proportion of the Hindus and Sikhs, and asserts that they have a great stake in the State and contribute the major portion of revenue and income-tax and that they have always been loyal and law-abiding.

M & N (pp. 11 and 12).—Here the writers give the reason for the resignation of a Hindu Minister and adversely criticise the qualifications of his successor, and comment on the low salary paid to him and the insignificant position assigned to him in the Cabinet.

O (p. 13).—In this passage it is stated that the court-fees levied in the State are prohibitive, that lawyers are not permitted to practise on terms which obtain in British India, that they have to pay heavy licensing fees, and that all this causes great hardship to litigants.

P (p. 14).—Deals with the under-representation of the Hindu minority in the State services and quotes figures in support of the allegation.

Q and R (pp. 15-16).—Describe the unsatisfactory constitution of the Municipality of Bahawalpur and the heavy incidence of taxation.

S (p. 17).—Criticises the manner in which the income tax is imposed, adversely affecting some communities, or persons, and unduly favouring others. It also

criticises the mode of hearing objections in income-tax cases by Revenue Officers in camp, at long distances from the places of business of the assesseees.

U (p. 19).—Relates to the manner of recruitment of Honorary Magistrates, many of whom are stated to possess little knowledge of law and legal procedure, and some are illiterate.

(Appendix No. 3 pp. 1-5).—Is a verbatim reprint of a communique issued by the State, with headlines which contain words taken from the communique itself.

In some of the remaining passages, strong words are used to which the learned Government Advocate has drawn our attention.

Passages A B & D.—Describe the circumstances in which the Enquiry Committee came to be appointed. They refer to newspaper reports, giving an account of the happenings at Bahawalpur early in January 1936, and of the measures adopted by the authorities, which are called "repressive" and the imprisonments awarded as "callous, unjust and improper".

Passage F.—Is historical and refers to certain incidents of 1913, when the State was administered by a Council of Regency during the minority of the Nawab Sahib, and sets out the circumstances in which the Hindu Sabha at Bahawalpur was formed, having, *inter alia*, the following aims and objects:

1. To be always loyal to the Nawab and the British Government.

4. To bring to the notice of the officers and the authorities of the State the legitimate demands and needs of the Hindus.

It is then stated that the Sabha represented to the authorities the necessity of abolishing the Council, most of whose members were outsiders having little sympathy with the people, and installing the Nawab on the gaddi. These passages, taken as a whole, are a narrative of events and do not appear to have been written with a malicious intention, nor do they in my opinion, attempt, or tend, to bring into hatred or contempt the administration of the State, as above defined. In the remaining paragraphs, which include passages G to T it is stated that the Hindus hailed with delight the installation of the Nawab in 1925, but that the Nawab was "not lucky in the choice of his Prime Minister" who was an outsider. Certain acts of the Prime Minister in instituting a system of monopolies and importing mono-

polists from Sind are strongly criticised. It is stated that this caused great discontent and resentment against him, and in turn the Prime Minister adopted repressive measures, during the absence of His Highness at Simla. On coming to know of the real situation, His Highness came down to Bahawalpur and conciliated the people and issued a *firman*. It is alleged however that the Prime Minister failed to carry out the promises held out to redress the grievances of the people. The passages strongly criticise the Prime Minister and even impute motives to him, and certainly attempt to bring him into hatred and contempt; but they are full of expressions of feelings of loyalty and devotion towards the Nawab and do not contain any matter, which might be said to have a tendency to alienate the people from their allegiance or subvert the system of Government established in State, or upset its "general order and discipline".

The learned Government Advocate largely relied upon passage V. (pp. 20 to 22) which strongly criticises the "administrators" and in one place reference is made to a certain order under S. 144, Criminal P. C., by which it is stated, "the Bahawalpur Durbar" has "made even the expression of sympathy with the victims of repression, a culpable offence". He contended that this, at any rate, is an attack upon the "Administration established in the State" and falls within Cl. (j) of S. 4 (1). These words, as qualified by the context, however, do not bear this interpretation. The paragraph, read as a whole, clearly shows that the attack is on particular "administrators and specially the Prime Minister" who had taken offence at the agitation against his appointment and his subsequent administrative acts, and who is stated to be "determined to crush their constitutional agitation". He is accused of giving wrong information to His Highness and thus obtaining his sanction for certain repressive measures, which are set out in detail. An account is then given of the punishments inflicted, and some of the convicted persons, including boys, are described as having been subjected to disgusting treatment. The whole of this paragraph no doubt is a strong condemnation of the policy of the Prime Minister and his colleagues and severely criticises the measures adopted by him. But here again the obvious intention is to secure a change in the policy

and personnel of the ministry and not to attack the "Administration established in the State", as explained above. Passage W is a part of the "conclusions" reached by the Enquiry Committee, and describes the measures taken

as reproducing the worst features of the repression practised in British India during the Civil Disobedience Movement, without any of the safeguards which operated in British India.

This passage must be read with the preceding paragraph, which suggests to His Highness the Nawab Bahadur of Bahawalpur State to adopt a conciliatory policy based upon justice and fairplay.

It brings to

His Highness's kind notice that the promises which he made out of his solicitude for the welfare of his subjects to redress the grievances of his long-suffering subjects are overdue,

and winds up with an appeal that :

It is only a friendly gesture, the like of which was made in 1933, that can save the situation at present.

These quotations clearly show that the object and intention of the writers was innocent and that the words objected to, as qualified by the context, are not capable of the interpretation sought to be put on them. After giving the case my most careful consideration, I have reached the conclusion that the book, taken as a whole does not offend against the provisions of S. 4 (1) (j) and that the order of forfeiture passed by the Local Government under S. 19 of Act 23 of 1931, should be set aside.

Addison, J. — I have the advantage of reading the judgments to be delivered by the Hon'ble Chief Justice and by my brother Tek Chand, J. I am in entire agreement with the latter so far as the decision of the preliminary points raised by the petitioner's counsel is concerned. I do not, however, agree with him in his final conclusion that the Report of the Enquiry Committee, in respect of which the order of forfeiture has been made, does not offend against the provisions of law as contained in the Indian Press (Emergency Powers) Act 23 of 1931 as amended by S. 3 of the Indian States (Protection) Act, 1934. Nor do I consider that the interpretation put by him on the wording of the relevant provisions of the statute is entirely correct.

The petitioner has challenged the validity of the order of forfeiture on grounds stated in paras. (4), (5) and (6) of his petition and for facility of reference they are reproduced below : (4) That the said

book does not contain any matter which brings into hatred or contempt or excites disaffection towards the Bahawalpur Administration. (5) That it only contains statements of fact supported by evidence. There was no malicious intention to excite hatred, contempt or disaffection towards the Bahawalpur Administration, the object being only to bring the grievances of Bahawalpur Hindus to the notice of the State with a view to have them redressed. (6) The contents of the said book in no way offend against the provisions of S. 4 (1) (j) of Act 23 of 1931, and the order of forfeiture under S. 19 was not justified.

Paragraphs (4) and (6) cover the same ground and the petitioner's objection is really two-fold, namely, (a) that S. 4 (1) (j) does not apply and (b) that the explanations appended to S. 4 protect the publication. The petitioner nowhere denies that the language of the report is such as tends directly or indirectly, to excite hatred, contempt or disaffection. All that is urged in the petition is that the book and its objectionable passages were not aimed at the Bahawalpur Administration, that the passages objected to are statements of fact and that there was no malicious intention to excite hatred, contempt or disaffection. The question whether the administration is attacked or not by the passages objected to and by the book as a whole is a question of fact determinable on the wording of the report itself and, in my view, reference to the administration established in the State is so clear and direct that I have no hesitation in deciding this point against the petitioner. Much of the report is most objectionable and does excite hatred and contempt as well as disaffection against the policy of administration carried on in the Bahawalpur State.

The following are a few instances in point : (1) Page 3.D.—"In the meantime, repression ran high in the State". (2) Page 6.F.—"It is, however, not for the first time in the history of the State that its Hindu subjects have been subject to a regime of ruthless repression". (3) Page 8.F.—The *Darbar* (that is the Government or Administration of the State) prohibited the holding of its annual session within the boundaries of the State. (4) Page 8.G.—The result was that discontent with the Administration was aggravated. (5) Page 9.H.—"The Hindus alone were penalised for voicing the grievances of the public in this matter. Some of the leading

Hindus were involved in false cases and awarded heavy sentences. At the same time other measures were adopted to intimidate the Hindus." (6) Page 11-M.—

"Especially the Hindus and the Sikhs felt that a new era of enlightened progress was going to be inaugurated in the State. But, alas, their hopes proved illusory." (7) Page 12-M.—

"This invidiousness in the matter of fixing up the salary of the Hindu Minister shows how the *Darbar* looks upon the demands of the Hindus." (8) Page 14-P.—

"In the same way in the higher and lower cadres of services in the State, the Hindus and other minorities are not given their due share." (9) Page 15-P.—

"This stepmotherly treatment is meted out to the Hindus." (10) Page 16-R.—

"It is, therefore, no exaggeration to say that while . . . other forms of taxation are very heavy in the Bahawalpur State, not even a small proportion of the large income derived from these heads . . . is devoted to the welfare of the people;" (11) Page 17-S.—

"Not only do the people groan under these oppressive . . . the despised minorities are subjected to all kinds of indignities ;" (12) Page 18-T.—

To say that no freedom of speech and no freedom of legitimate criticism are given in the State ;

(13) Page 18-19-T.—"It is not unoften that the ordinary civil and criminal procedures are suspended in the State and the administration is carried on with the help of Ordinances which terrorise and intimidate the law-abiding citizens to a very considerable extent ;" (14) Page 21-V.—

"The Bahawalpur *Darbar* has made even the expression of sympathy with the victims of repression, a culpable offence, a thing for which no precedent is to be found anywhere ;" (15) Page 22-V.—

"A few of the Hindus have been unfortunate in acquiring the undeserved ire of the administration to such an extent that their property has been confiscated ;" (16) Page 22-V.—

"Such a thing would put to shame any administration which called itself civilized and would merit the strongest condemnation in the eyes of all impartial observers ;" (17) Page 22-V.—

"In conclusion, we wish to say that repression of this magnitude and severity cannot be in the interest of any administration in any part of the world." (18) Page 23.—"Repression does not pay any Government in the long run All these things are bound to have a demoralizing effect both on the administration and those whom it favours."

There is another passage quoted in the judgment of the Hon'ble the Chief Justice, which I need not repeat but I desire also to make reference to the last passage W at p. 24, referred to by Tek Chand, J. That passage is most general in its terms and most objectionable. I have looked at the context, and it comes in a paragraph beginning with the words "On a most careful examination of the evidence recorded by us" and in this paragraph there is no redeeming feature. It is in the preceding paragraph that a suggestion is made to His Highness to adopt a conciliatory policy based upon justice and fair-play. In my judgment it is impossible to hold that the words objected to in passage W do not mean that which they themselves express. In the face of these passages which I have picked out not for the purpose of illustrating the utterly obnoxious nature of the writing but with the purpose of indicating the object of the criticism, it is idle to pretend that the target of the virulent attacks made in the report was not the administration of the State as a whole but only an individual administrator, namely, the Prime Minister. This is so obvious as to require no further discussion.

In this view of the case no occasion arises to discuss the abstract propositions of the law as to (1) What is the true import of the word "Government" as used in S. 124-A, I. P. C., or S. 4, Press Act, 1931? or (2) Whether an administrator or administrators may constitute administration as contemplated by the Act. It cannot be said that a committee of six gentlemen of whom five were lawyers and one an Hony. Magistrate, 1st Class, in the Lyallpur District, did not know when they used the words "*Darbar*" or "Administration" that these words would be taken by every one to mean what they ordinarily mean. To me it appears that these words were used with full knowledge of their significance and that the line of defence now adopted by the petitioner has been suggested to him by the authorities on which his counsel has relied. He has not, however, paused to think that the words as used in the report are the only proper guide in this case to determine the applicability of S. 4 and that an academic discussion of abstract questions of law cannot help him in a matter which is self-evident from a mere perusal of the document. Even if it be necessary to refer

to the authorities relied on by the petitioner which have been discussed at length in the judgment of Tek Chand, J., I do not think that they help the petitioner. The definition of the word "Government" as given by Strachey, J. in 22 Bom 112¹ and approved by the Full Bench in 22 Bom 152,⁵ is :

British rule and its representatives as such—the existing political system as distinguished from any particular set of administrators.

The petitioner by way of analogy for the definition of the word "administration" relies on this definition, but, as I understand the expression used by Strachey, J., it seeks to distinguish the representatives of a rule as such from the individual administrators as such and goes no further. The term "representatives of a rule as such" means those persons who carry out the policy of a rule or Government on the lines indicated by the ruler. In other words, they are identified with the rule and symbolise it in their administrative deeds. Whatever they do is done by the direction and with the approval of the authority in whom such direction or approval vests and their deeds then are considered to be the deeds of the ruler himself. On the other hand, all acts other than those specified above are done by them in their individual capacity and *qua* them they cannot be considered as representatives of the rule which they serve. To take a concrete instance: if the Collector of a District realizes land revenue at the prescribed rate, he does it in his representative capacity and the act is the act of the ruler; but if he employs methods for its realization which are not permitted under the law or have not the sanction of the State he does these acts in his individual capacity and on his own responsibility. When an attack is made on him in his former capacity the attack is on the rule he represents, but if his method of realization alone is condemned the condemnation will touch his person alone and will not travel beyond his individual capacity. In my view, even on the definition of "Government", as given in 22 Bom 112,¹ most of the report comes clearly within the mischief of the law.

This is a sufficient answer to the contention that criticism of the policy or administrative acts of a particular officer or officers should not be held to come within the mischief of this section. The question is one of fact whether the words

employed, directly or indirectly, tend to bring into hatred or contempt or to create disaffection towards the administration established in any State in India. The words "tend directly or indirectly" do not form part of S. 124-A, I. P. C., and that is why it has been held that intention is an essential ingredient of that section. This distinction must not be lost sight of, as it usually is. I might add that it would clearly be an easy thing to disguise a malicious attack upon Government or an administration under the guise of an attack on some of the officers of Government or an administration, carrying out the policy of Government. This, however, does not arise in this case as the administration is openly and unmistakably attacked and held up to hatred and contempt. Again, the question in the form in which it is now before us, did not arise in the Bombay case. Moreover, the offender there was found guilty of sedition and his petition to their Lordships of the Privy Council also failed. Neither before the Full Bench, which refused leave to certify the case a fit case for appeal to Her Majesty in Council, nor before their Lordships of the Privy Council, did the counsel for the offender discuss the definition of "Government" given by Strachey, J. which is now relied upon. The objection taken was to other matters. I am, therefore, unable to agree that it can be said that their Lordships of the Privy Council gave their approval to the definition of Strachey, J., that question being not before them. The definition of "Government" given by Strachey, J. was followed in 39 Mad 1085,⁷ which also discussed and approved 19 Cal 35⁸ and 8 Bom L R 421.⁶ As I read that judgment there is nothing in it which favours the petitioner. At p. 1119 of the report 39 Mad 1085⁷ Sir Abdur Rahim, Officiating Chief Justice, observed :

Government denotes an established authority entitled and able to administer the public affairs of the country. On the other hand Government is not identical with any particular individuals who may be administering the Government.

He referred to the remarks of Batty, J. in 8 Bom L R 421⁶ and to Sir Comer Petheram's explanation of the phrase in 19 Cal 35.⁸ The former said :

The individual is transitory and may be separately criticised, but that which is essentially and inseparably connected with the idea of Government established by law cannot be attacked without coming within this section.

Sir Comer Petheram's explanation that British India is governed like other parts of the Empire by persons to whom the power is delegated for that purpose reflects the same underlying idea. Such persons to whom this power is delegated cannot be criticised with impunity, if such criticism comes within the mischief of the section. I need not pursue this matter further as, in my view, so far as the present proceedings are concerned, it is abundantly clear that it was the administration of the Bahawalpur State which was the object of the attack and that attack falls within the mischief of the section. I now come to the explanations. They are in the nature of exceptions or safeguards and it would, therefore, be for the petitioner to establish that he comes within them. Explan. 2 protects comments expressing disapprobation of the measures of the Government or administration with a view to obtain their alteration by lawful means, and, similarly, Explan. 3 protects comments expressing disapprobation of the administrative or other action of the Government or administration, but the condition in both is that those comments should not excite or attempt to excite hatred, contempt or disaffection. Strachey, J.'s remarks at pp. 137 and 138 of the report, 22 Bom 112¹, are pertinent in this respect:

The object of the explanation is to protect honest journalism and *bona fide* criticism of public measures and institutions with a view to their improvement and to the remedying of grievances and abuses, and to distinguish this from attempts, whether open or disguised, to make the people hate their rulers.

I have already pointed out that the petitioner in his own petition cannot be said to have denied the objectionable nature of the remarks; he has merely emphasized the allegation that these remarks were not meant against the Bahawalpur Administration. It is, therefore, doubtful if he can avail himself of the benefit of these explanations. But apart from that, the comments express disapprobation of the measures of the administration and of the administrative and other action of the administration, and they certainly also excite or attempt to excite hatred, contempt and disaffection. It only remains to discuss the new Explan. 5. Here again, the petitioner appears to me to be labouring under a misapprehension as to the import of the explanation. In para. 5 of his petition,

besides urging that the report contains statements of fact, he contends that there was no malicious intention to excite hatred, contempt or disaffection towards the Bahawalpur Administration. As I read Explan. 5, it is necessary to prove three things namely: (a) that the objectionable statements are statements of facts; (b) that they were made without malicious intention; and (c) that the statements were made without attempting to excite hatred, contempt or disaffection. Proof of all three things is necessary before the explanation comes into play and, if any one of these ingredients is lacking, the explanation does not apply. In the present case, in my judgment, it is impossible to hold that any one of the ingredients has been made out. In agreement with the Hon'ble the Chief Justice, therefore, I would dismiss this application with costs which should be assessed at Rs. 150.

Order.—By majority we decide that this application be dismissed with costs. Counsel's fee Rs. 150.

K.B./A.L. *Application dismissed.*

A. I. R. 1937 Lahore 525

JAI LAL, J.

(Subedar) Sajawal Khan and others —
Plaintiffs — Appellants.

v.

Mt. Bano and others — Defendants —
Respondents.

Second Appeal No. 1142 of 1935, Decided on 14th October 1936, from decree of Dist. Judge, Rawalpindi, D/- 5th March 1935.

(a) Custom (Punjab)—Will—Ancestral property—Awans of Rawalpindi district have unrestricted power to make will of ancestral property in favour of persons of same tribe.

Among the Awans of the Rawalpindi district, there is an unrestricted power to make a will, even in respect of ancestral property, in favour of the persons of the same tribe and a will of ancestral property made by an Awan in favour of his daughters is valid: *A I R 1931 Lah 266* and *A I R 1924 Lah 452, Disting.*; *52 P R 1892, Dissent.* [P 526 C 1; P 527 C 2]

(b) Custom (Punjab) — Custom recorded in Customary law is presumed to be correct, though not supported by instances.

A statement of custom recorded in the Customary law carries with it a presumption of correctness, even if it is not supported by instances.

[P 526 C 1]

Mohammad Alam — for Appellants.

Nand Lal — for Respondent 1.

Judgment.—This appeal is by the plaintiffs. They instituted a suit for a declaration that a will of ancestral property made by Muhammad Wali in favour of his two daughters was invalid by custom and was ineffective against the reversionary rights of the plaintiffs, who, it was asserted, were entitled to inherit the property disregarding the will after the death of the widow of the testator Muhammad Wali. At the time of the institution of the suit Muhammad Wali had died. The District Judge has held that the entire property in suit is ancestral but he has upheld the will on the ground that among the Awans — a tribe to which the parties belong — there is an unrestricted power to make a will even in respect of ancestral property in favour of persons of the same tribe. He has, however, granted a certificate under S. 41, Punjab Courts Act, to the plaintiffs and consequently this appeal has been heard by me. The only question is whether according to the custom governing the parties Muhammad Wali had power to make a will of ancestral property in favour of his daughters. It may be mentioned that one of the daughters is married to an Awan; the other daughter is said to be not married. At least she was not married at the time when the will was made and apparently at the death of Muhammad Wali. It is alleged on behalf of the respondents that she is now married to an Awan and this is supported by the plaintiffs' allegation in the plaint. There is an initial presumption in favour of the legatees in this case because in answer to question No. 37 in the Customary law of the Rawalpindi district in which the parties reside and in which the land in suit is situated it is stated :

Awans reply that a will, verbal or written, giving a share or the whole of the property is good by custom if it alienates within the tribe; a will to a stranger is not valid.

There is ample authority now that a statement of custom recorded in the Customary law carries with it a presumption of correctness even if it is not supported by instances. The appellants claimed to have rebutted the presumption by oral and documentary evidence. They have not relied before me upon any oral evidence led by them to establish the custom, but reliance is made on statements made in cross-examination by two witnesses of the defendants, D. Ws. 1 and 2, Mir Alam and Sultan Ali, that the custom of Rawal-

pindi, Jhelum and Attock districts is the same on this subject. At the same time these witnesses definitely stated that among the Awans of Rawalpindi a sonless proprietor has unrestricted powers to make a will of ancestral property. The learned counsel for the appellants relies upon two judgments in support of his case. One of the judgments is by the Munsif of Gujar Khan in *Hasham v. Ahmad* and is dated 21st August 1902. In that case the Munsif held that among the Awans a sonless proprietor was not empowered to make a gift of the ancestral property. In coming to this conclusion the learned Munsif relied upon 52 P R 1892.¹ This case is cited on behalf of the appellants. In this case also it was held that a sonless Awan had no power to make a gift of ancestral property. The latest authority, however, is opposed to the view taken in these two cases. The importance of these judgments lies in the fact that it is laid down in later cases that among the Awans there is unrestricted power to make a gift of ancestral property but that it does not follow from this that there is similar power to make a will. It is, therefore, contended on behalf of the appellants that if an Awan has not the power to make a gift, it necessarily follows that he has not the power to make a will. But as I have already shown these judgments can no longer be considered to lay down correct law. In 12 Lah 525² cited by the appellants a Division Bench of this Court observed as follows :

Coming now to the question of custom relating to the alienation of ancestral property, we find that it has been repeatedly held that the Awans of Shahpur, Rawalpindi, Attock and Mianwali possess very wide powers of alienation *inter vivos* in respect of ancestral property, but as decided in 5 Lah 34³ they have no such power to dispose of ancestral property by will. A clear distinction has been drawn between an alienation *inter vivos* and an alienation by will, and indeed it was admitted by the defendants' counsel before the trial Judge that Raja had no power to make a testamentary disposition of his ancestral property.

It would be observed therefore that the view taken in the judgment of the Munsif and in 52 P R 1892¹ can no longer be accepted as correct. Now, with regard to 12

1. Hayat Muhammad v. Fazal Ahmad, (1892) 52 P R 1892.
2. Bakhsh v. Mohammad Khan, A I R 1931 Lah 266=134 I O 831=12 Lah 525=32 P L R 770.
3. Mt. Raghi v. Baza, A I R 1924 Lah 452=79 I O 743=5 Lah 34.

Lah 525² the above quoted passage contains all that the learned Judges have said on the question of the capacity of a sonless proprietor to make a will of ancestral property. At the commencement of the judgment, it is stated that the case related to the will of Raja, an Awan of village Bharpur Khillan in the district of Rawalpindi. The learned District Judge in this case has observed that he has not been able to find the name of this village in the list of villages in the Rawalpindi district. I have now referred to the original record of this case and find that this village is situated in the Jhelum district, Tahsil Chakwal, and not in the Rawalpindi district. The judgment cited therefore does not relate to the custom in the Rawalpindi district, but the learned counsel has relied upon the statements of the two witnesses who have stated that the custom in the Jhelum and the Rawalpindi districts is the same. The conclusion of the learned Judges in 12 Lah 525² is based on 5 Lah 34.³ That also is a brief judgment and the sole question for determination was whether a sonless Awan of Kot Sarang in Tahsil Talagang, Attock District, is competent to make a testamentary disposition of his ancestral estate, and after stating that there are several judgments to the effect that a sonless Awan of Talagang Tahsil has unrestricted powers to make a gift of his ancestral property, the learned Judges repelled the argument of the learned counsel for the appellant that as the power of gift has been proved to exist in the case of Awans, an initial presumption arises that there is a co-extensive power of testation. This presumption, however, was held by the learned Judges to be rebutted by an entry in the riwaj-i-am that the Awans are not entitled to dispose of their ancestral property by will. This riwaj-i-am related to the Jhelum district and Talagang Tahsil was a part of the Jhelum district at the time when it was prepared.

I may here mention that in several cases which have been decided in this Court subsequently the correctness of the riwaj-i-am of the Jhelum district has been doubted. Both the reported cases, therefore, are not sufficient to rebut the presumption that arises in the present case. In the riwaj-i-am of the Jhelum district it is expressly stated that a sonless proprietor is not entitled to make a will in respect of ancestral property, but in

the riwaj-i-am of the Rawalpindi district there is a statement that such a proprietor is entitled to make a will in respect of ancestral property in favour of another Awan. Even, therefore, if the two judgments relied upon be held to lay down the correct law with regard to the Jhelum district, they cannot be held to rebut the presumption that arises in the Rawalpindi district because the custom as recorded in the riwaj-i-am of the two districts is different. The statement in the Customary law of the Rawalpindi District is further supported by a judgment of the District Judge of Rawalpindi in Civil Appeal No. 42 of 1904, decided on 26th May 1904, in which a will of ancestral property by a sonless Awan was upheld on the ground that the same was valid according to custom. The oral evidence produced in this case has been held by the learned District Judge to be unsatisfactory and has not been relied upon before me. I hold, therefore, that on the evidence produced the conclusion of the learned District Judge is correct and I dismiss this appeal with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 527

SKEMP, J.

L. Banwari Lal — Defendant —

Appellant.

v.

Kundan Cloth Mills, Ltd. — Plaintiff —
Respondent.

Second Appeal No. 789 of 1936, Decided on 21st December 1936, from order of Senior Sub-Judge, Ludhiana, D/- 17th April 1936.

(a) Company — Shares — Memorandum of association — Subscriber signing memorandum of association and agreeing to purchase certain shares — Subsequently, but before registration of Company, subscriber asking promoter to rescind his agreement on ground of misrepresentation — Subscriber held could not rescind.

A subscriber signed the memorandum of association of a proposed Company and agreed to purchase certain number of shares. Subsequently but before registration of the Company he asked the promoter of the Company to cancel his shares on the ground that he had been induced to purchase shares by the misrepresentation of the promoter :

Held : that the subscriber could not rescind his agreement to purchase shares but was bound by it : *Lord Lurgan's case*, (1902) 1 Ch 707, *Foll.*; 12 Bom 311, *Ref.* [P 528 C 1, 2].

(b) Practice — Judgment—Judge wanting to criticise conduct of party should do this in sober language.

It may be necessary for a Judge or a Magistrate to pass reflections upon the conduct or honesty of a party or the truthfulness of a witness ; when this is necessary that should be done in sober and becoming language. It is never necessary to make remarks about a whole class of society who are not before the Court. [P 529 C 1]

J. G. Sethi—for Appellant.

D. N. Aggarwal—for Respondent.

Judgment. — This second appeal is against a judgment of the Senior Sub-Judge, Ludhiana, affirming a decision by the trial Judge that the defendant was liable for call money in respect of shares which he had agreed to take up in a Limited Company at the time of its formation. The defendant pleaded that before the registration of the Company he had repudiated liability for the shares ; but the lower Courts relying on 12 Bom 311¹ overruled this contention.

Mr. Sethi has argued the second appeal on behalf of the defendant. The facts, as far as it is necessary to state them, are that a Company called the Kundan Cloth Mills was promoted by Mr. Kundan Lal of Ludhiana. The defendant Mr. Banwari Lal of Delhi signed the memorandum of association and wrote in his own hand that he would take 50 shares. According to Mr. Kundan Lal, he did so on 18th January 1933. The same day Mr. Kundan Lal brought the memorandum and articles of association to Lahore in order to have the Company registered. He took the papers for registration himself to the office of the Registrar of the Joint Stock Companies on 19th January 1933. The Registrar was not there ; Mr. Kundan Lal returned to Ludhiana on 20th or 21st where he got a telegram despatched on the 19th and a registered letter from Mr. Banwari Lal asking that his shares should be cancelled. He returned to the Registrar's Office on 22nd January 1933 and the Company was registered on the 23rd. Mr. Banwari Lal says that, he signed the memorandum a day or two earlier than the 18th but the point is of no importance.

Mr. Sethi urges that Mr. Banwari Lal signed on the representation that if after consulting his sons he wished to withdraw from the Company he might do so. He

quoted 54 P R 1915² and other rulings in support of this contention. The lower appellate Court found as a fact that there was no misrepresentation. It was, however, admitted by Mr. Kundan Lal that he had told Mr. Banwari Lal that if he did not wish to keep his shares he would transfer them to some one else or take them himself. The shares however cannot be transferred until the original call money is paid. Out of the authorities quoted on behalf of the respondent Company by Mr. D. N. Aggarwal, who argued the case very well, that which gives the reason of the matter most clearly is an English case—*Lord Lurgan's case*, (1902) 1 Ch 707.³ Lord Lurgan had signed the memorandum of association for 250 shares before the company went into liquidation. He then urged that he had been induced to take the shares by untrue representations made by one of the promoters named Sims. Buckley, J. said :

Is Lord Lurgan entitled to rescission of his contract to take shares on the ground of the assumed misrepresentation ? I think not. Before the incorporation of the company Sims was not the agent of the company, because the company did not exist, and therefore Lord Lurgan could not have been induced to sign for the shares by the misrepresentation of the company or its agent. The contract of the subscriber of a memorandum of association is of a very peculiar kind. Down to the moment when the memorandum and articles are taken to Somerset House to be registered there is no contract at all, because the corporation does not exist, and any contract by the signatories must be with the corporation. At the moment of registration two things take place by force of the Companies Act, 1862: the company springs into existence, and the subscribers to the memorandum of association become, by virtue of S. 23 of that Act, members of the company. There is no executory contract which is subsequently executed. There is no contract at all until the moment when the corporation and the character of membership in the signatories to the memorandum come simultaneously into existence. I must therefore hold that the subscriber to the memorandum cannot have rescission on the ground that he was induced to become a subscriber by the misrepresentations of an agent of the company.

Again he said :

The contract effected by signature of the memorandum and registration of the company is not merely a contract created between the subscriber and the company. It is a contract whose existence is the basis of the creation of the corporation as one of the contracting parties, and every other person who becomes a member becomes such on the footing that that contract exists.

2. *Piara Singh v. Peshawar Bank Ltd.*, A I R 1915 Lah 405=28 I O 53=54 P R 1915=22 P L R 1915.

3. *In re Metal Constituents*, (1902) 1 Ch 707=71 L J Ch 323=86 L T 291=50 W R 492.

1. *In re Machine Exchange Co., Ltd.*, (1888) 12 Bom 311.

I quote this case because as pointed out by Sir Shadi Lal in 54 P R 1915² and also by Mukerji, J. in 48 All 580,⁴ the law on the point is the same in India as in England. Sir Shadi Lal said that he had consulted the decisions of the English Courts which contain a lucid exposition of the law, and which should be followed by the Courts in India in so far as the Indian Statute is not at variance with the law obtaining in England.

12 Bom 311¹ was followed by Mukerji, J., in 48 All 580.⁴ The judgments cited by Mr. Sethi in support of his contention all deal with applications for shares made after the company has been registered, which are governed by entirely different principles. I therefore dismiss this second appeal with costs. There is however one other point. The senior Sub-Judge in the course of his judgment said :

His (i.e., defendant's) way of writing (as for example in Ex. P. 1) is sneaking and cringing. He wants, like people of his caste, to earn money and throw risks on others' shoulders.

Mr. Sethi asks that these sentences should be expunged. The request is not opposed by Mr. Aggarwal, who indeed supports it. I have had Mr. Banwari Lal's letter Ex. P. 1 read out; it might possibly be called obsequious or wheedling, but it does not justify the terms 'sneaking' or 'cringing'. As for the other sentence, reflection on all members of Banwari Lal's caste is entirely unjustified. I do not know what Banwari Lal's caste may be. It is not stated in the English papers put up in the second appeal and though it might be easily ascertained from the plaint I have studiously abstained from doing so. Not knowing his caste I say that the remarks are entirely unjustified. It may be necessary for a Judge or a Magistrate to pass reflections upon the conduct or honesty of a party or the truthfulness of a witness; when this is necessary it should be done in sober and becoming language. It is never necessary to make remarks about a whole class of society who are not before the Court. Remarks such as that made by the Senior Sub-Judge cause legitimate resentment, and I direct that these two sentences be now expunged from the judgment.

P.R./D.S.

Appeal dismissed.

¹4. J. H. Chandler & Co., Ltd. v. H. I. Phillips,
A I R 1926 All 550=95 I O 927=48 All 580=
24 A L J 691.

A. I. R. 1937 Lahore 529

COLDSTREAM AND BHIDE, JJ.

Achal Singh and others — Objectors — Appellants.

v.

Mahant Girdhari Dass — Petitioner and others — Respondents.

First Appeal No. 841 of 1932, Decided on 25th November 1936, from decree of Gurdwaras Tribunal, Lahore, D/- 29th February 1932.

(a) Sikh Gurdwaras Act (8 of 1925), S. 16 (2)—Word 'incident' in Cl. (2) (i) means historical event as distinguished from myth or tradition—Institution founded as langar by Kamboh who had adopted Udasi fraternity, for feeding and accommodating fakirs and travellers—Institution becoming typical Udasi Dera occupied by fakirs — Samadh of founder built in Dera — Dera not proved to have been founded in commemoration of any incident in life of any Sikh Guru — Public worship in Dera predominantly by Kambohs — Dera not proved to have been established in connexion with tradition of any Sikh Guru nor established in memory of Sikh saint, martyr or historical person — Institution held could not be declared Sikh Gurdwara.

The word 'incident' in S. 16 (2) (i) of the Act means some historical event as distinguished from a mere myth or tradition. [P 531 C 2]

An institution was founded by a Kamboh who became a fakir and adopted Udasi fraternity, as a langar, a charitable institution for the feeding and accommodation of fakirs and travellers. The institution became a typical Udasi Dera occupied by fakirs who used its income to maintain themselves and to build and maintain samadhs of Mahants. After the death of the founder a samadh was built in his memory and the then Mahomedan ruler made a grant of lands to the institution to meet the expenses of the langar. There was no evidence to show that the Dera was founded in commemoration of any incident in the life of any of the Sikh Gurus. The oral evidence adduced to show that the Dera was founded owing to some tradition in connexion with the tenth Guru was highly suspicious, conflicting and vague and there was no mention in the history of the district in which the Dera was situate that the tenth Guru ordered the founder of the Dera to build a Sikh Gurdwara. It was also found that the institution was not described by the then Mahant as Sikh Gurdwara at the time of the first settlement of the Punjab District, even though in cases of similar institutions such description was made by their Mahants. It was found on evidence that before the end of 19th century the public worship in the Dera was predominantly by Kambohs who were not regarded as Sikhs till 1901 and not by Sikhs. It was not even proved that the Dera was established in the memory of a Sikh martyr, saint or historical person :

Held : that the institution was not a Sikh Gurdwara under the circumstances.

[P 531 C 1, 2; P 537 C 1, 2]

(b) Evidence Act (1872), S. 57—Passages in books containing alleged tradition — Mere

existence of passages is not evidence of tradition — Before judicial notice of them is taken it must be shown that writer had special knowledge of tradition.

Before any judicial notice could be taken of any passages in books relating to the alleged tradition something more than the mere existence of the passages would have to be proved before the passages could be regarded as evidence of the existence of the tradition. It must be shown that the writer had any special knowledge of the alleged tradition or the tradition is a repetition of that given in the history. [P 592 C 2]

Harnam Singh — for Appellants.

Achhru Ram and Mohan Sundar Dass
— for Respondents.

Coldstream, J.—On 10th April 1926 a petition was forwarded to the Local Government under S. 7, Sikh Gurdwaras Act, praying that an institution in Bhuman Shah in the revenue estate of that name in Dipalpur Tahsil of Montgomery District be declared to be a Sikh Gurdwara. Two counterpetitions were submitted under S. 8 of the Act, one by Girdhari Lal, Mahant of the institution, and the other by worshippers in the institution claiming that the institution was not a Sikh Gurdwara but an Udasi Dera founded by Bhuman Shah, an Udasi, whose samadh it contained and after whom it was called. These two petitions were disposed of together in consolidated proceedings by the Sikh Gurdwaras Tribunal to whom they had been duly forwarded, under the provisions of S. 14 of the Act. The tribunal by a majority (the President and Rai Bahadur Lala Dwarka Parshad, Sardar Kharak Singh, dissenting) found in favour of the petitioners, holding that the objectors, the Shromani Gurdwara Prabandhak Committee and the signatories of the petition presented under S. 7 who had been made parties to the proceedings, had failed to prove that the institution fell within the definition of a Sikh Gurdwara in S. 16 (a) of the Act. Against the decision in each case five of the signatories of the petition under S. 8 and the Shromani Gurdwara Prabandhak Committee have presented the two Appeals Nos. 841 and 842 of 1932. This judgment will dispose of the two appeals.

Bhuman Shah, who was a Kamboh by birth, was born about 1685. He became a fakir and a chela of Baba Pritam Das, thus joining the Udasi fraternity. Being credited with spiritual power he was given the lands of the village then known as Kot Kutabpura by their owners who were Wattus, members of a Mahomedan tribe.

Here he founded a langar, a charitable institution for the feeding and accommodation of fakirs and travellers. After his death his successor, Bhai Nirmal, built a samadh in his memory and the village became known as Bhuman Shah. To meet the expenses of the langar the Mahomedan ruler of the time endowed it with a jagir of the lands of Bhuman Shah. This jagir was confirmed by Maharaja Ranjit Singh and subsequent grants were conferred on the Mahant of the institution by Sikh Sardars. In 1854, after the country had come under British rule, the Bhuman Shah lands were released from revenue in perpetuity in favour of

the Dera of Bhai Bhuman Shah subject to the good behaviour of the community and the application of the proceeds of the jagir to the maintenance of the shrine.

The shrine became famous and was held in particular reverence by the Kambohs who regarded, and still regard, Bhuman Shah as their patron saint. It was managed by a succession of Mahants all of whom were Udasis, chela succeeding Guru. In 1893 Bhai Harbhajan Das became Mahant. In 1925 finding that he was no longer able to manage the shrine, he appointed his chela Girdhari Das, the petitioner, as his successor and installed him as Mahant: *vide* p. 40. All these are facts which are not disputed. As Girdhari Lal was admittedly in possession of the shrine and it had been ruled in the *Manak* case by this Court in 12 Lah 497¹ that Udasis were not Sikhs for the purpose of the Sikh Gurdwaras Act, the onus of proving that the institution was a Sikh Gurdwara was placed by the tribunal on the objectors. To this procedure no objection was taken before us and the judgment of their Lordships of the Privy Council confirming the decision of this Court in the *Manak* case is authority for regarding it as correct: 17 Lah 146.²

In order to establish their claim the objectors had to prove under the provisions of S. 16 (2) (i), (ii), (iii), (iv) and (v), either (i) that the Dera was established by or in memory of any of the Sikh Gurus or in commemoration of any incident in the life of any of the ten Sikh Gurus and was

1. *Ram Prasad v. Shiromani Gurdwara Prabandhak Committee*, Amritsar, A I R 1931 Lah 161=135 I C 657 = 12 Lah 497 = 32 P L R 910.

2. *Hem Singh v. Basant Das*, A I R 1936 P C 93=161 I C 529 = 17 Lah 146 = 63 I A 180 (P O).

used for public worship by Sikhs before and at the time of the presentation of the petition under S. 7, or that (ii) owing to some tradition connected with one of the ten Sikh Gurus it was so used predominantly by Sikhs, or that (iii) it was established for use by Sikhs for the purpose of public worship and was so used, or that (iv) it was established in memory of a Sikh martyr, saint or historical person and was so used, or that (v) owing to some incident connected with the Sikh religion was so used predominantly by Sikhs. The objectors first sought to prove the institution to be a Sikh Gurdwara under each of these clauses but subsequently abandoned their claim under Cl. (v) with which clause we are therefore no longer concerned. The only question which we have to decide is whether the Tribunal has correctly decided that the objectors have failed to prove the circumstances required by any of the Cls. (i), (ii), (iii) and (iv).

It will be convenient to deal with the case put before us with reference to each of these clauses : Cl. (i) There is no evidence that the Dera was established in memory of any of the ten Sikh Gurus. On the other hand there are a number of circumstances brought out by the documentary evidence, the admissibility of which has not been challenged, which strongly indicate that the Dera was not founded in memory of any of the Sikh Gurus. It has never, so far as is shown by any of the evidence brought to our notice, been called a Gurdwara. It was established, not as a place of public worship but a langar. When inquiry into the muafi was made in 1854 it was noted that the endowment was in favour of the samadh of Bhai Bhuman Shah in which there was a Dera of the same name where about 80 Sadhs resided, were fed and clothed, and that the samadh was a handsome building (*vide* p. 5/1). The Mahant of the time stated that the jagir had been granted to meet the expenses of the langar (*vide* p. 32). Again in 1860 (*vide* p. 31) the jagir was described as in favour of the samadh Bhai Bhuman Shah.

When an inquiry was held into the question whether a Mahant had been duly put in charge of the Dera or not, certain villagers, in a petition to the Deputy Commissioner (apparently against a proposal to declare the Mahantship to be unclaimed) specially mentioned that funeral rites were being regularly performed and

food was being supplied as before to travellers, as showing that the state of affairs was satisfactory. No reference to any Sikh worship was made. Unlike similar records relating to other institutions into whose origin we have had to inquire from time to time the records of inquiries into the muafi attached to this shrine make no mention of Sikh ceremonial such as the reading of the Granth being carried on by the Mahant. Bhai Darshan who was the Mahant at the first settlement, and who had himself founded a Dera in honour of Guru Nanak in another village where the Granth was recited, when examined, made no mention of any connexion between the foundation of the institution and any Guru, stating simply that Bhuman Shah village had been given as a jagir by the Kings of Delhi before the reign of Ranjit Singh to Bhuman Shah, an Udasi Faqir, who started a langar. He also stated that the Dera had been plundered by a Sikh Sardar. An examination of all this documentary evidence leads to the certain conclusion that the institution was founded as a langar which became a typical Udasi Dera occupied by faqirs who used its income to maintain themselves, to build and maintain samadhs of Mahants and to accommodate travellers. Nor is there any evidence to show that the Dera was founded in commemoration of any incident in the life of any of the Sikh Gurus. 'Incident' in Cl. (i) must, in my opinion, mean some historical event as distinguished from a mere myth or tradition. It has been conceded before us that there is no mention, in any authoritative history of the Gurus or of the Sikh religion, of any visit by a Guru to the Montgomery District or of any other incident connected with the foundation of this Dera.

For the reasons given I have no doubt of the correctness of the Tribunal's decision that the requirements of Cl. (i) have not been proved. Cl. (ii) : It is on the application of this clause that the appellants have mainly based their case, contending that the public worship in this institution was predominantly Sikh and that this was owing to a tradition connecting the tenth Guru, Guru Gobind Singh, with the foundation of the shrine. To prove the existence of the tradition they have relied principally on an account of the foundation of the Dera given in a history of the Montgomery District published

in 1872. A translation of the relevant passage is exhibited as O. 13 at p. 70 of Vol. 3 of the printed record. This publication purports to have been compiled during the land revenue settlement operations of 1868—73 at the instance of the settlement officers under the supervision of Extra Assistant Settlement Officer and in pursuance of the orders of the Financial Commissioner. The portion relating to Dera Bhuman Shah was prepared by Fida Hussain, a Kanungo. Here the following story is told :

Guru Gobind Singh, accompanied by five horsemen, met Bhuman Shah who was then a boy, but already devoutly religious, grazing cattle in a jungle, and discerning his spiritual greatness asked him for food whereupon the boy gave him his only piece of bread. This so pleased the Guru that he blessed the lad promising him renown as a saint and worker of miracles. The Guru instructed him to go to Kot Qutab and dig up a bush of high grass which had been his place of worship (dhuan) during the boy's previous incarnation as a devout Faqir. There, under the grass, he would discover his sandals and his blanket and there he must establish his langar. So Bhuman Shah became the disciple of Bawa Pritam Faqir of Pakpattan, calling himself Bhai Bhuman Shah. He went to Kot Qutab, then owned by Wattus, and asked for land which the Wattus at first refused but on his digging up the bush and discovering the sandals and blanket realized that he was a worker of miracles and gifted to him the whole of the Kot Kapura lands. There Bhuman Shah settled and built his famous langar which succeeding mahants had duly maintained. This is the only documentary evidence which has been placed on the record in proof of the existence of this story and to which our attention has been drawn. No reference was made in argument to the pamphlet mentioned by Sardar Kharak Singh at p. 143 of his judgment and I presume that reliance is not placed upon it.

Here a digression is necessary to dispose of an objection urged by the appellant against the refusal of the tribunal to accept in evidence portions of two other books published in 1911 and 1913. These books were produced after the hearing of evidence had been concluded. The tribunal by an order in which all three members concurred rejected the books on the ground

that there was nothing to show that they were works of authority. It is stated before us by appellants' counsel that they contain accounts of the foundation of this Dera similar to that given in the history of the Montgomery District that the mere publication of these accounts showing that the tradition existed in 1911 and 1913 was itself a relevant fact that S. 57, Evidence Act, to the last part of which the tribunal apparently had regard, has no application, as the books were not produced to prove the truth of their contents but merely the fact that a certain story was told in them. Now whether S. 57 is or is not applicable it is clear that before any judicial notice could be taken of any passages in these books relating to the alleged tradition something more than the mere existence of the passages would have to be proved before the passages could be regarded as evidence of the existence of a tradition. But no attempt to produce evidence was made by the objectors to show that the writers had any special knowledge of the alleged tradition or that the story was described as a tradition or was merely the repetition of that given in the history of the Montgomery District referred to above. We have not been asked in the grounds of appeal to take further evidence. All we are asked to do is to take notice of the passages. In the circumstances I am not prepared to accept the books in evidence now. I may add that it appears from the findings of the tribunal that the books were produced not only to prove the existence of a tradition but also as evidence of a historical fact. It is not however now argued that the alleged tradition is a true story.

Before passing to notice the oral evidence relating to the alleged tradition I may mention that in opening his case before the tribunal the objectors' counsel stated the tradition to be that the Guru ordered Bhuman Shah to build a Gurdwara. Of this order there is no mention in the story told in the history of the Montgomery District. The oral evidence relied upon before us by the appellants regarding the tradition is dealt with in detail at pp. 108 and 109, pp. 132-133 and pp. 142-143 of the printed judgments of the learned President and the members of the tribunal. Ten witnesses have mentioned a tradition. These are Nos. 8, 14, 17, 36, 51, 52, 53, 54, 56 and 61. It is common ground of the parties that the

shrine is venerated predominantly by Kambohs who, as already made clear, regard Bhuman Shah as their patron saint. Of these witnesses three are Kambohs. S. Kishan Singh (O. W. 51), is a retired official of the Patiala State and lives in Patiala. He visited the shrine twice and once had a conversation in a railway station waiting room with Mahant Harbhajan Das who without being questioned about the matter told the witness that Guru Gobind Singh had gifted the Gurdwara to Bhuman Shah. O. W. 8 is a barrister and while he was a contractor at Pakpattan in 1922 the mahant told him that the Guru had blessed Bhuman Shah and foretold the continuance of his langar. The witness is an Arora who visited the Gurdwara only once : the tradition was told to him in a Court room in Pakpattan. The witness Hardit Singh, O. W. 14, also an Arora, introduces a new detail into the Mahant's story, namely, that the Guru told Bhuman Shah where he would find an iron 'loh' (pan). This detail he had heard the mahant mention to his congregation at a meeting in Kaliaana village, to which place the witness belongs. Pratap Singh, O. W. 17, another Arora of Kaliaana village, says that the Mahant Harbhajan Das told him that the Gurdwara was the gift of the Guru.

A retired Police Sub-Inspector, O. W. 36, adds that the Guru, according to the mahant, came to the Gurdwara and there gave the land to Bhuman Shah for a Gurdwara. S. Kartar Singh, O. W. 53, a Mohyal of Gurdaspur, who was once stationed at Pakpattan as an Inspector of Police, enlarges on this story. Guru Gobind Singh, so he was told, directed Bhuman Shah to dig in a certain place. There a loh, (pan) a cooking dish and a ladle were found which had been gifted by the Guru. These articles according to the witnesses were actually preserved in the Gurdwara. Nathu Ram, O. W. 56, a resident of Chak 139, another Arora, gives similar evidence.

All this oral evidence is in the highest degree suspicious ; it is conflicting, and sometimes vague, in respect of the actual tradition. If it is true that Mahant Harbhajan Das did give the witnesses the information they declare he did, it is doubtful whether this evidence proves the existence of a tradition, that is to say, a story handed down orally from generation to generation. It is not shown that

the story of the meeting between Bhuman Shah and Guru Gobind Singh was current before 1872. No one knows how the Mahant came by the information he gave the witnesses. No witness says he was told the story by any of his ancestors and, as already noticed, the only Kamboh witness on the point is not a resident of the District and heard the tradition from the Mahant in the Patiala Railway Station. It may be that the story was invented to gain special favour of the Sikhs, some of whom had enriched the institution, and many of whom visited it as a famous smadh. The evidence of 13 witnesses of the other side including Sikh Kambohs, and three other Sikhs, that no such tradition exists is at least as reliable as this oral evidence and it is strengthened by the fact that a different story of the acquisition of the lands of the estate by Bhuman Shah is given in the revenue records of the Second Settlement of 1872 (*vide* p. 25). The story then told by the Mahant of the time, Bhai Santokh Das, who was in charge of the institution from 1860 to 1886, and had succeeded Bhai Darshan, the Mahant who had founded another Dharamsala in which the Granth Sahib was recited, was that the land was given by Lakhu, a Wattu, and his mother in gratitude for Bhuman Shah's prayers which had resulted in the release of Lakhu from prison where he had been put by the Governor of Lahore.

Assuming, however, that since 1872 a tradition has existed connecting Guru Gobind Singh with the institution, the objectors, to bring the shrine within the ambit of Cl. (ii), must prove further not only that the institution was used for public worship predominantly by Sikhs before and at the time of the presentation of the petition under S. 7 but also that it was so used 'owing to' that tradition. It being common ground that public worship in the institution has been predominantly by Kambohs a great part of the arguments has been devoted to the question whether the Kambohs are Sikhs. In support of the objectors' contention that this worship has been Sikh worship reliance has been placed on : (1) the statement by Mahant Darshan made at the settlement of 1853 (O. 10) to which a reference has been made above, that he had built a Dharamsala in honour of Guru Nanak (the father of Sri Chand, the founder of the Udasi sect) in which the Granth

was recited; (2) a plan (O. 1) filed by the agent of Mahant Harbhajan Das in a suit instituted against the Mahant by some of the Udasis of the institution in 1897 praying for his removal from the Mahantship because of his bad behaviour; (3) statements made by the Mahant in reply to the charge then brought against him (O. 7); (4) the evidence that Harbhajan Das used a signet ring which bore the words 'Akai Sahai'; (5) another statement by the Mahant in 1924 that *karah parshad* was distributed in the institution (O. 14); (6) evidence that the family of Baba Karam Singh Bedi, descendants of Guru Nanak, controlled the election of the Mahants; (7) the fact that fairs frequented by Sikhs are celebrated at the institution; (8) the fact that the Mahants have been called 'Bhais' and 'Shah'; (9) the fact there have been endowments of the shrine by Sikhs and (10) the fact that an entrance to the shrine is called the *darshani deorhi*.

The circumstances sought to be proved by this evidence are inconclusive, either by themselves or taken together. It is not proved that only Sikhs are known as Bhais or Shah. It is common knowledge that other than Sikhs are so addressed and named. Sch. 2 of the Act, mentions the institution of Dera Baba Charan Shah (No. 70) as an institution which cannot be claimed to be a Sikh Gurdwara and there is at least one instance: see A I R 1934 Lah 60,³ of the Mahant of an Udasi shrine being called Bhai. The fact that Sikhs endowed an institution does not prove it to be a Sikh Gurdwara: see, e. g., A I R 1934 Lah 969⁴ and A I R 1936 Lah 216.⁵ Any palace or religious building may have a *darshani deorhi* (a door at which the owner or person in authority sits before the people or from which he may be seen) and the plan of 1897, on which the objectors rely, shows no *darshani deorhi* or any *deorhi* at the place where according to the objectors' evidence, this door is situated. It is not satisfactorily proved that the Bedis had any control over the election of Mahants while on the other hand the *wajib-ul-arz* of 1857 (p. 30) shows that the Mahants nominated their successors, or, if a Mahant failed to do so, his successor was appointed

by the fraternity. Nor is the possession of a signet ring inscribed with the words 'Akai Sahai' evidence of any great importance. No doubt the words denote Sikh influence, but there is no reason to suppose that an Udasi who was not a Sikh would not wear such a ring, for Udasis as well as Sikhs worshiped God as the 'Eternal Protector'. We know that Harbhajan Singh remained an Udasi all his life. In 1924 he was President of the Udasi Maha Mandal—a society formed for the purpose of combating the Akali (Sikh) movement which led to the passing of the Sikh Gurdwaras Act. Admittedly three, or including the Dusehra four fairs are celebrated at the shrine—the Maghi fair, the Baisakhi fair and a fair held on the 13th of Poh. The first three are frequented by Hindus as well as by Sikhs and are not peculiar to Sikh institutions. It is contended by the appellants that the fair on the 13th Poh was in commemoration of the martyrdom of the sons of Guru Gobind Singh at Sirhind on that day. But this contention is negatived by the evidence of the objectors' own witnesses Jawand Singh, (O. W. 4), Mota Singh, (O. W. 5), a Sikh, and Santa Singh, (O. W. 23), another Sikh, who declared that it was in memory of Bhuman Shah, who was born on that day. These witnesses were among the first 50 witnesses examined by the objectors. After their evidence had been recorded the tribunal on 24th August 1931 allowed the objectors to withdraw 20 witnesses who were present and gave them a long adjournment for calling further evidence. The witnesses then summoned were examined in January 1932. It was not until after that time that the objectors put forward the proposition that the fair of the 13th Poh was in celebration of the martyrdom of the sons of Guru Gobind Singh. It is obvious that the earlier witnesses are the more reliable.

That there was no public Sikh worship in the dera in Bhai Darshan's time may fairly be presumed from the omission of any reference to such worship in the institution in Bhai Darshan's description of the dera in 1853. We know from the large number of cases of this kind which have come before us that the Mahants of similar institutions, when examined by Settlement Officers at the first settlement of the Punjab Districts, were very careful to enlist official and popular sympathy by declaring that they regularly read the

3. Nagindar Singh v. Pal Das, A I R 1934 Lah 60=154 I C 371.

4. Santokh Singh v. Devi Das, A I R 1934 Lah 969=150 I C 925.

5. Santa Singh v. Puran Das, A I R 1936 Lah 216=162 I C 858.

Granth Sahib and had there been any kind of Sikh ritual performed in this dera, Bhai Darshan would most certainly have emphasized the fact. As regards the statements of Bhai Harbhajan Singh made for the purpose of the litigation in 1927 and the plan then produced (O. 1), the circumstances in which these were made have to be considered in estimating their present evidential value. The Mahant was being attacked by his opponents. It is significant that the latter in their plaint (*vide* O. 2) made no reference to Sikh observances but complained that the Mahant had not served the sadhs and the public strictly according to the old practice of the Akhara, or maintained the langar, or kept the dera in a flourishing condition, and that he had stopped lighting lamps on samadhs and visiting his disciples. It appears that the Mahant had given a written guarantee to the Bedis that he would behave well and serve the dera. In his pleas (*vide* O. 3) the Mahant denied the allegations against him referring to his good relations with the congregation (bhek) and his disciples, and his proper maintenance of the mandir.

There was no suggestion by the plaintiffs that Sikh observances were customary or had been neglected. In his written evidence (*vide* Exs. O-6 and O-7), the Mahant went out of his way to state that shabad kirtan was regularly performed in his dera, that rababis (minstrels) were always present, that he attended kirtan and bhajan meetings, that he read the Granth Sahib daily when he visited the samadhs (which according to the plan, were on-looked by a verandah in which the Granth Sahib was opened) and that when he failed to do this, he fined himself and spent the fines on the distribution of *karah parshad*. These admissions were doubtless prompted by a desire to propitiate the Bedis. They may be evidence that public Sikh worship was in this Mahant's time carried on at the samadhs but they do not show that the shrine was predominantly used by Sikhs for public worship. The Udasis have always revered the Granth Sahib which they used to keep and read among their Hindu scriptures. A review of the evidence I have described, does not lead to the conclusion that before the end of the nineteenth century public worship in this dera, which was a typical Udasi institution in which the principal object of veneration was the

samadh of Bhuman Shah (decorated, I may mention, with a picture showing the Mahant or a sadh smoking a hukka) and of his successors was by Sikhs. Until 1901 the Kambohs were not regarded as Sikhs. In 1883 the Kambohs of the Montgomery District were described in the Gazetteer of that year as 'almost without exception Hindus'. This was perhaps because Sikhs were commonly regarded as a sect of Hindus; but that the Kambohs of that time were Sikhs as defined in the Sikh Gurdwaras Act (Cl. 9, S. 2) there is no reason whatever to assume. They were not known to be Sikhs but were known to be Hindus. At the Census of 1881 the number of Kambohs, male and female, in the whole of the Montgomery District was returned as 217. At that time some distinction had been made between Sikhs and Hindus. At the Census of 1901 the number was 201. It is obvious therefore that the fact that the worship at the dera was predominantly by Kambohs at that time does not help the appellants. It is true that at the Census of 1921 the Kambohs in the Dipalpur Tahsil who were returned as Sikhs outnumbered those who were returned as Hindus (17217 as compared with 11420), but this fact will not prove that the worshippers in this Dera were then predominantly Sikhs.

To discredit the evidence of the witnesses produced by the petitioner on this point the appellants proposed after the adjournment, to which I have already referred, to place on record the register of Sikh electors in the Montgomery District prepared under the provisions of the Sikh Gurdwaras Act for the purpose of electing members of the committee of management of the Gurdwaras of the District and the Board of Control (Ch. 8 of the Act). The appellants' intention was to show that many of the Kambohs who had given evidence that they were not Sikhs and that the worship in the dera was not Sikh had been placed on the register as Sikhs entitled to vote. The learned President of the Tribunal and Rai Sahib Dwarka Parshad declined to admit this register as evidence, holding that it was not proved that any enquiry had been made from each of the persons placed on it, and that the register could at best be only secondary evidence in the absence of a declaration made by the voter himself before the Tribunal in accordance

with S. 2 (9) of the Act. Sardar Kharak Singh was in favour of admitting the document. The orders of the Tribunal are at pp. 29 and 30 of Part 2 of the printed record.

Strong exception has been taken before us to the order of the majority of the Tribunal, the contentions being that the register would have been good evidence to contradict the witnesses who had been placed on the roll, but had denied in giving evidence that they were Sikhs, and that the fact that they were on the register would make it probable that they were Sikhs, the rules providing that any person who is on the electoral roll of persons entitled to vote for the election of a member to represent a Sikh constituency of the Provincial Legislative Council is entitled to vote at the election of the Gurdwara Committee, and the qualification for voting as a Sikh at the Council election being the same as that required for voting at the Gurdwara Committee election. Before the register was produced five witnesses, Nos. 14, 17, 18, 19 and 21, had been examined by the petitioner-respondent about their inclusion in the electoral roll. The first had stated that he did not remember the preparation of any roll of electors under the Act. Dhunna Ram, P. W. 17, a Kamboh, declared he did not know whether he was on the roll or not, and that he did not get himself enrolled. Jaimal Singh, P. W. 18, an Arora, also professed ignorance of the preparation of a roll of Sikh voters. Another witness, P. W. 21, a Sikh (who had not been regularly baptized) admitted that he was on the electoral roll for the Council and was a Sikh. He gave evidence that the Kamboh worshippers at the dera were Sikhs. He is not however a resident of Bhuman Shah. The patwari who prepared the register was not summoned. Had any evidence been produced to prove how the register was prepared or that only persons defined as Sikhs by the Act had been placed on the register of voters, either for the Legislative Council or for the purpose of the Sikh Gurdwaras Act, the register would, I think, have been relevant and possibly of some use to the appellants. As it is however, the mere putting of the register on the record would not prove that the dera was used predominantly by Sikhs for public worship. Admittedly the Kamboh Sikhs are largely Sahjdhari and not ortho-

dox Sikhs, and we do not know whether all those who were enrolled in the register would have asserted that they were Sikhs according to the definition in the Sikh Gurdwaras Act, had their qualifications been questioned.

The oral evidence is, as remarked by the members of the Tribunal mostly of a partisan nature. Many witnesses on both sides have made untrue statements in exaggerating their case—those of the petitioners asserting that the Granth Sahib is not read in the dera, and several of those called by the appellants denying that the samadh is worshipped—and so forth. Having considered this oral evidence with due regard to the established and admitted circumstances, I attach greater weight to that put forward by the petitioner. By 21st August 1931 forty-one witnesses had been examined by the objectors, none of whom were Kambohs. On 22nd August three Kamboh witnesses were called from Amritsar (O. Ws. 48, 49 and 50). The first is a journalist who was approached by one of the appellants (who also procured the others) two days before he gave evidence. He had attacked the Bhuman Shah Mahant some years ago in his paper. He is president of a society calling itself the Kamboh Maha Sabha whose object is social reform. He had once spent a night in the dera in 1920. The second is the general secretary of this society and is a parcel clerk at Amritsar Railway Station. He visited Bhuman Shah once in 1924. The third is a shopkeeper and treasurer of the society. After this evidence had been recorded there was the long adjournment until January 1932 and then more witnesses were called from Patiala, Gurdaspur, Khem Karan, Lahore and some chaks in Montgomery District. Several admitted that reverence was paid by the worshippers to the samadh of Bhuman Shah. Two of these had previously been residents of Bhuman Shah. The petitioner examined thirty Kambohs, including twenty-three zamindars of Montgomery District most of whom live close to Bhuman Shah, and ten regularly baptized Sikhs. Several are persons of respectable standing. Here I may mention that the dera is not the only place of worship in the village. There is a Sikh Gurdwara for baptized Sikhs at a short distance from it (P. W. 5).

Assuming however that during recent times the dera has been used for public

worship by Sikhs and predominantly by Kambhos who were or are Sikhs (in spite of the fact that the last two Mahants were prominent antagonists of the Akali movement), there is no justification whatever for holding that this use was owing to any tradition connecting the shrine with the tenth or any other Sikh Guru. It is not the appellants' case that there has ever been any change or innovation in the form of public worship at the shrine or that the Kamboh worshippers suddenly began to frequent the dera because they had come to know the tradition. The only evidence relied upon before us in support of the contention that it was owing to the alleged tradition that Sikhs have been predominant worshippers is a statement of the witness Bhawania Ram, O. W. 61, a Kamboh of a village close to Bhuman Shah, that his community pays a contribution (*kar*) to the dera at every harvest because Guru Gobind Singh ordered Baba Bhuman Shah to carry on a langar there, and a statement of Partap Singh, an Arora, O. W. 17, that Mahant Harbhajan Das once asked him for help "because the Gurdwara was his (Partap Singh's Guru's *Bakhshish*)". The contribution referred to as '*kar*' is mentioned in the Gazetteer of the Montgomery District published in 1898 (page 89) where reference is made to the dera as follows :

Udasi Faqirs own several fine villages in the west of the Dipalpur Tahsil. Among them is Bhuman Shah at which there is a shrine of that name. There is a langar This is supported partly by the proceeds of the jagir enjoyed by the incumbent of the shrine and partly by the contributions of the Kambhos who look upon Bhuman Shah as their patron saint. He was a Kamboh who entered the Udasi Order.

A similar description of the dera is given in the previous Gazetteer of 1884 (page 69). No connection between the contribution and any Sikh tradition is suggested and the bald statements of the witnesses, O. W. 17 and O. W. 61, are certainly not sufficient to prove that Sikh public worship, if any, did take place in the shrine, was owing to a belief in the story of the meeting between Guru Gobind Singh and Bhuman Shah. On the other hand having regard to the reliable documentary evidence adduced, it cannot be doubted for a moment that the Kambhos frequent the shrine and worship in it because it is associated with the memory of their patron saint.

Clause (iii).—It is proved that the shrine was not established for use by Sikhs for public worship and this clause therefore has no applicability.

Clause (iv).—There is no evidence that this dera was established in memory of a Sikh martyr, saint or historical person. It was established by Bhuman Shah, an Udasi, as a langar, and endowed for use as such by the Mahomedan ruler at the time. I would dismiss the appeal with costs.

Bhide, J.—I agree.

K.B./A.L.

Appeal dismissed.

* A. I. R. 1937 Lahore 537

COLDSTREAM AND BHIDE, JJ.

Robert Hercules Skinner — Plaintiff —
Appellant.

v.

R. M. Skinner and others —
Defendants — Respondents.

First Appeal No. 847 of 1933, Decided on 11th November 1936, from decree of Senior Sub.Judge, Hissar, D/- 1st February 1933.

(a) Execution—Bar to — Pre-decree compromise cannot be pleaded as bar in execution proceedings—Executing Court can go into matters arising after decree but not into pre-decree agreements — Separate suit for pre-decree compromise is maintainable.

There is an essential distinction between the functions of a Court which adjudicates on the rights of the parties and embodies the decision in a decree, and the functions of a Court whose duty is merely to execute such a decree. The executing Court can only go into matters relating to the execution, discharge or satisfaction of the decree which arise after the decree came into existence and result in its discharge or satisfaction. But the executing Court cannot go into a pre-decree compromise which may nullify the decree. In such a case the remedy for the party pleading a pre-decree compromise is by way of a separate suit : *Case law discussed.* [P 540 O 1,2].

* (b) Limitation — Declaratory suit — Suit for declaration on ground of pre-decree compromise that decree-holder is barred from executing decree — Time begins to run when compromise is repudiated by decree-holder.

In an execution proceeding, the judgment-debtor presented an application under O. 21, R. 2, Civil P. O., for recording satisfaction as there was a pre-decree compromise. The application was not contested by the decree-holder who did not put in appearance; it was, however, dismissed by the Court. Subsequently, the decree-holder made an application for execution of the decree. The judgment-debtor thereupon filed a suit on the basis of the pre-decree compromise for a declaration that the decree-holder was barred from executing.

the decree. The decree-holder pleaded that it was barred by limitation, as the suit was filed after six years from the date of dismissal of the judgment-debtor's application under O. 21, R. 2 :

Held : that the suit was within time as the judgment-debtor could have no cause of action when his application was dismissed until the compromise was repudiated by the decree-holder, by applying to execute the decree. [P 540 O 2]

* (c) *Res judicata*—Constructive *res judicata*—Compromise between parties to suit before decree—Compromise not disclosed by defendant to Court before decree was passed—Defendant bringing suit for declaring compromise binding on plaintiff—Defendant is barred from raising this plea of compromise under Explan. 4 to S. 11, Civil P.C., in his suit.

A compromise was entered into by the parties to a suit before a decree was passed by the Court; but the defendant in that suit did not bring it to the notice of the Court before the passing of the decree and a decree was passed. The defendant then brought a suit for declaring the compromise binding on the plaintiff in that suit :

Held : that it was incumbent on him to raise this plea of compromise in the previous suit and as he did not do so he was debarred by Explan. 4 to S. 11, Civil P. C., from raising it in this suit : *A I R 1921 Lah 248 ; 29 Cal 810 and 67 I C 753, Rel. on.* [P 541 O 1]

(d) *Compromise—Pre-decree compromise*—Compromise amongst parties to suit in which some defendants were minors—Sanction of Court not taken—Compromise against interest of minors—It is not binding on minors.

Where in a suit against some persons including some minors, a compromise was entered into during the pendency of an appeal in the High Court but no sanction was obtained from the Court and it was found that the compromise was not for the benefit of the minor defendants :

Held : that it was not binding on them as it was effected without the sanction of the Court in contravention of the provisions of Rr. 6 and 7, O. 32, Civil P. C. [P 541 O 1]

* (e) *Practice—Relief—Alternative relief*—Suit by judgment-debtor for declaring pre-decree compromise binding on decree-holder and for injunction restraining him from executing decree—Alternative relief for refund of Rs. 80,000 paid under compromise to decree-holder, prayed for in appeal—Suit arbitrarily valued for jurisdiction purposes at Rs. 11,000 and only court-fee of Rs. 10 paid for declaration—Court-fees not being paid on Rs. 80,000 alternative relief cannot be allowed in appeal, no pleadings and no issue being framed on the point in suit.

Parties to a suit entered into a compromise before the passing of the decree in the suit but this compromise was not disclosed to the Court before the passing of the decree and a decree was passed. The judgment-debtor then brought a suit for declaring the compromise binding on the decree-holders and for injunction restraining them from executing the decree and the suit was valued at only Rs. 11,000 arbitrarily for purposes of jurisdiction and court-fee of Rs. 10 was only

paid for declaration only, the relief of injunction being said to be a mere consequential relief. The suit being dismissed, the judgment-debtor in appeal prayed for allowing alternative relief of refund of amount of Rs. 80,000 paid by him to decree-holder under the compromise :

Held: the suit having been valued arbitrarily and no court-fee having been paid on Rs. 80,000 for a refund, there were no pleadings on this point and no issue was framed in the trial Court. Hence the alternative relief for refund of amount could not be allowed in appeal. [P 541 O 2]

Shamair Chand, Sham Lal, J. L. Kapur, Parkash Chand and Yashpal
— for Appellant.

Mohammad Amin Khan and Mohammad Din Jan — for Respondents.

Bhide, J.—This is a plaintiff's appeal, arising out of a suit for a declaration that the defendants are debarred from executing the Privy Council decree in Suit No. 97 of 1918, instituted in the Court of the Senior Subordinate Judge, Hissar, and for an injunction restraining them from executing it. The facts which led to the suit were as follows : On 30th May 1914, three brothers named Thomas Skinner, Robert Skinner and George Skinner entered into an agreement with R. H. Skinner, the plaintiff for sale of certain villages in the Hissar District for a sum of Rupees 4,23,000. Rs. 5,000 were to be paid in cash and one lac of rupees by 18th June 1914. The balance was to be paid by transfer and adjustment of accounts in the Bank of Upper India. The first two conditions were fulfilled, but the third one was not, with the result that a sum of over Rupees three lacs remained due from the vendee. The vendors instituted a suit against the vendee R. H. Skinner (Suit No. 97 of 1918, referred to as Suit No. 97 of 1918, in the judgments, but really instituted in 1917) for specific performance of the contract by payment of this sum and obtained a decree from the Court of the Senior Subordinate Judge, Hissar, on 9th July 1918. The vendee appealed to the High Court and during the pendency of the appeal, the legal representatives of Robert Skinner and George Skinner who are the defendants in the present suit are alleged to have entered into a compromise with the present plaintiff on 5th November 1923, giving up their rights in the suit entirely for a consideration of Rs. 80,000, which was paid to them. The compromise, however, was not presented to the Court and was, therefore, not embodied in the decree. The reason given

for adopting such an extraordinary course is that all the plaintiffs in that case had not entered into the compromise. The decree of the Senior Subordinate Judge was affirmed by the High Court on 26th November 1923. The vendee appealed to their Lordships of the Privy Council, but there also the compromise was not mentioned. The appeal was dismissed by their Lordships, though with a slight modification of the decree, which is not material for the purposes of the present suit. The decree of their Lordships of the Privy Council was passed on 16th December 1927. The defendants in the present suit who were parties to the aforesaid compromise did not appear before their Lordships of the Privy Council.

The defendants did not at first make any attempt to execute the decree in their favour but one Shankar Das, who had a decree against the present plaintiff R. H. Skinner, attempted to execute it. When the question of execution of the decree was thus raised, R. H. Skinner presented an application to the executing Court under O. 21, R. 2, Civil P. C., on 17th December 1923, stating the facts relating to the compromise and praying that the decree may be recorded as satisfied. The executing Court, however, dismissed this application, holding that the alleged compromise could not be taken notice of by it, as it was arrived at during the pendency of the appeal in the High Court, but was not presented to the High Court and was not embodied in the decree. This order was passed on 29th October 1924, (*vide* Ex. D.2, and the order thereon). Shankar Das's application was thereafter dismissed, as he had no right to execute the decree in the manner in which he sought to do so. Nothing further happened till 1st August 1929, when the present defendants made an application for execution of the decree passed by their Lordships of the Privy Council on 17th December 1927, ignoring the alleged compromise. R. H. Skinner then instituted the present suit for a declaration and injunction in order to prevent the execution of the decree. The suit was resisted by the defendants on various objections, most of which were upheld by the trial Court and the suit was dismissed. From this decision, R. H. Skinner has presented this appeal. Before proceeding to discuss the merits of the appeal it may be stated that only some of the defendants in Suit No. 97 of

1918 had entered into a compromise with the present plaintiff and it is only against them that the present suit was instituted. The plaintiff does not dispute the right of the other decree-holders to execute the Privy Council decree in question.

The main points urged in this appeal were that the trial Court has erred in holding : (1) that the suit was not maintainable; (2) that it was time-barred; and (3) that the compromise alleged by the plaintiff was not binding on the defendants. I shall take up these points in the above order. As regards the first point, the trial Court has held that the alleged compromise could be pleaded as a bar to execution only in the executing Court as that Court alone has jurisdiction to decide all questions relating to execution, discharge, and satisfaction of a decree according to the provisions of S. 47, Civil P. C., and therefore a separate suit was not maintainable for the purpose. There appears to be a considerable divergence of judicial opinion on the question as to whether a pre-decree compromise, such as is relied on in the present case, can be pleaded as a bar to execution in the executing Court only, or whether it must be enforced, if at all, by obtaining an injunction in a separate suit. The Bombay and Madras High Courts take the former view : *see* 22 Bom 463¹ and 40 Mad 233,² while the Calcutta and Rangoon High Courts take the latter view : *see* 31 Cal 179,³ 6 C W N 796,⁴ 4 Rang 118⁵ and 5 Rang 685.⁶ The Calcutta as well as the Rangoon High Courts have dissented from the Bombay Full Bench ruling. The Madras rulings proceed largely on the principle of *stare decisis* : *see* 49 Mad 513.⁷ There is no ruling of this Court on all fours with the present case; but the rulings reported in A I R 1927 Lah 894⁸

1. Laldas v. Kishordas, (1898) 22 Bom 463.

2. Chidambaram Chettiar v. Krishna Yathiyar, A I R 1918 Mad 1174=37 I C 836=40 Mad 233=32 M L J 13 (F B).

3. Hassan Ali v. Gauzi Ali Mir, (1904) 31 Cal 179.

4. Chhote Narain Singh v. Mt. Rameshwar Koer, (1902) 6 C W N 795.

5. Mulla Ramzan v. Maung Po Kyaing, A I R 1926 Rang 140=96 I C 773=4 Rang 118.

6. M. E. Moolla & Sons Ltd. v. Chartered Bank of India, Australia and China, A I R 1928 Rang 36=107 I C 860=5 Rang 685.

7. Venkatasubba Mudaly v. Manickammal, A I R 1926 Mad 582=98 I C 428=49 Mad 513=50 M L J 364.

8. Dilsukh Rai v. Lachhman Das, A I R 1927 Lah 894=100 I C 156=28 P L R 71.

and 67 I C 753,⁹ so far as they go, appear to be in favour of the appellant.

In A I R 1927 Lah 894,⁸ a pre-decree arrangement was pleaded by the judgment-debtors on the basis of which they claimed that they were not personally liable in spite of the provisions in the decree to the contrary. 40 Mad 233,² referred to above, was relied on by the appellant in that case. The learned Judges pointed out that the Madras ruling had been dissented from by the Calcutta High Court and was moreover not exactly applicable to the case before them. For, the question before them was not whether the decree should or should not be executed but whether the Court should depart from the terms of the decree and decline to execute it personally against the judgment-debtors. They held that the compromise alleged by the judgment-debtors, if given effect to, would involve variation in the terms of the decree and this was beyond the powers of an executing Court. In 67 I C 753⁹ the question was whether an order of discharge passed in insolvency proceedings could be pleaded in bar of execution of a money decree. It was held that the plea could have been taken up during the pendency of the suit which resulted in the decree, and the executing Court had no power to go behind the decree.

Section 47, Civil P. C., is, no doubt, very widely worded and lays down that all questions relating to the execution, discharge and satisfaction of a decree shall be determined by the Court executing the decree. But there is, I think, an essential distinction between the functions of a Court which adjudicates on the rights of the parties and embodies the decision in a decree and the functions of a Court whose duty is merely to execute such a decree. As pointed out by the learned Judges of the Calcutta High Court in 31 Cal 179,³ S. 244, Civil P. C., 1882, (which corresponds to S. 47, Civil P. C., 1908) presupposes the existence of a decree which is validly susceptible of execution. The executing Court can, therefore, only go into matters relating to the execution, discharge or satisfaction of the decree which arise after the decree came into existence and result in its discharge or satisfaction and not into a pre-decree compromise like the one pleaded in this case which practi-

cally nullifies the decree. I respectfully concur in this view and hold that the compromise in question could not be pleaded as a bar in execution proceedings, and that a separate suit for declaration of the plaintiff's rights (such as they might be) on the basis of the compromise is maintainable.

The next question for consideration is that of limitation. The learned Judge of the trial Court was of the opinion that the cause of action arose when the appellant's application under O. 21, R. 2, referred to above, for recording satisfaction of the decree was dismissed on 29th October 1924, and that the suit being governed by Art. 120, Limitation Act, and having been instituted more than six years after the cause of action arose, i. e., on 21st April 1931, was barred by time. As regards the application under O. 21, R. 2, it must be noted that it was not contested by the present defendants who did not put in appearance. The executing Court dismissed the application, but the plaintiff could have no cause of action against the defendants unless and until they repudiated the compromise and sought to execute the decree. It is admitted that no application for execution of the decree was made by the present respondents till 1st August 1929, and they had not repudiated the compromise in question on any previous occasion. In the circumstances, the present suit appears to be clearly within time.

The next point for consideration is whether the compromise alleged by the plaintiff, even if it was entered into, has any legal effect and is binding on the defendants. The learned Judge of the trial Court has held that the agreement was not binding because (a) it was entered into during the pendency of the appeal in the High Court and was superseded by a decree and (b) secondly, because it was effected without the sanction of the Court in contravention of the provisions of Rr. 6 and 7 of O. 32, Civil P. C., and was not for the benefit of the defendants, all of whom except defendant 1 were admittedly minors on the date of the alleged compromise. As regards the first point, the learned Judge has relied on Explan. 4 to S. 11, Civil P. C., and 1 Lah 445¹⁰ and 29 Cal 810,¹¹

10. Hem Raj v. Dost Mahomed, A I R 1921 Lah 248=57 I O 153=1 Lah 445.

11. Benodi Lal Pakrashi v. Brajendra Kumar Saha, (1902) 29 Cal 810=6 O W N 838.

9. Ram Das v. S. P. Netto, (1922) 64 P L R 1922=67 I C 753.

and I agree with the view taken by him in the circumstances of the case. According to the alleged compromise, the defendants gave up their rights entirely in lieu of a consideration of Rs. 80,000 which was paid to them. Consequently, after the payment of that sum, they were not entitled to any decree at all. It was, therefore, incumbent on the present appellant to raise this plea in the previous suit in view of Explan. 4 to S. 11, Civil P. C., and as he did not do so, it seems to me that he is now debarred from raising it. It was conceded by the learned counsel for the appellant that the mere fact that compromise was effected with some of the plaintiffs only was no bar to its being presented to the Court and the Court could have dismissed the suit so far as those plaintiffs were concerned. As the parties proceeded with the suit it is the decree of the Court and not the alleged compromise that must be held to have determined the rights of the parties finally. A similar view was taken in 1 Lah 445,¹⁰ in which the plaintiff tried to enforce a lease which he had obtained before the decree in a previous suit, but which he did not bring to the notice of the Court and was consequently held to be superseded by the decree. 29 Cal 810¹¹ would also appear to support the view. It is true that the point was raised there in the executing Court, but the learned Judges did not base their decision on the want of jurisdiction in that Court. The decision in 67 I C 753,⁹ also appears to me to support the respondents. It was held in that case that a plea as regards the discharge of a debt in insolvency proceedings which could have been taken during the pendency of a suit could not be raised after the decree as a bar to its execution.

In view of the above finding, it seems unnecessary to go into any other question for the purposes of this appeal. But I may add that the compromise was clearly in contravention of the provisions of O. 32, Rr. 6 and 7, Civil P. C., and was therefore not binding on defendants 2 to 5 who were minors on the date of the alleged compromise, as sanction of the Court was not obtained. It is also not shown how the compromise can be said to have been for the benefit of the minors, as the appellant was liable to pay a sum of over three lacs, while he paid only a sum of Rs. 80,000 according to the alleged compromise, and the minors continued to

be still liable to the Bank of Upper India for a large sum, as pointed out by the learned Judge of the trial Court, as the encumbrance in favour of the Bank was not cleared. The learned counsel for the appellant urged in the end that his client should at least be allowed a refund of the sum paid by him, with reasonable interest and that the defendants should be restrained from executing the decree until they make such refund. The learned counsel for the respondents opposed this request on the ground that this point was neither pleaded nor put in issue. He pointed out that Mrs. Rosalind Skinner, defendant 1, had alleged that the sum of Rs. 40,000 received by her was repaid by her to an agent of the appellant soon afterwards. He contended further that it was not shown that the guardians of these defendants who were minors had spent the money for the benefit of the minors. The learned counsel for the appellants conceded that there was no specific issue on the question raised by him, but pointed out that the plaintiff had prayed for such alternative relief as he might be found to be entitled to and urged that it was always open to the Court to order such refund by way of restitution or damages.

In my opinion, there is force in the respondents' counsel's contention. The plaintiff sued only for a declaration and an injunction. He valued the suit arbitrarily at Rs. 11,000 and paid court-fees of Rs. 10 only in the first instance. On an objection being raised, the plaintiff's counsel contended that the suit was only for a declaration (the injunction being only a consequential relief) and hence the court-fee was sufficient (*vide* his statement dated 23rd November 1931 on the record). He was required to pay court-fee on Rs. 11,000 but that was only on the arbitrary jurisdictional value he had fixed. If he were suing for refund of Rs. 80,000 he would have been required to pay court-fees on that amount but no such question was raised. If the question of refund had been raised, the minor defendants might have taken up other pleas and shown that the amount was not spent for their benefit, as is contended by the learned counsel for the respondents. Moreover, when the suit was instituted, the defendants had merely applied for execution and had not realized anything. The plaintiff may become entitled to a refund of Rs. 80,000 if the defendants succeed in realizing

and the law applicable to the Punjab is that of the Mitakshara School, which is much less favourable to females, and only includes the widow, the daughter, the mother, the father's mother and father's father's mother. The Hindu Law of Inheritance Act also included the son's daughter, daughter's daughter and the sister : see Mulla, Ss. 11 and 61-A. Under the Mitakshara Mt. Jal Kaur has no claim. But it is argued on her behalf that if Gian Singh, the vendor, were to die and the intervening heirs had disappeared, he would be succeeded by Brahma Singh and Mt. Jal Kaur could then succeed Brahma Singh. This does not bring Mt. Jal Kaur within the words of S. 15, Pre-emption Act. She would not be entitled to inherit on the death of Gian Singh; she would only be entitled to inherit if her husband Brahma Singh had inherited first.

In my judgment this discussion is not very relevant; it is necessary because of the views expressed by the learned District Judge and of the line of argument taken before me. It is indeed not clear whether these Chhimbas are governed by Hindu law or by Punjab custom. There was no allegation to either effect in the plaint or in the written statement. I think that for Hindu village menials not holding landed property the initial presumption is that they are governed by Hindu law and I understood both learned counsel to agree with this; but obviously the presumption is not strong. This would only be of importance if the case were a case of succession among Ohhimbas. Here the dispute is between a Ohhimba and a member of the proprietary body. According to Rattigan's Digest of Customary Law, para. 238-A, in the case of property owned in a village by non-proprietor,

the direct male descendants and ordinarily the widow and mother of a deceased non-proprietor will succeed to his rights in the house occupied by him at the time of his death, but not remote collaterals.

The remark says :

Near collaterals have been allowed to succeed. . . . The rulings seem to sum up to this : that no collateral in the second degree has ever been barred and that no collateral beyond the third degree has ever succeeded.

The appellant's counsel cited 3 Lah 33¹ where a collateral in the fourth degree was held not entitled to succeed to the house of a non-proprietor. It appears to

me that this is the rule which must be applied to a house owned in a village by a non-proprietor whether the non-proprietor is governed by Hindu law or by Mahomedan law or by Punjab custom. That is the rule which generally speaking applies to a house owned by a village menial, except in those places where a right of sale is established. I am therefore, constrained to hold that Mt. Jal Kaur is not an heir of Gian Singh and that the plaintiff has a superior right of pre-emption. I accept the appeal, set aside the decree of the learned District Judge and restore that of the trial Judge; but as I think it is a particularly hard case that an outsider should be able to disturb a sale by one relation to another, I direct that the parties bear their own costs throughout.

S.C./D.S.

Appeal allowed.

A. I. R. 1937 Lahore 543

BHIDE, J.

Mangal Mal — Plaintiff — Appellant.
v.

Small Town Committee, Srigobindpur
— Defendant — Respondent.

Second Appeal No. 1074 of 1936,
Decided on 7th January 1937, from decree
of Senior Sub-Judge, Gurdaspur, D/. 14th
May 1936.

(a) Punjab Small Towns Act (2 of 1922),
S. 35 (II)—Interpretation—Words "encroachment over any street" include overhanging structures such as sunshades or cornices projecting over streets—Committee ordering removal of sunshades projecting over public street—Order is intra vires.

The words "encroachment over any street" in S. 35 (II), Punjab Small Towns Act, are wide enough to include overhanging structures such as sunshades or cornices projecting over streets and the mere fact that overhanging structures are not specifically mentioned in S. 35 (II) is not sufficient to hold that they are not included in the expression "encroachment over a street".

[P 544 C 2]

Where therefore a Small Towns Committee orders the removal of sunshades and cornices of house projecting over public street, the order is intra vires of the Committee.

[P 544 C 2]

(b) Punjab Small Towns Act (2 of 1922)
Ss. 35 (II) and 37—Small Towns Committee ordering removal of projection over public street under S. 35 (II)—Order cannot be challenged in civil Court unless it is ultra vires, oppressive or arbitrary (*Obiter*).

Obiter. — Where a Small Towns Committee orders the removal of any projections of a house over a public street under S. 35 (II), Punjab Small

1. *Sher Jang v. Munshi Ram*, A I R 1922 Lah 115=67 I C 964=3 Lah 33.

Towns Act, the civil Court has no jurisdiction to set aside such order unless it is ultra vires, oppressive or arbitrary : *A I R 1936 Lah 572, Rel. on.*
[P 545 C 1]

R. L. Anand and Vishnu Datt —
for Appellant.

H. R. Mahajan — for Respondent.

Judgment.—The plaintiff Mangal Mal, is a resident of the "small town" of Sri-gobindpur in the Gurdaspur District. He was required by the Small Town Committee to remove three sunshades and a cornice (20 feet x 11 inches) in the eastern wall of his house, which according to the Committee projected over a public street. The plaintiff thereon sued to obtain an injunction to restrain the Committee from requiring him to do so. Plaintiff's contention was that the land adjoining the eastern wall of his house belonged to him and the order passed by the Committee was ultra vires, malicious and oppressive. The Committee joined issue on these points and also maintained that the matter was not cognizable by a civil Court. The Courts below have found that the land adjoining the eastern wall of the plaintiff's house was a public street and this finding is no longer challenged. The trial Court held that the order of the Committee was neither ultra vires nor malicious or oppressive and that the civil Court had no jurisdiction to interfere with it. It accordingly dismissed the suit. On appeal the learned Senior Subordinate Judge held that the order was malicious and oppressive, but in view of the provisions of S. 37, Small Towns Act, civil Courts had no jurisdiction to call it in question. He therefore dismissed the appeal, but in view of the malicious and oppressive character of the order as found by him, left the parties to bear their costs throughout. From this decision both parties have appealed—the defendant Committee's appeal being merely with respect to the question of costs.

I shall take up the plaintiff's appeal first. It is contended on behalf of the plaintiff that the defendant Committee had no jurisdiction to pass an order under S. 35, Small Towns Act, to remove an 'overhanging structure' such as a sunshade or a cornice. The order of the Committee purports to be passed under Cl. (11) of that section which gives power to the Committee to make general order for

the prevention or removal of any moveable or immoveable encroachment over any street, drain,

sewer or channel and the recovery of the expenses incurred by such prevention or removal or in rectifying any damage caused to the street, drain, sewer or channel by such prevention or removal.

I agree with the view of the learned Senior Subordinate Judge that the words "encroachment over any street" are wide enough to include "overhanging structures" such as sunshades or cornices projecting over streets. The learned counsel referred to the corresponding provisions of S. 172, Punjab Municipal Act, where overhanging structures are specifically mentioned. But the language of that section is different; and the mere fact that overhanging structures are not specifically mentioned in S. 35 (11), Small Towns Act, does not appear to me to be sufficient to hold that they are not included in the expression "encroachment over a street". In view of the above finding, the order of the Committee seems to be clearly intra vires. As regards the question whether it is "oppressive and malicious", and whether if it is so, civil Courts would have jurisdiction to set it aside, it seems to me that the finding of the learned Senior Subordinate Judge that the order was oppressive and malicious is based mostly on his inspection and extraneous considerations which do not constitute legal evidence. The learned Subordinate Judge has referred to an order passed by the Committee requiring the plaintiff to demolish his building, on the ground that it was built without sanction. This order was erroneous and was withdrawn when the error was found, but the question for consideration in the present case is whether the order for the removal of the sunshades and cornice is malicious or oppressive. The learned counsel for the appellant urged that the President of the Committee was inimical to the plaintiff but he was unable to refer to any evidence on the record in support of this allegation. The mere fact that the relations between the plaintiff and one of the members of the Committee are strained is obviously no ground for holding that the other members of the Committee passed the order in question maliciously. The President of the Committee went into the witness-box and he has not been shown to have any enmity with the plaintiff. The plaintiff on the other hand had not the courage to go into the witness-box to support his allegations of enmity.

The learned Senior Subordinate Judge inspected the spot and found that there

were many other projections of this type in the town. But it was explained that these projections had either been made before the order under S. 35 (II) was passed or had been made with the sanction of the Committee. The learned Senior Subordinate Judge did not go into these individual cases and was not therefore justified in drawing any inference merely from the projections over the street which were noticed by him at the time of his inspection. It may be true that the cornice and the sunshades are not likely to cause any inconvenience to the public. But as pointed out in 12 Bom 474,¹ this is not the real point for consideration in such cases. In view of the general order passed by the Committee under S. 35 (II) with the sanction of the Commissioner it was incumbent on the plaintiff to apply for sanction of the Committee for the overhanging structures. If he had done so, he would probably have got the sanction without difficulty and if the sanction was improperly refused, he could have appealed to the Deputy Commissioner as provided in S. 37, Small Towns Act. But he did not either apply for sanction or appeal to the Deputy Commissioner. Not only this but he maintained that the land adjoining his house belonged to him and was not a public street. This fact shows that the plaintiff was not acting bona fide. It also indicates the danger of the public being allowed to make overhanging structures without sanction. For if such structures are made without sanction, the owner may claim in course of time the land underneath the projection to be his own property.

In my opinion the finding of the learned Senior Subordinate Judge that the order of the Committee was malicious and oppressive is not legally sustainable and I therefore set it aside. In view of the above conclusion it is unnecessary to consider the question of jurisdiction of civil Courts at length. For even according to 38 P L R 83² and other rulings relied upon by the appellant's counsel, a civil Court would not have jurisdiction to set aside an order of a Small Towns Committee like the one challenged in this case unless it were found to be ultra vires, oppressive

or arbitrary. The above conclusion is also sufficient to dispose of the cross appeal by the defendant. For the learned Senior Subordinate Judge's order leaving parties to bear their costs in spite of the dismissal of the plaintiff's suit is merely based on his finding that the Committee's order was malicious and oppressive. That finding having been set aside, there is no reason why the defendant Committee should not have its costs throughout.

The learned counsel for the defendant has asked for the remarks of the learned Senior Subordinate Judge as regards the malicious and oppressive character of the order of the Committee being expunged. But this seems now unnecessary, as the finding of the learned Senior Subordinate Judge on this point has been set aside. I dismiss the plaintiff's appeal and accepting that of the defendant Committee, direct the plaintiff to pay the costs of the defendant throughout.

K.B./A.L.

Appeal dismissed.

* A. I. R. 1937 Lahore 545

ADDISON AND DIN MOHAMMAD, JJ.

Firm Attar Singh-Balram Singh —
Plaintiff — Appellant.
v.

Vishan Das-Prabh Das and others —
Defendants — Respondents.

Civil Revn. No. 574 of 1936, Decided on 6th January 1937, from order of Sub-Judge, First Class, Amritsar, D/- 13th August 1936.

* Specific Relief Act (1877), Ss. 53, 54 and 56 S. 53 is general and under it perpetual injunction cannot be obtained in all cases—Ss. 54 and 56 must be read together—Dispute referred to arbitration by defendant—Plaintiffs suing for perpetual injunction restraining arbitration as plaintiffs never entered into contract—No perpetual injunction can be claimed either under S. 54 or S. 56 as plaintiffs can protect themselves by appropriate proceedings.

The right to an injunction depends in India upon statute and is governed by the provisions of the Specific Relief Act, Chs. 9 and 10. S. 53 is merely a general section enacting that perpetual injunction can only be granted by a decree in a suit. The section by itself does not give a general right to obtain a perpetual injunction in all cases in which it is asked but is dependent upon the sections which follow. Further Ss. 54 and 56 must be read together as supplementing each other. [P 546 C 2; P 547 C 1]

In a suit for a declaration that there was no contract between the parties and that the defen-

1. E. C. K. Ollivant v. Rahimtula Nur Mahmood, (1888) 12 Bom 474.

2. Municipal Committee, Sialkot v. Jagat Singh, A I R 1936 Lah 572=160 I O 942=38 P L R 83.

dants had no right to refer the dispute to arbitration and for injunction to restrain the arbitrators from giving the award, no injunction can be claimed either under S. 54 or S. 56 of the Act. If the plaintiffs' case is well founded, the arbitration proceedings, even if they result in an award, can only terminate in an award which is a nullity and cannot possibly affect the rights of the plaintiffs; if the arbitrators make an award in favour of the defendants, the plaintiffs will have ample opportunity to protect themselves by appropriate proceedings: *A I R 1920 Cal 239* and *A I R 1931 Lah 66, Foll.*; *A I R 1934 Lah 162* and *A I R 1919 Cal 1042, Not foll.*; *A I R 1919 Cal 89, Rel. on*; *A I R 1923 Lah 24, Ref.*

[P 546 C 1, 2]

S. Amar Singh — for Appellant.

Shamair Chand and Qabul Chand —
for Respondents.

Addison, J.—The plaintiff instituted a suit for a declaration that no contract was entered into between the parties and as the defendants had no right to refer the dispute to arbitration an injunction should issue to the arbitrators not to give an award. Following *A I R 1931 Lah 66*,¹ which is to the effect that such a suit as the present does not lie, the trial Judge has stayed the suit till the giving of an award which, he stated, could be attacked later on, if the occasion arose, by the parties. On his finding he might have dismissed the suit but he merely stayed it. Against this decision the plaintiff preferred a revision petition to this Court, asking that the suit should not be stayed but should be proceeded with. This revision petition has been referred to a Division Bench for decision. There is a case on all fours with the present, reported in *47 Cal 733*.² It was there laid down that, in a suit for declaration that a certain contract entered into between the parties was not binding on the plaintiffs, inasmuch as they did not enter into such a contract, and that they were accordingly entitled to an injunction to restrain arbitration, no injunction could be claimed under S. 54 or S. 56, Specific Relief Act. It was also pointed out that, if the plaintiffs' case that they did not enter into the alleged contract were well founded, the arbitration proceedings, even if they resulted in an award, could only terminate in an award which would be a nullity, and could not possibly affect the rights of the plaintiffs; if the arbitrators made an award in favour of the defen-

dants (which itself was doubtful), the plaintiffs would have ample opportunity to protect themselves by appropriate proceedings. Finally, it was held that Ss. 54 and 56 must be read together as supplementing each other, and that it would be an erroneous construction of the statute to hold that the right to an injunction should be determined independently of the provisions of Ss. 54 and 56 by reference to the terms of S. 53.

With great respect I am in full agreement with this decision. The right to an injunction depends in India upon statute and is governed by the provisions of the Specific Relief Act, Chs. 9 and 10. Ch. 9 consists of two Sections 52 and 53. These enact that preventive relief is in the discretion of the Court and that a perpetual injunction can only be granted by a decree. Ch. 10 then goes on to deal with perpetual injunctions, the first section being S. 54. It defines when perpetual injunctions can be granted. Para. 1 of the section enacts that a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant. The next two paragraphs deal with two distinct classes of cases, namely, first, the case when the obligation arises from contract, and, secondly, the case where the defendant invades or threatens to invade the plaintiffs' right to or enjoyment of property. In the first of these two classes, the principle is formulated that the Court shall be guided by the provisions contained in the second chapter of the statute. In the second class it is enacted that the Court may grant a perpetual injunction in five specific categories of events. It cannot be contended that the prayer for injunction in the present suit can be brought within the scope of S. 54. This is clear from para. 1 of the section which provides that, in order to entitle a litigant to a perpetual injunction, he must establish that the injunction is required to prevent the breach of an obligation, a term which is defined in S. 3. There must thus be a breach of an existing legal right which is vested in the applicant before an injunction is granted to restrain the breach. S. 56 equally has no application and the two Sections 54 and 56 supplement each other. The first defines the circumstances in which perpetual injunctions may be granted; the second enumerates the cases where an injunction must not be granted. Cl. (i), S. 56, enacts

1. *Jiwan Mal Thakur Das v. Shahzadah Nand & Sons*, *A I R 1931 Lah 66=130 I C 769*.

2. *Ram Kissen Jugdoyal v. Pooran Mull*, *A I R 1920 Cal 239=56 I C 571=31 C L J 259=47 Cal 733*.

that an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other mode of proceeding (except in case of breach of trust). In this case it is alleged that there was no contract. If that is so, the arbitration proceedings, if they result in an award, can only terminate in an award which is a nullity, and the plaintiff will have ample opportunity to protect himself by an appropriate proceeding. For this reason S. 56 bars the present suit while it does not come within S. 54.

Likewise, reliance cannot be placed upon S. 53 of the Act which is merely a general section enacting that a perpetual injunction can only be granted by a decree in a suit. This section by itself does not give a general right to obtain a perpetual injunction in all cases in which it is asked, but is dependent upon the sections which follow in Ch. 10. These define when perpetual injunctions may be granted and also when they cannot be granted. This Calcutta decision was followed in this Court by Dalip Singh, J. in A I R 1931 Lah 66¹ in a considered judgment. Jai Lal, J. however in a very brief judgment in A I R 1934 Lah 162³ followed A I R 1919 Cal 1042⁴ without referring to 47 Cal 733,² which was decided after A I R 1919 Cal 1042⁴ or A I R 1931 Lah 66.¹ With great respect it seems to me that the decision in 47 Cal 733² is to be preferred to that in A I R 1919 Cal 1042.⁴ In the 1919 Calcutta case no reference was made to the statute under which alone, in India, the right to an injunction depends, as remarked in 33 Cal 203.⁵ The same was the view taken by Rankin, J. in 52 I C 588.⁶ He there said that where a dispute is referred to arbitration under a clause in a contract and one or other of the parties to the contract seeks to impeach it on equitable grounds, such as fraud, mistake or surprise, the Court will, and should, restrain the arbitration proceedings until the question of the contract out of which they arise has been determined by the Court; but where a party

denies the contract altogether, his course is to let the arbitrators do what they like, to wait till there is a question of the award being enforced, and the moment he gets notice that the award is going to be or has been filed, to object to it; and that where the proceedings will be a nullity and futile, although vexatious, the Court will not grant an interlocutory injunction. An obiter dictum in A I R 1923 Lah 24⁷ was relied on, on behalf of the plaintiff, but this need not be further considered as it was only a passing remark not affecting the decision of the case.

Following therefore 47 Cal 733² and A I R 1931 Lah 66¹ I would hold that the suit was incompetent. There is thus no reason to interfere with the order of stay and I would dismiss this revision petition with costs.

Din Mohammad, J.—I agree.

V.B.B./A.L. *Petition dismissed.*

7. Narain Das Jainilal of Delhi v. Jai Narain Bainlal of Delhi, A I R 1923 Lah 24=75 I C 786.

* A. I. R. 1937 Lahore 547

BLACKER, J.

S. L. Kapoor — Petitioner.

v.

Emperor.

Criminal Revn. No. 535 of 1937, Decided on 16th June 1937, from order of Sess. Judge, Delhi, D/. 6th April 1937.

* Railways Act (1890), Ss. 3 (7) and 138—Person contracting with railway to perform service of providing meals for travellers on its behalf is 'railway servant'—Such person overlooked and directed in regard to manner of doing his work is servant and not independent contractor—Termination of his services is discharge within meaning of S. 138.

In a very large proportion of the cases in which a person contracts with the railway to perform a certain service on its behalf he can be said to be employed by the railway to do that service and so comes within the definition of S. 3 (7), Railways Act. The service of a railway is not limited to the running of trains, but has a much wider meaning. The provision of meals for travellers is part of the service of a railway. The test to determine whether a person is an employee or an independent contractor is whether or not the employer retains the power not only of directing what work is to be done, but also of controlling the manner of doing the work. If a person can be overlooked and directed in regard to the manner of doing his work such person is not a contractor. Moreover the method of remuneration makes no difference. [P 548 C 2; P 549 C 1]

Where therefore by an agreement with a contractor of a refreshment room the Railway

3. Gayan Chand v. Bharat Chamber of Commerce Ltd., Delhi, A I R 1934 Lah 162.

4. Gajanand Maskara v. Taleb Jalaluddin, A I R 1919 Cal 1042=46 I C 173=22 C W N 535.

5. Tituram Mukerji v. Cohen, (1906) 33 Cal 203=32 I A 185=9 C W N 1073=8 Sar 908=2 C L J 408 (P C).

6. Sardarmull Jessraj v. Agar Chand Mahata & Co., A I R 1919 Cal 89=52 I C 588=23 C W N 811.

Administration both overlooks and directs him in the performance of his work, the contractor must be deemed to be a railway servant and not an independent contractor and the termination of his services by the railway amounts to discharge within the meaning of S. 138 of the Act: *A I R 1924 Rang 373* and *Sadler v. Henlook*, (1835) 4 El & Bl 570, Rel. on. [P 549 C 1, 2]

Shamsher Bahadur — for Petitioner.

Norman Edmunds — for the Crown.

Order. — The petitioner, Mr. S. L. Kapoor, is in occupation of certain premises which form a part of the Delhi Junction Railway Station and are used as a Hindu refreshment room. These premises belong to the N. W. Railway Administration and the petitioner was up till 15th February 1937 occupying them in pursuance of an agreement between himself and the N. W. Railway by which he used them to provide meals for Hindu passengers by that railway.

This agreement was terminated by the railway on 15th February and notice was given to him to vacate the premises. He did not do so and an order was obtained by the railway from the Additional District Magistrate, Delhi, under S. 138, Railways Act, the relevant portions of which run as follows :

'If a railway servant is discharged and he refuses or neglects, after notice in writing for that purpose, to deliver up the Railway Administration . . . any building . . . belonging to the Railway Administration and in the possession of such railway servant . . . any Magistrate of the First Class may, on application made by or on behalf of the Railway Administration, order any police officer, with proper assistance, to enter upon the building and remove any person found therein and take possession thereof and to deliver the same to the Railway Administration . . . '

On a petition being filed in his Court by the petitioner the learned Sessions Judge of Delhi has recommended the setting aside of the order on the broad ground that "by no stretch of meaning could the petitioner in this case be held to be a railway servant".

The learned Sessions Judge has apparently held that the petitioner is, or was, an independent contractor, and that therefore in law the relations of servant and master cannot exist between him and the Railway Administration. But even if for the sake of argument the petitioner be "considered to be an independent contractor and not a servant in the sense in which that term is understood in common law", he can still be a "railway servant" if he comes within the statutory definition

of those words contained in the special Act known as the Railways Act.

Section 3 (7), Railways Act, runs as follows :

'Railway servant' means any person employed by a Railway Administration in connexion with the service of the railway.

It was held in *A I R 1924 Rang 373*¹ that the service of a railway was not limited to the running of trains but had a much wider meaning. I think that there can be no doubt whatever that the provision of meals for travellers is part of the service of a railway. It remains to be decided whether a person in the position of the petitioner is "employed" by the railway or not.

I can see no justification for the view that a contractor cannot be said to be 'employed'. In fact the word appears to me to be the most natural one to use. A reference to Halsbury's Laws of England (Edition of 1911), Vol. 20, at p. 264, paras. 618 and 619, shows that the word is freely used to denote the relationship between a person who wants a work done and an independent contractor whom he gets to do it for him. It seems to me therefore that in a very large proportion of the cases in which a person contracts with the railway to perform a certain service on its behalf he can be said to be employed by the railway to do that service and so comes within the definition of S. 3 (7) of the Act. The present, in my opinion, is clearly one of those cases.

It seems to me moreover quite clear that in this case even independently of the statutory definition the petitioner stands towards the railway in the position of a servant and not of an independent contractor. I have been referred to no Indian cases which are directly in point, and it is necessary again to refer to Halsbury's Laws of England for the principles governing the case.

The question of the relationship between master and servant is discussed in paras. 131 (foll) at pp. 64-70 of the volume of that work to which I have referred above. It is there stated that in all cases the relation imports the existence of power in the employer not only to direct what work the servant is to do but also the manner in which the work is to be done. The distinction between a con-

1. *Joseph v. J. L. Lammond*, *A I R 1924 Rang 373*=83 I C 894=26 Or L J 190=3 Bur L J 147.

tractor and a servant is more clearly stated in para. 133 which follows the decision of the Court of appeal in (1835) 4 El & Bl 570.² In this case it was made clear that the test is whether or not the employer retains the power not only of directing what work is to be done but also of controlling the manner of doing the work. If a person can be overlooked and directed in regard to the manner of doing his work such person is not a contractor. Moreover the method of remuneration makes no difference.

To apply those principles to the present case it is necessary to examine the agreement between the petitioner and the respondent railway. It makes no difference that in that instrument the Agent of the railway is described as lessor and the petitioner as lessee. What has to be seen is the terms of the instrument itself. By that instrument the railway, which has taken upon itself the duty of providing meals for Hindu passengers, permitted the petitioner to perform that service on their behalf, paying him no remuneration in money and receiving from him no consideration. His remuneration was the profit which accrued from the service of meals, and instead of the railway taking that profit and paying him a wage or commission they allowed him to take it all directly. But it is clear from the agreement that the petitioner had not got a free hand in the performance of this service. In Cl. 5 he was directed as to the times when he should open and close the refreshment room. In Cl. 6 he was directed to keep a complaint book which was open to the inspection of the railway officers and in Cl. 20 he was bound to pay a penalty if any complaint was held by the Divisional Superintendent to be justified. In Cl. 7 he had to dress his servants in accordance with the special instructions to be issued by an officer of the railway and by Cl. 8 he was liable to be directed as to the pattern of crockery which he should use. In Cl. 14 he was even liable to direction as to the pictures, notices and advertisements which he displayed in the refreshment room.

It is, therefore, clear that he was both "overlooked" and directed in the performance of his work and that he must be

deemed to have been a servant and not an independent contractor.

I am accordingly in no doubt that he was a railway servant within the meaning of S. 3 (7), Railways Act. The termination of his service by the railway under Cl. 21 of the agreement amounts to his discharge within the meaning of S. 138 of the Act, and he is therefore liable to dispossession of the premises which he was occupying as a servant of the railway.

I, therefore, find myself unable to accept the recommendation of the learned Sessions Judge and I dismiss the petition. I also discharge the stay order passed by the learned Sessions Judge.

S.C./D.S.

Petition dismissed.

A. I. R. 1937 Lahore 549

COLDSTREAM AND JAI LAL, JJ.

Secretary of State — Defendant —
Appellant.

v.

J. Burrowes — Plaintiff — Respondent.

First Appeal No. 1460 of 1935, Decided on 22nd January 1937, from decree of Sub-Judge, 1st Class, Rawalpindi, D/- 29th April 1935.

Damages—Measure of—Contract entitling railway servant to month's notice or pay before terminating his services — Servant going on leave and suffering from tuberculosis—Railway discharging him without notice —Servant is entitled to damages of a month's pay—Servant claiming Rs. 55,000 as damages —Lower Court is not justified in awarding costs to servant on relief originally claimed.

It is not correct to say that where a railway employee is given a notice of discharge not on account of incompetence or misbehaviour, but because he is ill while he is on sick leave or leave without pay, it is not necessary for the Railway Administration to give him a month's notice or a month's pay as provided in the contract between him and the railway authorities. [P 550 C 2]

A railway servant, drawing Rs. 130 per mensem went on leave. He suffered from tuberculosis and was discharged by the railway authorities without any notice, though his contract with the company provided that before terminating his services he was entitled to a month's notice or a month's pay. He claimed Rs. 55,000 as damages:

Held: that he was entitled to damages of Rs. 130, i. e., a month's pay: *A I R 1918 Mad 1257* and *AIR 1930 Sind 17, Disting.* [P 550 C 2]

Held also: that it could not be said that the railway acted vindictively in discharging the servant on the ground of ill-health. Hence the lower Court was not justified in awarding costs to the servant calculated on the relief originally claimed. [P 551 C 1]

2. *Sadler v. Henlook*, (1835) 4 El & Bl 570=24 L J Q B 138=1 Jur (N S) 677=3 W R 181=3 C L R 760.

Ram Lal and Basant Krishen —

for Appellant.

Vishnu Dutt — for Respondent.

Coldstream, J.—The suit out of which this appeal has arisen was instituted by the respondent Burrowes, who was in employment of the North Western Railway as a Shunting Driver, to recover Rs. 55,000 by way of damages for wrongful dismissal. Under the terms of his contract of employment his service was non-pensionable and terminable at any time by the railway administration on one month's notice or on payment of a month's pay in lieu of notice. In 1931 Burrowes became ill. On 11th February 1932, he proceeded on a month's leave. This period of leave was extended, the extension being leave on medical certificate. In March, Burrowes went to a sanatorium for tuberculosis patients at Dharampur. Sometime before 5th May 1932 he applied for further leave until 31st December 1932, on the ground that he was ill and undergoing treatment in the sanatorium. This application was forwarded by the Medical Director of the sanatorium with a note that Burrowes was undergoing treatment for abdominal tuberculosis and that he was improving in health but that in order to effect the cure he would have to stay in the sanatorium till the end of December 1932. Burrowes left the sanatorium on the 2nd of August and returned to his home in Rawalpindi. According to the plaint, on 15th August 1932 he was informed by the Divisional Personnel Officer, North Western Railway, Rawalpindi, that he was discharged from railway service with effect from 20th July 1932,

having been permanently and completely incapacitated for further service of any kind in the department as declared by the Medical Officer of Rawalpindi on 20th July 1932.

The plaintiff's contention was that at the time he was discharged he was completely cured of his illness, which illness was as a matter of fact not tuberculosis and that the Railway Administration had broken their contract in discharging him without due notice. The suit was resisted by the Secretary of State, on whose behalf it was contended that the plaintiff had been rightly and legally dismissed and was not entitled to any damages at all. The learned subordinate Judge, who tried the case, held that, though the Railway Administration were justified in terminating the plaintiff's services, they

were liable for damages to the extent of Rs. 130, that being the monthly pay of the plaintiff, inasmuch as the Administration had not given the plaintiff a month's notice required by the terms of the contract. At the same time the Subordinate Judge not only absolved the plaintiff, who had brought the suit in forma pauperis from paying the court-fee payable on his suit Rs. 1792-8-0, but also awarded the plaintiff the full costs in the case, Rupees 1089-2-0, out of which Rs. 950 represented counsel's fee calculated on the relief claimed. Against this decision the Secretary of State has preferred the present appeal. It is still contended before us by the learned Government Advocate that in the circumstances of this case notice was not necessary and that therefore the decree for Rs. 130 was wrongly passed. It is also contended that having regard to the result of the suit, that is to say, the award of only Rs. 130 out of the sum of Rs. 55,000 claimed, the lower Court acted improperly in awarding the costs to the plaintiff calculated on the whole of the sum claimed.

The learned Government Advocate has not been able to show us any authority either in the Rules of the Railway or elsewhere for the proposition that where a Railway employee is given a notice of discharge not on account of incompetence or misbehaviour but because he is ill while he is on sick leave or leave without pay, it is not necessary for the Railway Administration to give him month's notice or a month's pay as provided in the contract between him and the Secretary of State. He has referred us to two judgments 37 I C 655¹ and A I R 1930 Sind 17.² Those two judgments proceeded upon circumstances totally different from the present case. It may be that there is some rule governing the case which allows the Railway Administration to discharge a person in peculiar circumstances without giving him a notice or a month's pay even though the contract requires such notice or payment, but no such rule has been brought to our notice. The lower Court was, therefore, right in decreeing Rs. 130. The second contention urged by the learned Government Advocate has force. The

1. *Ramaswami Aiyar v. Madras Times Printing & Publishing Co., Ltd.*, A I R 1918 Mad 1257 = 37 I C 655.

2. *Detaram v. Forbes*, A I R 1930 Sind 17 = 117 I C 778 = 25 S L R 96.

claim for Rs. 55,000 was wholly unjustified. It was perfectly clear from the contract that all that could be claimed by the plaintiff was a month's pay. It cannot be said that the railway acted vindictively in discharging the plaintiff on the ground of his ill-health. As already remarked, Burrowes applied for extension of leave on the ground that he was suffering from tuberculosis and would not be fit for work until the end of December 1932. In these circumstances the Railway Administration was clearly justified in terminating the plaintiff's services. Having regard to these facts I am unable to appreciate the lower Court's reasons for awarding the plaintiff costs calculated on the relief claimed. In my opinion, the order was not a just one, and, while dismissing the appeal as regards the decree for Rs. 130 I would accept it so far as to order that with the exception of the court-fee which should be paid as directed by the lower Court the other costs should be borne by the parties. Parties will bear their own costs in appeal.

Jai Lal, J.—I agree.

V.B.B./A.L. *Order accordingly.*

A. I. R. 1937 Lahore 551

DIN MOHAMMAD, J.

Emperor

v.

Prabhu — Opposite Party.

Criminal Misc. Petn. No. 189 of 1936,
Decided on 8th September 1936.

Criminal P. C. (1898), S. 339 (3) — Two contradictory statements by approver—Prosecution is not warranted in every case—High Court should exercise extreme caution—When confession and incriminating statements by approver are untrue, inference is they are put in his mouth by others—Prosecution for perjury should not be sanctioned being opposed to public policy.

The mere fact that two statements are contradictory cannot in every case be a warrant for directing the prosecution of the approver. The High Court is not bound to accord sanction in every case that is brought to its notice under S. 339 (3), Criminal P. C. The discretion vested in the High Court under this section must be exercised with extreme caution and cardinal question for consideration by the Court is whether the confession and the incriminating statement made by the approver were or were not true. If the circumstances point to the conclusion that the confession and the incriminating statement were not true, the irresistible inference must be that those statements were put in the mouth of the

approver by some one and in such a case it would be opposed to public policy to prosecute and punish the approver for perjury: *A I R 1934 All 43, Rel. on.* [P 551 C 2; P 552 C 1]

Jhanda Singh for Govt. Advocate —
for the Crown.

Faqir Chand Mital — for Opposite
Party.

Order.—Under S. 337, Criminal P. C., Prabhu accepted a tender of pardon in a case against Chandgi, Bhartu and others. On 28th November 1935 he appeared as a prosecution witness in the inquiry against Chandgi but did not support the prosecution. On 26th February 1936 he appeared before the Sessions Judge in the trial of Bhartu and others and made a statement different from what he had made before. On this ground a complaint under Ss. 193/194 has been made against him by the Magistrate, First Class, Rohtak, supported by a certificate from the Public Prosecutor as required by S. 339, Criminal P. C.

A perusal of the judgment of the Sessions Judge in the case of Bhartu and others will show that the statement of Prabhu has been very severely criticised by the Sessions Judge, and that, in spite of his having made a statement which the prosecution expected that he would make, the Sessions Judge did not consider it safe to rely thereon and to convict the accused persons on its basis. The Sessions Judge has further mentioned that after Prabhu had made a statement in the Court of the committing Magistrate in the case of Chandgi, his uncle was allowed by the District Magistrate to interview him in jail and that an Assistant Sub-Inspector of Sonapat had some hand in it and that it was after this interview that Prabhu changed the previous statement which he had made in the case of Chandgi and reverted to his original position once more.

The High Court is not bound to accord sanction in every case that is brought to its notice under S. 339, sub-s. (3), Criminal P. C., and I consider that this is a fit case in which sanction should be refused. If the whole story of the prosecution is characterized by the Sessions Judge as inherently false and the approver is disbelieved on account of the intrinsic improbabilities of his statement, the only conclusion possible is that the facts that he had offered to disclose were false and that he had been compelled to accept that position merely in view of the risk that he

ran in not accepting it. It is justifiable to infer therefore that his statement in the case of Chandgi was a truthful statement and that when he was again approached by his uncle presumably at the instance of the police he once more yielded to the pressure and consented to make a statement which was not in accordance with truth. This no doubt brings him within the purview of Ss. 193 and 194, I. P. C., but one cannot ignore the circumstances in which his self-incriminating statement appears to have been made. As laid down in 56 All 288¹:

The mere fact that the two statements are contradictory cannot in every case be a warrant for directing the prosecution of the approver. The discretion vested in the High Court must be exercised with extreme caution and the cardinal question for consideration by the Court is whether the confession and the incriminating statement made by the approver were or were not true. If the circumstances point to the conclusion that the confession and the incriminating statement were not true, the irresistible inference must be that those statements were put in the mouth of the approver by some one and in such a case it would be opposed to public policy to prosecute and punish the approver for perjury.

I am in entire agreement with the principle enunciated above and refuse sanction for the prosecution of Prabhu under Ss. 193 and 194, I. P. C., as asked for.

U.S./K.S.

Sanction refused.

1. Emperor v. Mathura, A I R 1934 All 49=1934 Cr O 74=147 I O 653=35 Or L J 444=56 All 288=1933 A L J 1389.

A. I. R. 1937 Lahore 552

ADDISON AND DIN MOHAMMAD, JJ.

Zafar Hussain — Defendant — Appellant.

v.

Mian Mohammad Ghias-ud-Din and another, Plaintiffs and others, Defendants — Respondents.

First Appeal No. 100 of 1936, Decided on 17th December 1936, from decree of Senior Sub-Judge, Jullundur, D/- 25th November 1935.

(a) Adverse Possession—Property in dispute allotted to *D* as her share—After *D* property passing to two widows (one of them *J*) of *D*'s brother—*M* and *H*, male descendants of *K*, the original owner, taking possession from *J* on their own account—In subsequent litigation by *J*, two other male descendants of *K* also impleaded as defendants along with *M* and *H*—*J*'s suit dismissed—No steps by other

two descendants to make their claim effective—*M* and *H* in exclusive possession for 12 years before suit—*M* and *H* held had established their hostile title.

An act of trespass is an individual act of the trespasser and unless there is clear and cogent evidence to show that the trespass was committed by an agent in the interest of his principal, the principal is not in any way benefited by it.

[P 556 C 2]

After the death of *K*, the original owner, the property in dispute was allotted to *D*, the widow of *K*'s brother, as her share. After *D*'s death the property was in the hands of two widows of *D*'s brother. Two of the male heirs, *M* and *H*, of *K*, ousted *J* the then occupant (one of the widows) in 1917 and took possession on their own account. In the subsequent litigation by *J*, *M* and *H* alone were described as possessors and although two more male descendants of *K* were impleaded as defendants, neither of them took any steps to make his claim effective after *J*'s suit was dismissed. *M* and *H* continued to occupy the property to the exclusion of other claimants for over 12 years before the other descendants and heirs brought a suit claiming share in the property in dispute:

Held: *M* and *H* had unequivocally asserted their hostile title as against all other heirs of original owner *K*, and their exclusive possession could in no circumstances become joint by the mere denial of their sole right of occupation or the assertion of their joint right to occupy it by the other male descendants of *K* unattended by any overt act on the part of either to translate his denial or assertion into practice. The possession of *M* and *H* was adverse at its inception and remained so throughout the period that elapsed before the suit by the other claimants was filed: A I R 1923 P C 175, Rel. on. [P 556 C 1, 2]

(b) Mahomedan Law—Wakf—Creation of—Parties belonging to Hanafi sect—Clear intention of owner to dedicate definitely and permanently must be established—No particular formality is needed—User can create wakf—But user must be preceded by intention of owner—User alone is not sufficient to divest property of private character.

Under Mahomedan law followed by the Hanafi sect even if no particular formality need be observed to make a wakf complete, there must be unmistakable proof available that the owner made a clear declaration dedicating the property definitely and permanently to God. Even an owner's unexpressed intention to dedicate property cannot have the effect of a formal dedication. In the absence of any such intention or declaration, no wakf can be said to have been created. It is true that a wakf can be created by user but that user too must be preceded by an intention on the part of the owner to create a wakf. If no such intention is established, user alone will not be sufficient to divest the property of its private character: A I R 1917 Lah 122; A I R 1929 Lah 684 and A I R 1934 Pat 612, Rel. on. [P 557 C 1]

The mere fact that it has been treated as a public serai under Act 22 of 1867, an Act relating to public serais or paraos, or that it has admitted lodgers without any charge for three days, is not enough to show that it is wakf. [P 557 C 1]

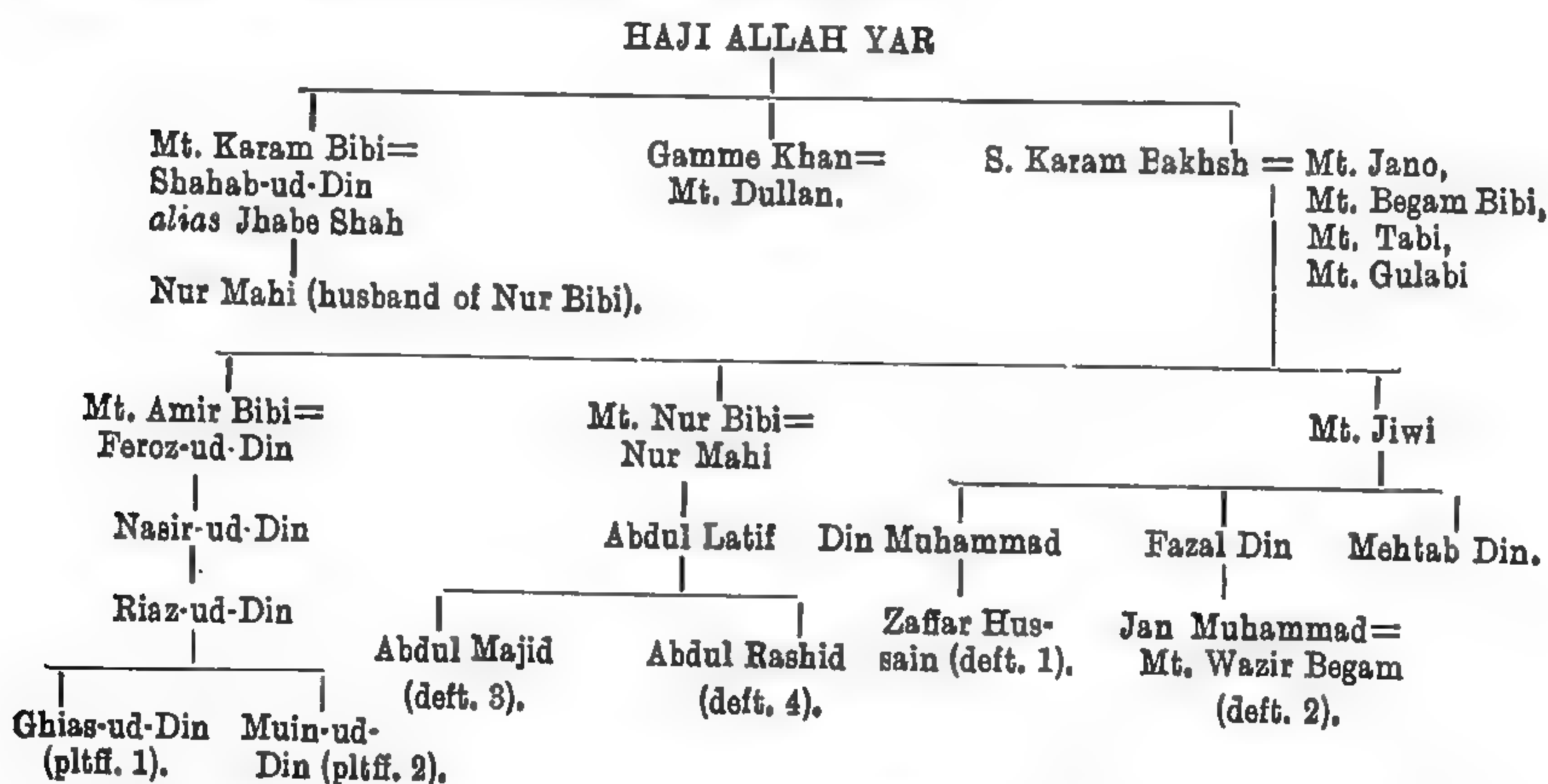
Mohammad Sharif and Mohammad Amin Khan — for Appellant.

Barkat Ali, Ghulam Mohy-ud-Din and Achhru Ram — for Respondents Nos. 4 and 5.

Din Mohammad, J.—The suit out of which this appeal has arisen was instituted by Mian Mohammad Ghias-ud-Din and Mian Ghulam Moin-ud-Din, I. C. S., sons of Mian Riaz-ud-Din, against Sheikh Zaffar Hussain, Mt. Wazir Begam, widow of Jan Muhammad, Sheikh Abdul Majid and Abdul Rashid, sons of Sheikh Abdul Latif, and R. S. Lala Kirpa Ram. It was for possession by partition of 16/63 share in the items of property marked (a) (b) and (c) in the plaint and for 1/3 share in the item marked (d). It was alleged by the plaintiffs that they along with the first four defendants inherited the property in dispute from Sheikh Karam Bakhsh, deceased, that they were in joint possession thereof and that in order to avoid further disputes they claimed separate possession according to their share. Defendant 5 being a mortgagee of a small portion in the property in suit was also brought on the record. Out of defendants 1 to 4, Abdul Majid and Abdul Rashid supported the plaintiffs' allegations

and further claimed 31/63 share for themselves. Zaffar Hussain and Mt. Wazir Begam put in separate pleas which, however, proceeded on common ground. They contended, inter alia, that item (c), which is a 'haveli' at Hoshiarpur, belonged exclusively to Zaffar Hussain and item (a), which is a 'serai' at Jullundur, was wakf and hence impartible. The Subordinate Judge found in favour of the plaintiffs holding that they were entitled to 16/63 share in items (a), (b) and (c) and to 1/3 share in item (d). At the same time he observed that the four defendants were equally entitled to the rest of the property in suit. Zaffar Hussain alone has appealed against the whole decree, while Abdul Majid and Abdul Rashid have submitted cross-objections claiming that the shares of the parties have not been properly assessed by the Subordinate Judge.

Counsel for the appellant at the outset informed us that he would confine his appeal to the properties (c) and (a) only and consequently the dispute before us is narrowed down to the two items in question. In order to understand properly the nature of the present dispute the following pedigree table reproduced from p. 63 of Vol. 1 of the printed record will be helpful :



Sheikh Karam Bakhsh, to whom the property in dispute originally belonged, was the Governor of Doaba Jullundur under the Sikh rule. He died in 1857, leaving a considerable amount of moveable and immoveable property. On his death, a dispute arose between all his relations as to the persons entitled to inherit his property. Under strict Mahomedan law, Mt. Dullan, who was a widow

of Gamme Khan, was not entitled to partake of his inheritance, nor was Nasir-ud-Din whose mother Mt. Amir Bibi had predeceased Sheikh Karam Bakhsh. Mt. Dullan, however, claimed a share as an heir, while Nasir-ud-Din claimed the whole of it on the ground of his being an adopted son of Sheikh Karam Bakhsh. Litigation ensued which eventually came up for decision in the Court of the Com.

missioner, Jullundur. The Commissioner by his order dated 26th January 1858, fixed the shares of the various contestants as follows: Mt. Gulabi 9 shares; Mt. Begam 9 shares; Mt. Tabi 9 shares; Mt. Jano 9 shares; Mt. Nur Bibi 64 shares; Mt. Jiwi 64 shares; Nasir-ud-Din 64 shares; Mt. Karam Bibi and Mt. Dullan 60 shares. The matter of the actual partition of the property was made over to three Munsifs to be appointed by lots: Ex. P.36, Vol. 2, pp. 2 to 9.

The Munsifs made some interlocutory reports settling certain details that arose for their decision and submitted a final report on 28th April 1859, detailing the considerations that had prevailed with them in partitioning the property and specifying the various items of property allotted to each claimant: Ex. P.37, Vol. 2, pp. 10 to 14. In this report the Munsif stated that a sum of Rs. 4,064.14.0 had been earmarked "for the construction of a serai with a view to the spiritual good of the deceased" and it was proper that this sum should be utilized for the same purpose. They also observed that the havelis were not included in the partition of the property, but had been set apart for the residence of the four widows and Mt. Dullan and that those havelis should on the death of the ladies be divided among the heirs of the deceased in proportion to their shares. It may be remarked here that the words 'wursai mazkur' (the said heirs) in the original vernacular report have been wrongly translated as 'their heirs' in the last line on p. 10, Vol. 2. It appears that during the course of the partition an agreement was entered into between the various contestants and the haveli at Hoshiarpur was allotted to Mt. Dullan as a part of her heritage, its money value having been taken into account in apportioning her share. This is evident from a copy of the list prepared at the time of the said partition, the translation of which is printed at pp. 65 to 67 of Vol. 2 of the printed record: Ex. P.41.

Mt. Dullan did not agree to the action taken in connexion with this haveli as she claimed it to be her husband's property and thus not liable to be treated as the property of Sheikh Karam Bakhsh. She contested this matter before Rai Sahib Bansi Lal who, however, did not accept her contention and issued orders to the Munsifs to include the said haveli in

the partition of the property: Ex. P.40, Vol. 2, pp. 14-15. Dissatisfied with this order, Mt. Dullan preferred an appeal to the Commissioner, Jullundur Division, who dismissed her appeal: Ex. P.39, Vol. 2, pages 15-16. Mt. Dullan died about the early eighties of the last century.

The earliest document on the record in relation to this haveli after Mt. Dullan's death dates back to 1917. It appears that this haveli fell into ruins and proved a source of danger to the inhabitants of the locality. Consequently on 25th August 1917, a Sanitary Inspector in the service of the Municipal Committee, Hoshiarpur, submitted a report for action under S. 114, Punjab Municipal Act, in connexion with this haveli and described it as the property of Mt. Soni, widow of Sheikh Sandhi. It may be mentioned that Sheikh Sandhi was a brother of Mt. Dullan. Notice was consequently issued to Mt. Soni. She, however, represented that the haveli did not belong to her but was the property of Sheikh Jan Muhammad and Zaffar Hussain, residents of Jullundur, and that consequently notice should be served on them. Thereupon, the Sanitary Moharrir recommended that notice be issued to the said owners. This was done on 12th September 1917. On 28th November 1917, the case was consigned to the record room with the remark that the requisite notice had been duly served: Exs. D-1/6 to D-1/11, Vol. 3, pp. 31 to 33.

On 12th March 1918, one Mt. Jiwan, who claimed to be a daughter of Mt. Dullan's sister, instituted a suit pertaining to this haveli under S. 9, Specific Relief Act, against Jan Muhammad and Zaffar Hussain. She alleged in her plaint that she was the sole heir of Mt. Dullan and that she had been forcibly dispossessed by the defendants on 1st September 1917. She stated that she had first filed a complaint under S. 145, Criminal P. O., against the said defendants, on which the defendants vacated the haveli and that she once more stepped into its possession. Her complaint was eventually dismissed on the ground that she was in occupation of the haveli, but four or five days after the dismissal of her complaint the defendants again evicted her forcibly and obtained possession of the haveli. On 29th November 1918 the Subordinate Judge dismissed this suit. A revision against that order was presented to this Court but that also

failed: Exs. D.1/41, D.1/19 and D.1/18, Vol. 3, pp. 33 to 38. Mt. Jiwan then instituted a regular suit on 25th January 1921 in forma pauperis. Her application to be allowed to sue as a pauper was resisted by Jan Muhammad and Zaffar Hussain who put in a joint written statement on 21st February 1921. The same day Abdul Latif made an application asking to be brought on the record on the ground that he too as an heir of Sheikh Karam Bakhsh was in possession of 15/32 share in the haveli in dispute. His name was brought on the record in spite of the protest by the other defendants. On 7th October 1921, Mian Riaz-ud-Din also made a similar application claiming one-fourth share in the haveli in dispute. No orders appear to have been made on this application as negotiations for compromise were then proceeding. On 28th November 1921, the Senior Subordinate Judge, holding that Mt. Jiwan was merely a cat's-paw in the hands of other persons who had stood in the way of a compromise suggested by him, refused to grant Mt. Jiwan permission to sue in forma pauperis: Exs. D.1/23, P.1/16, P.1/2, D.1/40, P.1/28, D.1/42, Vol. 3, pp. 38 to 46. Since then, the haveli in dispute appears to have been in the possession of Jan Muhammad and Zaffar Hussain.

As regards the serai, it appears that in 1859 the Commissioner approved the proposal made by the Munsifs that a serai should be built for keeping the name of Sheikh Karam Bakhsh alive and for conferring spiritual benefit upon him: Vol. 3, p. 15. The work of construction was taken in hand by the Government and the building completed. It is not clear, however, what buildings were actually put up in the first instance and what have been added later, but it is admitted that the heirs of Sheikh Karam Bakhsh had constructed a large number of rooms in the serai subsequent to its original construction. During the course of the settlement operations in 1883 the serai was included in the abadi: Ex. D.1/38, Vol. 3, pp. 19 to 22. In 1896, the Municipal Committee passed a resolution allowing the use of the serai as a vegetable market and since then the major portion of the building has been used as such: Ex. D.1/4, Vol. 3, p. 27. It has always been managed by a representative of the male members of the family of Sheikh Karam Bakhsh. The shops and stalls in the serai have been let

out on rent as private property of the family by the manager for the time being on behalf of all the living male members of the family, and in all suits that have arisen in connexion with these shops and stalls, the members of the Sheikh's family have consistently taken up the position that the serai was their private property. It is further proved that the serai has been treated by the authorities as a public serai within the meaning of Act 22 of 1867 which provides for the regulation of public serais and puraos and police arrangements have been made by them to keep watch on the wayfarers and travellers who lodge there. There is a mosque also in its compound, and on its outer entrance there is an inscription in Persian which runs as follows:

Out of generosity and charity, this serai was built by Mian Karam Bakhsh in the way of God. The date of his death coincides with the date of its construction, which is 1274 A. H.

This year of Hijra corresponds to 1857 A. D. Besides the documentary evidence summarized above, the plaintiffs as well as the two sets of defendants led oral evidence also in support of their respective allegations. The evidence for the plaintiff was mainly confined to the proof of various rent deeds executed from time to time in relation to the serai, evidencing its private character and the plaintiffs' joint possession of it along with the other heirs of Sheikh Karam Bakhsh. The defendants Abdul Majid and Abdul Rashid chiefly concerned themselves with proving that their share in the property in suit was 31/63. They produced copies of old plans relating to a previous partition between the parties of some other property left by Sheikh Karam Bakhsh, when their 31/63 share was recognized by the arbitrators appointed for the purpose and acquiesced in by all the other claimants. The defendant Zafar Hussain examined several witnesses to establish both the wakf nature of the serai in suit and his separate ownership and possession of the haveli at Hoshiarpur. As regards the serai, the upshot of their statements is that the serai is wakf, that it has always been treated both by the authorities as well as by members of the public as a public serai, that the major portion of it is being used as a vegetable market, that the portion not so used is reserved for wayfarers, that marriage parties are also accommodated there, that since its con-

struction it has been managed by some member or other of Zaffar Hussain's family and that it is at present under the management of Zafar Hussain himself. With respect to the haveli the documents referred to above have been formally proved to show that barring Zafar Hussain and Jan Mohammad, no other heir of Sheikh Karam Bakhsh had ever possessed it and that their possession now has by presumption been converted into ownership. The points requiring determination, therefore, are, whether the plaintiffs have established their claim to the haveli and whether the contesting defendants have proved that the serai is wakf and hence impartible.

We take up the case of the haveli first. As pointed out above, the unimpeachable evidence supplied by the old documents on the record is that the haveli was allotted to Mt. Dullan as a part of her inheritance and that it was not included among those 'havelis' which had been left out of the partition in 1858-59 for the residence of the ladies of the family including Mt. Dullan, and made subject to the condition of reversion to the heirs of Sheikh Karam Bakhsh on the demise of those ladies. It is in evidence that on Mt. Dullan's death, the two widows of her brother, Sheikh Sandhi, continued to occupy it and in 1917, even when one of the widows was alive, Jan Mohammad and Zafar Hussain ousted the then occupants and took possession of it on their own account. In the litigation that ensued, they alone were described as possessors and although Abdul Latif, father of Abdul Majid and Abdul Rashid, succeeded in having himself brought on the record in spite of the protest made by Jan Mahammad and Zafar Hussain and although Mian Riaz-ud-Din, father of the plaintiffs, also made an application to be impleaded as a defendant on the ground of his being an heir of Sheikh Karam Bakhsh, neither of them took any steps to make his claim effective after Mt. Jiwan's suit was dismissed. The result was that both Jan Mahammad and Zafar Hussain continued to occupy the haveli to the exclusion of all other claimants. They had unequivocally asserted their hostile title as against all the other heirs of Sheikh Karam Bakhsh and their exclusive possession could in no circumstances become joint by the mere denial of their sole right of occupation or the assertion of their joint right to occupy it

by Abdul Latif or Mian Riaz-ud-Din, unattended by any overt act on the part of either to translate his denial or assertion into practice. The possession of both Jan Mahammad and Zafar Hussain was adverse at its inception and so it remained throughout the period that elapsed before the present suit was instituted.

Counsel for the plaintiffs has urged that as Mahtab Din, Jan Mahammad and Zafar Hussain had one after the other been acting as agents of Mian Nasir-ud-Din and after him of Mian Riaz-ud-Din in the management of their joint property, this trespass on their part should also be considered to be on behalf of all members of the family and thus benefiting every one of them. We do not, however, agree. An act of trespass is an individual act of the trespasser and unless there is clear and cogent evidence to show that the trespass was committed by an agent in the interest of his principal, we are not prepared to hold that the principal is in any way benefited by it. In the present case, moreover, there was a clear disclaimer by the agent at the very time when the trespass was committed.

Although the case of 46 Mad 751¹ was not cited at the Bar, we consider that the principle deducible from that judgment relating to adverse possession completely covers the case before us. We accordingly reverse the decision of the Subordinate Judge and dismiss the plaintiffs' suit as regards the haveli at Hoshiarpur. We now come to the Serai at Jullundur. From the brief account of the serai given above, it will be abundantly clear that there is not a shred of evidence to show that Sheikh Karam Bakhsh made any declaration during his life as to its dedication. All that has been urged by the appellant in this connexion is that the Munsifs while distributing the property of the deceased Sheikh among his heirs, set apart a sum of Rs. 4,000 odd for the building of the serai, that it was built for the spiritual benefit of the deceased, that on its completion, an inscription was put up on its outer gate which stated that Sheikh Karam Bakhsh had built the serai, out of generosity and charity, in the path of God and that ever since then it has been open to the public for accommodation of travellers and for

1. Subbaiya Pandaram v. Mohammad Mustafa, A I R 1923 P O 175 = 74 I O 492 = 50 I A 295 = 46 Mad 751 (P O).

housing marriage parties, etc. In other words, though admitting that the serai was not completed by Sheikh Karam Bakhsh himself, and hence not dedicated by him, he has mainly relied on its having been built as a wakf property with the funds received out of his estate and its having been used as such since its construction. We are however disposed to think that the fact that the serai was not built or dedicated by Sheikh Karam Bakhsh himself would be sufficient to repel the appellant's contention. Under Mahomedan law followed by the Hanafi sect to which the parties belong, even if no particular formality need be observed to make a wakf complete, there must be unmistakable proof available that the owner made a clear declaration dedicating the property definitely and permanently to God. Even an owner's unexpressed intention to dedicate property cannot have the effect of a formal dedication. In the absence of any such intention or declaration, no wakf can be said to have been created. It is true that a wakf can be created by user but that user too must be preceded by an intention on the part of the owner to create a wakf. If no such intention is established, user alone will not be sufficient to divest the property of its private character : see 33 P R 1917;² A I R 1929 Lah 684³ and A I R 1934 Pat 612.⁴

In this case, even the user is not proved; rather, the manner in which the serai has been held and enjoyed leaves no doubt that it has never been treated as wakf. As to how it was used prior to 1896, the evidence is vague and inconclusive. Since 1896, it has practically been used as a vegetable market, and only an insignificant part of it has afforded shelter to the wayfarers. It is clear that the mere fact that it has been treated as a public serai under Act 22 of 1867 or that it has admitted lodgers without any charge for three days is not enough to show that it is wakf. There is evidence that several other privately owned buildings in that very town are being used as public serais and controlled under the Act. Besides, there are a number of documents on the record which

show that the heirs of Sheikh Karam Bakhsh have always considered it to be their private property. In fact, the contesting defendants themselves and their predecessors-in-title have, in various suits relating to shops and stalls in the serai made a categorical denial of the serai being wakf, and every manager, whosoever he was, in all rent deeds secured from the stall keepers has described it as the joint property of all the living male descendants of Sheikh Karam Bakhsh. The inscription on the outer gate of the serai does not advance the case of the defendants any further. In the first place, it was not written at the instance or in the lifetime of Sheikh Karam Bakhsh, and secondly, the unknown poet merely followed his line in indulging in hyperbolic expressions.

On these grounds we have no hesitation in holding that the serai is not wakf and is consequently heritable and partible. The mosque in the Serai however will remain wakf as before. Adverting now to the cross-objections put in by the sons of Abdul Latif, the decree does not incorporate that part of the judgment which deals with the respective shares of the various defendants but we treat these cross-objections in the way of a prayer to remove that defect in the decree and save the parties the expense and worry of a separate suit. On examining the evidence relied on by the objectors, we consider that there is enough material on the record to support their contention. The statement of Khan Ghulam Mohy-ud-Din, Advocate, corroborated as it is by the plans prepared at the time of the previous partition, is conclusive on the point and there are no grounds for not acting upon it.

The result is that we allow the appeal to the extent of dismissing the plaintiffs' suit in respect of the haveli at Hoshiarpur, but dismiss the appeal as regards the serai at Jullundur. We allow the cross-objections too and raise the share of Abdul Majid and Abdul Rashid in the serai which we have held to be partible as well as in the property (b) in the plaint from 47/126 allowed to them by the Subordinate Judge to 31/63. The remaining 16/63 share will belong to the defendants Zafar Hussain and Mt. Wazir Begam. We are aware that Mt. Wazir Begam had in her pleas disclaimed any share in the property in suit, but as the Subordinate Judge declared her to be equally entitled with the other defendants and there was no

2. Mahmud v. Muhammad Hamid, A I R 1917 Lah 122=38 I O 387=33 P R 1917.

3. Kishan Kishore v. Din Muhammad, A I R 1929 Lah 684.

4. Birendra Keshri Prasad v. Bahuria Saraswati Kuer, A I R 1934 Pat 612=155 I O 756=16 P L T 147=13 Pat 356.

appeal taken from this part of the decision, we do not propose to interfere with this part of the judgment. We leave the parties to bear their own costs throughout.

V.B.B./A.L. *Appeal partly allowed.*

A. I. R. 1937 Lahore 558

TEK CHAND, J.

Partapa and another — Insolvents —
Petitioners.

v.

Bishna and others — Creditors —
Opposite Parties.

Civil Revn. Petn. No. 828 of 1936, decided on 18th February 1937, from order of Dist. Judge, Ludhiana, D/- 26th November 1936.

Punjab Debtors' Protection Act (2 of 1936), S. 4 — Interpretation — Words "in the execution of decree" are not inadvertently added—Lease of agricultural land for 20 years by receiver in insolvency—S. 4 does not apply.

It is one of the cardinal canons of interpretation of statutes that where the wording of an enactment is clear, explicit and unambiguous, the Court must give effect to it and it cannot gather the supposed intention of the Legislature from the debates, or even the Statement of Objects and Reasons. Therefore the words "in the execution of decree" in S. 4, Punjab Debtors' Protection Act, are not inadvertently added. Hence a receiver in insolvency has power to lease agricultural land for a period of 20 years and S. 4 does not apply to such a case. *Crawford v. Spooner*, 6 Moo P C 1 and *Rex v. West Riding of Yorkshire County Council*, (1906) 2 K B 676, Rel. on. [P 559 C 1, 2]

Mela Ram — for Petitioners.

Achhru Ram — for Opposite Parties.

Order. — On the 18th April 1936 Partapa and Nahir Singh were adjudicated insolvents, on their own application, by the Insolvency Judge, Ludhiana. By the same order the learned Judge appointed two persons as Joint receivers. On the 17th June 1936 the receivers leased certain agricultural land of the insolvents for a period of 20 years. They realized the lease money from the lessees and asked the insolvents to hand over possession of the land to the lessees but they declined to do so. The insolvents also submitted an application that suitable maintenance be provided for them. The receivers forwarded the application to the Insolvency Judge, and also prayed that the insolvents be ordered to hand over possession of the leased land to the lessees. On the 29th June 1936, the Insolvency

Judge directed a warrant for delivery of possession of the land to issue. He also ordered that out of the lease money Rs. 50 be paid in lump sum to the insolvents by way of maintenance, after they had delivered possession of the land to the lessees. From this order the insolvents appealed to the District Judge, contending that the receivers or the insolvency Court had no jurisdiction to lease the land for a period of 20 years, in view of S. 4, Punjab Debtors' Protection Act, 2 of 1936 (which had come into force on the 6th June 1936), according to which proceedings for temporary alienation should have been transferred to the Collector. They further urged that their application for maintenance should also have been forwarded to the Collector for consideration under S. 5 of the Act. The learned District Judge held that Ss. 4 and 5 were inapplicable as these sections referred to proceedings before a "civil Court" and an Insolvency Court was not a "civil Court". He also held that the amount of maintenance granted by the Insolvency Judge was sufficient. He accordingly dismissed the appeal. The insolvents have come in revision, and it has been contended on their behalf that in holding that the expression "civil Court", as used in Ss. 4 and 5, does not include an insolvency Court, the learned District Judge has misconstrued S. 2 (4) of the Act, which expressly provides that :

In this Act, unless there is anything repugnant in the subject or context, 'Court' includes a Court acting in the exercise of insolvency jurisdiction.

Counsel for the respondent does not contest that the definition of 'Court' in the Act is wide enough to cover an 'insolvency Court', but he urges that S. 4 is inapplicable to this case for another reason. He points out that Chapter 2 of the Act of which Ss. 4 and 5 form part, is headed "Execution of decrees" and contends that the procedure laid down therein is not applicable to proceedings in insolvency. He further draws attention to S. 4 itself, which reads as follows :

Notwithstanding anything contained in any other enactment for the time being in force, whenever a civil Court orders that land be attached and alienated temporarily in the execution of a decree for the payment of money the proceedings of such attachment and alienation shall be transferred to the Collector.

The wording of the section is clear and explicit and lays down that proceedings for temporary alienation are to be transferred to the Collector in those cases in

which land has been "attached" and is sought to be alienated temporarily "in the execution of a decree for the payment of money". It is conceded by counsel for the insolvents that in proceedings in insolvency, the land of the insolvents is not "attached" nor can it be said that temporary alienation of land effected, or sought to be effected, by the receiver is in "execution of a decree". The learned Counsel frankly admitted that if the section, as worded, is to be given its plain meaning, its operation must be limited to cases of attachment and temporary alienation "in execution of money-decrees", and that the present case is not one of that description. He urged, however, that the words "in the execution of a decree" were superfluous, being against what he described the 'policy' of the Act, and that they should be ignored altogether in interpreting the section. Indeed, he boldly suggested that these words appear to have crept in the section inadvertently, as the 'real' intention of the Legislature was to transfer to the Collector all proceedings for temporary alienation of land from civil Courts not only in execution of money decrees but in all cases of whatever description, pending in civil Courts. In support of this argument, the learned counsel attempted to refer to the Statement of Objects and Reasons of the Bill, and the proceedings of the Legislative Council, but I did not allow him to do so. A Court, of law, whose duty it is to interpret a statute must take the statute as it finally emerged from the Legislature. It cannot take note of such extraneous considerations as suggested by the learned counsel, and assume that the 'real' intention of the Legislature was something quite contrary to what it expressed in plain language, or that it allowed words to "creep" into the statute "inadvertently". It is one of the cardinal canons of interpretation of statutes that where the wording of an enactment is clear, explicit and unambiguous, the Court must give effect to it and it cannot gather the supposed intention of the Legislature from the debates, or even the Statement of Objects and Reasons. As observed by their Lordships of the Privy Council in the leading case in 6 Moo P C 1¹ at p 9:

The construction of an Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the Legislature; we cannot aid the Legislature's

defective phrasing of the Act; we cannot add, and mend, and, by construction, make up deficiencies which are left there. If the Legislature did intend what it has not expressed clearly; much more, if the Legislature intended something very different; if the Legislature intended something pretty nearly opposite of what it said, it is not for the Judges to invent something which they do not meet with in the words of the text aiding their construction of the text always, of course, by the context; it is not for them to supply a meaning, for, in reality, it would be supplying it If a Court of Law were to do so, it would obviously be not to interpret the law but to make it.

In regard to the proceedings in the Council it is sufficient to refer to the oft-cited remarks of Farwell, J. in (1906) 2 K B 676² at p 716:

It was suggested that the view taken by us of the Act is not in accordance with the 'intention' of the House of Commons or with 'public understanding' of the effect of the Act; and reference was attempted to be made to the debates; but we have only to deal with the construction of the Act as printed and published. That is the final word of the Legislature as a whole, and the antecedent debates and subsequent statements of opinion or belief are not admissible.

The whole position is very well put in Maxwell on 'Interpretation of Statutes,' 7th Edn., p. 9.

Nothing could be more dangerous than to make such considerations the ground for construing an enactment that is unambiguous in itself. To depart from the meaning on account of such view is, in truth, not to construe the Act, but to alter it. But the business of the interpreter is not to improve the Statute; it is to expound it. The question for him is not what the Legislature meant, but what its language means; i. e. what the Act has said that it meant. To give a construction contrary to, or different from, that which the words import or can possibly import, is not to interpret law but to make it; and the Judges are to remember that their office is *jus dicere*, not *jus dare*.

I must, therefore, hold that S. 4 is not applicable to this case and that the receivers had the power to lease the land for a period of 20 years, and the insolvency Court was competent to issue a warrant for the dispossession of the insolvents. It was conceded that in this view of the case, S. 5 also was inapplicable, and the prayer of the insolvents for maintenance could be decided by the insolvency Court. Nothing was urged on the merits against the amount fixed by the learned Judge. The petition for revision fails and is dismissed with costs.

P.R./D.S.

Petition dismissed.

2. Rex v. West Riding of Yorkshire County Council, (1906) 2 K B 676=75 L J K B 938.

1. Crawford v. Spooner, (1852) 6 Moore P C 1.

A. I. R. 1937 Lahore 560

TEK CHAND, J.

Telu — Judgment-debtor — Appellant.

v.

F. Jethu Mal-Hari Parshad — Decree-holder — Respondent.

Exn. Second Appeal No. 1480 of 1936, Decided on 19th February 1937, from order of Dist. Judge, Ambala, D/- 8th July 1936.

(a) Punjab Courts Act (6 of 1918), S. 41 (3) — Applicability of Hindu law or custom — Question cannot be gone into in second appeal unless certificate under S. 41 (3) is filed.

The question whether a party is governed by Hindu law or by custom cannot be gone into in second appeal unless a certificate under S. 41 (3), Punjab Courts Act, is filed. [P 560 C 2]

(b) Punjab Debtors' Protection Act (2 of 1936), S. 10 (2) — Standing trees attached in execution of money decree before Act came into force—Trees ordered to be sold after Act came into force—Order is without jurisdiction in view of S. 10 (2).

Certain standing trees belonging to the judgment-debtor were attached in execution of a money decree before the Punjab Debtors' Protection Act came into force and the trees were ordered to be sold after the Act came into force:

Held: that the attachment did not create a charge or lien upon the attached property nor confer any title upon the attaching creditor. The order directing sale of the trees after the Act came into force was contrary to S. 10 (2), Punjab Debtors' Protection Act, and therefore could not be maintained. [P 560 C 2]

Tek Chand — for Appellant.

Shamair Chand — for Respondent.

Judgment.—In execution of a money decree obtained by the respondent against the appellant as the legal representative of his father Chhaju, certain standing trees were attached. The judgment-debtor objected that the trees were not liable to attachment as they were 'ancestral' (having been inherited by Chhaju from father) and no charge had been created thereon by the deceased Chhaju in his lifetime. The execution Court upheld the objection and released the trees. On appeal the learned District Judge reversed this decision, holding that the judgment-debtor had not proved that he was governed by custom and, in the absence of such proof, he must be presumed to be governed by Hindu law,

under which the trees were liable to be sold for payment of an unsecured debt of the deceased father of the judgment-debtor. The judgment-debtor has come in second appeal and it has been urged on his behalf that the learned District Judge was in error in holding that the judgment-debtor was governed by Hindu law and not by custom. This however is a matter, with which I cannot go in second appeal, without a certificate under S. 41 (3), Punjab Courts Act.

The decision of the learned Judge however cannot be maintained for another reason. The order of the executing Court releasing the trees from attachment was passed on 16th May 1936. From this order the decree-holder appealed to the District Judge on 13th June 1936 and the appeal was not decided till 8th July 1936. In the meantime on 6th June 1936, the Punjab Debtors' Protection Act (2 of 1936) had come into force. S. 10 of that Act lays down that, notwithstanding anything to the contrary, contained in any other enactment for the time being in force, standing trees, apart from the land on which they stand, shall not be liable to sale in the execution of a decree or an order of a Court. The provisions of this section are mandatory and therefore on 8th July 1936, the learned District Judge could not order the sale of trees in execution of a money decree. It is no doubt true, that the trees had been attached long before the Act came into force, but the attachment did not create a charge or lien upon the attached property nor confer any title on the attaching creditor. It merely had the effect of preventing and avoiding private alienation by the judgment-debtor. I hold therefore that the order of the learned Judge dated 8th July 1936 directing the sale of the trees in execution of the respondents' decree was contrary to S. 10 and cannot be maintained. I accept the appeal, set aside the order of the learned District Judge and restore that of the Court of first instance. As the point was not raised before the learned District Judge by the judgment-debtor or his counsel, the parties shall bear their own costs in all Courts.

K.B./A.L.

Appeal allowed.

A. I. R. 1937 Lahore 561

DIN MOHAMMAD, J.

Maru — Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 150 of 1937, Decided on 30th March 1937, from order of Magistrate, 1st Class, Ferozepore, D/- 24th December 1936.

(a) Penal Code (1860), S. 397 — Recovery of stolen property from accused and accused identified by prosecution witnesses — That accused was armed with deadly weapon at the time of robbery or that he attempted to cause grievous hurt or death not proved — S. 397 held did not apply.

Section 397, I. P. C. applies only to those persons who come within the four corners of the enactment and no other. The section does not create an offence but merely regulates the punishment. [P 561 C 2]

The stolen property was recovered from the accused who was afterwards identified by most of the prosecution witnesses. It was not alleged by any witness that at the time of committing the robbery he was armed with any deadly weapon or that he caused grievous hurt or death or attempted to cause grievous hurt or death :

Held : that S. 397 was not applicable : *A I R 1925 All 305* and *A I R 1924 Cal 643, Rel. on.*

[P 561 C 2]

(b) Arms Act (1878), S. 19 (f) — Pistol and cartridges recovered at instance of accused from house of another — Such other person withheld by police — Accused not armed with pistol in commission of robbery — No exclusive possession held established to justify conviction under S. 19 (f).

An accused was charged under S. 19 (f) of the Arms Act and the only evidence against him was that at his instance a place was dug up in the house of another person wherefrom a pistol and some cartridges were recovered, but during the commission of robbery he was not alleged to be armed with a pistol; moreover the person from whose house the pistol and cartridges were recovered was suspiciously withheld by the police :

Held : that such exclusive possession was not established against the accused as would justify his conviction for the offence of possessing a pistol without a license. [P 562 C 1]

Judgment.—This judgment will dispose of Criminal Appeals Nos. 151, 150 and 229 of 1937. The first two appeals have been presented by Chiragha and Maru, respectively, against their conviction under S. 392 read with S. 397, I. P. C., and sentence of seven years' rigorous imprisonment each, while the third appeal has been presented by Maru against his conviction under S. 19 (f), Arms Act and sentence of one year's rigorous imprisonment. The case for the prosecution is that the two accused persons now before me committed robbery along with another person who was at the time of the commission of the offence

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armed with a pistol, and robbed their victims of the various silver ornaments which they were wearing at the time. I will take up the case of Chiragha first. So far as the actual commission of the offence is concerned, I am satisfied that the case has been clearly established against him. Apart from the fact that a part of the stolen property has been recovered from him, he has been identified by most of the prosecution witnesses who had come into contact with him at the time the robbery was committed. The trial Magistrate, however, has gone wrong in applying S. 397, I. P. C., to his case inasmuch as no witness has alleged that he was armed with any deadly weapon at the time of committing robbery or that he had caused grievous hurt or attempted to cause death or grievous hurt to any of his victims. S. 397 applies only to those persons who come within the four corners of the enactment and to no other. This section does not create an offence but merely regulates the measure of punishment and is, therefore, applicable only to the individual whose case is covered by it. The language of the enactment is in itself very clear, but if any authority is needed for this proposition, reference may be made to 47 All 59¹ and 51 Cal 265.²

I accordingly accept Chiragha's appeal to this extent, that I alter his conviction from one under S. 392 read with S. 397, I. P. C., to that under S. 392, I. P. C., only, and reduce his sentence to four years' rigorous imprisonment. The case of Maru, however, stands on a different footing. Most of the alleged victims of robbery did not identify him and even his identification by the two witnesses who picked him out correctly at the identification parades, is not above suspicion. In fact, one of them, Pathana, has admitted that he had already seen Maru at Tarmala village about a month before the identification parade was held. The recovery of some stolen articles, too, attributed to him is not convincing. Those articles were admittedly recovered from the house of one Sajjan, and it is strange that Sajjan does not figure in the case anywhere. I accordingly accept Maru's appeal and acquit him. Similarly, I am not satisfied that the charge under S. 19 (f), Arms Act, has been

1. *Dulli v. Emperor*, *A I R 1925 All 305*=85 I C 714=26 Cr L J 570=47 All 59.

2. *Emperor v. Ali Mirza*, *A I R 1924 Cal 643*=81 I C 800=25 Cr L J 1024=51 Cal 265.

established against Maru. The only evidence against him is that at his instance a place was dug up in the house of Sajjan wherefrom a pistol and some cartridges were recovered. Considering that he is not alleged to have been armed with a pistol even at the time of committing robbery and also taking into view the fact that Sajjan has been suspiciously withheld by the police, I do not think that such exclusive possession is established against Maru as would justify his conviction for the offence of possessing a pistol without a license. I accordingly accept his appeal and acquit him.

U.S/D.S.

*Appeals accepted.***A. I. R. 1937 Lahore 562**

ADDISON AND DIN MOHAMMAD, JJ.

Imam Bakhsh — Appellant.

v.

Emperor.

Criminal Appeal No. 1031 of 1936, Decided on 10th November 1936, from order of Sess. Judge, Mianwali, D/- 8th August 1936.

Penal Code (1860), S. 300, Exception 1 — Accused knowing about criminal intimacy of his sister with deceased—Being informed of this one night, going to sister's house, breaking open her house, and killing her and her paramour—Provocation, though grave, held not sudden, but sought.

Where an accused knowing about the criminal intimacy of his sister with the deceased and having heard about this one night from some other person, went to the house of his sister with an axe, broke into it in spite of protest and then proceeded to murder his sister and her paramour:

Held: that even assuming that the provocation was grave, it was not sudden but was sought by the accused. Hence Exception 1, S. 300, did not apply. [P 562 C 2]

*Khurshaid Zamad — for Appellant.**R. C. Soni — for the Crown.*

Judgment.—This is an appeal by Imam Bakhsh against a sentence of transportation for life passed upon him under the provisions of S. 302, I. P. C., for the murders of his sister Mt. Kauran, who was a widow, and of one Shera, a mochi. The facts are quite clear. Mt. Kauran was suspected by Khadam Hussain, a brother of her deceased husband, of having an intimacy with Shera and he told this to the appellant, the brother of Mt. Kauran, but the appellant was not convinced. On the night in question Khadam Hussain saw Shera entering the kotha of Mt. Kauran at midnight and quietly placed a lock

outside the door. He then went and informed the appellant, who picked up an axe which was lying near his bed and went straight out of his house to the kotha of Mt. Kauran. He found it locked. He asked Khadam Hussain to hand over the key to him. This he refused to do and told the appellant that all that should be done was to report the matter to the Police. The appellant threatened Khadam Hussain who ran away in order to call other persons so as to prevent the appellant doing harm to anyone. Thereupon the appellant with his axe broke open the lock and the door and found his sister and Shera inside. He then proceeded in a most brutal manner to kill Shera and, when he was satisfied that he was dead, he turned upon his sister and killed her in as savage a way. The witnesses, who arrived at the spot, called out to him to stop injuring his sister but he would not stop.

The only point urged before us in appeal was that the appellant had grave and sudden provocation. One of the provisos however to Excep. 1, S. 300 is that the provocation is not sought. In the present case it is established that the appellant knew that his sister was suspected of an intimacy with Shera. When told by Khadam Hussain that night, he left his house after picking up an axe, went to the house of his sister, broke into it in spite of protests and then proceeded first to murder Shera and then to murder his sister. Even if it is assumed that the provocation was grave, it cannot be said that it was sudden. The appellant knew what to expect in the house before he left his own house. In order actually to see the couple together, he had to break into the house after which he proceeded to slaughter his sister and Shera in a savage manner, one after the other. Obviously this provocation was not sudden while it was also sought by him. It follows that Excep 1, S. 300, does not apply in the present case. A similar case, decided by a Division Bench of this Court, is 35 Cr L J 1378.¹ There is no escape from the conclusion that this was a case where two people were deliberately murdered. There is no force in the appeal and we dismiss it.

T.M./D.S.

Appeal dismissed.

1. Mehra Mistak v. Emperor, A I R 1934 Lah 103=1934 Cr C 197=151 I O 751=35 Cr L J 1373.

A. I. R. 1937 Lahore 563

SKEMP, J.

Panna Lal and others — Defendant —
Appellants.

v.

Mohammad Zaki and another,—Plaintiffs and *others*, Defendants

— Respondents.

Second Appeal No. 1546 of 1936, Decided on 10th February 1937, from order of Dist. Judge, Rohtak, D/- 20th August 1936.

(a) Minor—Guardian-ad-litem—Negligence—Doing everything to defend suit but failing to appear in appeal—Held no negligence.

In a suit against minor, after the plaintiff had finished his evidence, the guardian-ad-litem who upto that date had done everything necessary to defend the suit, did not appear and also did not appear in the appeal though served :

Held : that this was of itself not sufficient to prove negligence : *A I R 1925 Lah 116* ; *A I R 1932 Cal 1888* and *A I R 1927 Mad 538 Rel. on.*

[P 564 C 2]

(b) Appeal—New point.

It is an error in deciding an appeal on a point not really taken before the trial Court.

[P 564 C 2]

Shamair Chand and Fakir Chand

Mittal — for Appellants.

Ram Lal Anand I — for Respondents (Plaintiffs).

Judgment.—In 1919 two brothers Said Ahmad and Mohammad Siddiq bought in equal shares an engine for grinding flour. Mohammad Siddiq died and Said Ahmad transferred his own half share to one Panna Lal. In 1926 Panna Lal sued Said Ahmad and the two minor sons of Mohammad Siddiq, as well as some female pro forma defendants, for separate possession of his half share of the engine and for Rs. 159 as mesne profits. The minors' cousin Hamid-ul-Hassan acted as their guardian. On the 14th March 1927 the trial Court gave Panna Lal a decree for separate possession and mesne profits against Said Ahmad only. Panna Lal appealed, his appeal was accepted and the decree extended to include the minors. The engine was sold in execution proceedings to a third party. The elder minor Mohammad Zaki has now come of age and on the 12th August 1933 he sued to set aside the previous decree on the ground that the guardian did not prosecute the suit nor produced witnesses; he did not carry out his functions in the interests of the minors but colluded with the opposite party. He did not appeal against the decree of the trial Court, did not even attend the hearing of the appeal, did not attend

and made no objections in the auction proceedings. The decree was obtained conclusively by fraud ; the auction of the engine took place in favour of Panna Lal benami. Finally Mohammad Zaki on his own behalf and that of his minor brother sought that the decree should be set aside on the grounds of negligence, conspiracy and absence. The trial Court framed the following principal issue :

Whether the guardian of the plaintiffs acted with negligence and colluded with defendant 1 and the plaintiffs were prejudiced in their defence of the suit and appeal by their acts, negligence and collusion and the decrees in dispute were obtained against them through fraud ?

The trial Judge dismissed the suit. He said that the guardian Hamid-ul-Hassan lodged a written statement, that he engaged Sant Lal, one of the best lawyers available at Sonapat, where the case was tried, that he obtained five dates, for evidence summoned witnesses, paid process fees and diet money. A formal application for his appointment was made and though no order was passed he did act effectively as guardian. The appellate record shows that he was summoned but he did not attend. The learned District Judge accepted the appeal and held that the previous decrees were a nullity. He said :

The learned Subordinate Judge has held that the guardian-ad-litem of the minors had not failed in his duty and that there was no collusion between him and the opposite party. It appears to me that this was really not the point on which the decision of the case hinged. It was alleged and the record bears it out that Hamid-ul-Hassan who was appointed guardian-ad-litem of the minors committed default at the stage of evidence and consequently the minors were not represented in Court at all. In appeal also no one appeared as guardian-ad-litem on their behalf. Issues were struck and Panna Lal entered on evidence which he closed on 25th January 1927. Defendants were then called upon to lead their evidence. On 8th March 1927 the minors' guardian-ad-litem was absent. The counsel engaged by him pleaded lack of instructions and inability to proceed because the witnesses who had been bound over to be present had not turned up.

Time was refused. The proper course for the Court trying the case was to appoint a new guardian. He concluded that there was consequently no body who could represent the minors and it was "irrelevant whether Hamid-ul-Hassan had colluded with Panna Lal and the auction-purchaser or not." The learned District Judge also said :

Into the merits I am not prepared to enter as it is not necessary although it is clear as daylight that these infant defendants were practically robbed of their share in the engine and after the satisfaction of the decree against them a sum less

than Rs. 50 was left in deposit as due to them. Comments on this are unnecessary.

Now, Panna Lal's plaint in the original suit valued half the engine at Rs. 700. The whole engine was subsequently sold for Rs. 921-8-0 and half the engine is valued in the present suit at Rs. 450. The price realized for the engine at a forced sale is not so very unreasonable, nor is the amount left in deposit for the minors, considering the costs of the suit. Mr. Shamair Chand who represented Panna Lal and the auction-purchaser, urged with force that the learned District Judge ought not in appeal to have made up a new case for the minors or to have allowed counsel to do so. The real case in the lower Court as disclosed by the issue was fraud and collusion; but on appeal it was decided on the point of non-representation. Mr. Shamair Chand relied on three rulings: A I R 1925 Lah 116,¹ 59 Cal 1108² and 50 Mad 357.³ The first of these cases was quoted by the trial Judge. The learned District Judge relied on 113 P R 1918,⁴ a Single Bench judgment which held that a decree against a minor not properly represented was a nullity. The proposition is undoubtedly correct but the judgment does not show the circumstances which led to its being held that the minor was not properly represented. In A I R 1925 Lah 116¹ Scott-Smith, Ag. C. J., dealt with a case in which the minor's grandmother had been appointed guardian-ad-litem. She did not appear to defend the suit and allowed an ex parte decree to be passed. The Acting Chief Justice held that:

Mere failure on the part of the guardian-ad-litem to defend a suit or to appeal from a decree is of itself not gross negligence.

He said that it was possible that there might be a good case against the minor and the guardian-ad-litem might have thought fit not to incur additional expense in defending the suit. In 59 Cal 1108² the guardian-ad-litem appeared in the trial Court. He was served with a notice for appeal but did not appear or take any steps. It was held that this did not of itself show that he was either unable or unwilling to act or that he was guilty of

neglect towards the minor. In 50 Mad 357³ a Court official was appointed guardian. He declined to act because the proceedings were transferred to another Court; and no other guardian was appointed. A suit was brought to set aside the decree on the ground that the minor was not legally represented, but a Bench of the Madras High Court refused to do so. This is a particularly strong case because there were good grounds for suspecting fraud by some of the plaintiffs in the previous litigation. There is no evidence to prove fraud or collusion between Hamid-ul-Hassan and Panna Lal. The only facts are that after Panna Lal had finished his evidence, Hamid-ul-Hassan who up to that date had done everything necessary, did not appear and did not appear in the appeal though served. In my judgment, and in accordance with the authorities cited, this is not of itself sufficient to prove negligence. As already noted I think the learned District Judge was in error in deciding the appeal on a point not really taken before the trial Court. I accept this appeal and dismiss the suit with costs throughout.

T.M./D.S.

Appeal allowed.

A. I. R. 1937 Lahore 564

SKEMP, J.

Chanda Singh and another —

Defendant — Appellants.

v.

Gandoo Mal and others — Plaintiffs

— Respondents.

Second Appeal No. 670 of 1936, Decided on 2nd April 1937, from decree of Dist. Judge, Ludhiana, D/- 26th March 1936.

(a) Custom (Punjab) — Alienation — Necessity—Right of reversioner to challenge alienation as being without consideration and necessity—Such right extends to involuntary sales also.

The rule of custom giving the reversioners the right to challenge the alienations of ancestral property as being without consideration and necessity is not only restricted to voluntary sales but it extends also to involuntary sales such as Court auctions: 18 P R 1908 (FB) and A I R 1922 Lah 224, *Foll.* [P 565 C 1]

(b) Punjab Courts Act (6 of 1918), S. 41 (3) —Applicability—Whether custom extends to involuntary as well as voluntary sales, is question of legal principle—Second appeal is competent from such decision without certificate under S. 41 (3).

The question whether the rule of custom saving the rights reversioners in alienations without con-

1. Nawab Singh v. Gurbaksh Singh, A I R 1925 Lah 116=82 I O 598.

2. Zarina Bibi v. Wazuddi, A I R 1932 Cal 888=140 I O 852=59 Cal 1108.

3. Kuppusami Iyengar v. Bawasami Rao, A I R 1927 Mad 538=101 I O 399=50 Mad 357.

4. Hira Singh v. Ghulam Qadir, A I R 1918 Lah 330=48 I O 399=113 P R 1918.

sideration and necessity extends to involuntary sales such as Court auctions or voluntary sales only, is a question of legal principle and second appeal from the decision thereof is competent without a certificate under S. 41 (3), Punjab Courts Act, as there is no dispute with regard to question of custom in such a case. [P 565 C 1, 2]

Mela Ram — for Appellants.

Mohan Lal Ahluwalia — for

Respondents.

Judgment.—One Gandoo Mal obtained a simple money decree against Bhagat Singh, one of three brothers, in execution of which he attached and brought to sale Bhagat Singh's one-third share in two houses. Gandoo Mal himself, with the permission of the Court, bought this share. He obtained formal possession and then sued for partition. Bhagat Singh's two brothers, Chanda Singh and Hardit Singh, resisted the suit, inter alia, on the ground that the bond on which Gandoo Mal obtained his decree was without necessity or consideration. The trial Judge held that necessity for the debt was not proved and also that one of the two items was not proved to have existed at all. He dismissed the suit. The plaintiff appealed and without going into the merits, the learned District Judge accepted the appeal on the ground that the rule of custom saving the rights of reversioners in alienations without consideration and necessity did not extend to Court auctions. He said :

The right to contest an alienation of ancestral property is derived from custom and I know of no authority in which such a right has been extended to Court auction-sales As far as I know this is the first case in which a Court auction-sale has been attacked for want of necessity.

The attention of the learned District Judge is invited to 18 P R 1908¹ and 65 I C 992.² The first of these cases deals with a sale under S. 88, Criminal P. C., the second with a Court auction like the present. If the rights of reversioners to protect their interests were not extended to Court auctions then that right could be defeated by cunning lenders bringing collusive suits against dishonest proprietors and getting land sold in execution of their collusive decrees. This argument was used in somewhat different words by Chatterji, J. in 18 P R 1908¹ at p. 122 and was also approved by Clark, C. J. at p. 120. Mr. Mohan Lal Ahluwalia for the respondents does not justify the reason-

ing of the learned District Judge but pleads that second appeal is not competent without a certificate as the question of custom is involved. There is no dispute as to the question of custom; what is in dispute is a question of legal principle, namely, whether custom extends to involuntary as well as voluntary sales. I accept this appeal under O. 41, R. 23, Civil P. C., set aside the judgment and decree of the District Judge and direct that he re-hear the appeal in accordance with law. Stamp on this appeal to be refunded; the appellant is to have the other costs of this hearing from the respondent.

K.B./A.L.

Appeal allowed.

A. I. R. 1937 Lahore 565

BEHIDE, J.

Tilok Chand — Plaintiff — Appellant.
v.

Subedar Mohammad Khan —
Defendant — Respondent.

Second Appeal No. 122 of 1937, Decided on 27th April 1937, from decree of Dist. Judge, Mianwali, D/- 2nd November 1936.

Punjab Regulation of Accounts Act (1 of 1930) — Object of— Mere acknowledgment by debtor on back of notices, that statement of account is correct, does not absolve creditor from keeping accounts and sending notices in prescribed form.

The object of the Punjab Regulation of Accounts Act is to ensure that the accounts are kept in a clear and intelligible manner and that the notices of the balance due are also sent in a similar manner so as to be easily intelligible to the debtor. The mere acknowledgment by the debtor on the back of the notices that the statement of account is correct, cannot absolve the creditor from his responsibility for keeping accounts and sending notices in the prescribed form. [P 566 C 1]

Iqbal Singh — for Appellant.

Feroze-ud-din — for Respondent.

Judgment.—Second Appeals Nos. 122 and 123 of 1937 and Civil Revision No. 89 of 1937 are connected and will be disposed of together. They arise out of three suits for recovery of money instituted by three brothers, named Tilok Chand, Devi Das and Hakam Chand, on the basis of separate bonds executed in their favour by the same defendant, Subedar Mohammad Khan. The suits were decreed by the trial Court but on appeal the learned District Judge has disallowed costs and interest on the ground that the plaintiffs had failed to comply with the provisions

1. Sadhu Singh v. Secy of State, (1908) 18 P R 1908=156 P L R 1908=19 P W R 1908 (FB).

2. Ghanaya v. Hazara Singh, A I R 1922 Lah 224=65 I C 992.

of the Regulation of Accounts Act. From this decision the present appeals and the petition for revision have been preferred.

It has been stated that the plaintiffs have sued on the basis of a bond executed in their favour by Subedar Mohammad Khan. According to the provisions of the Punjab Regulation of Accounts Act all the three plaintiffs should have kept accounts in the prescribed form in connexion with loans advanced by them and also sent six-monthly notices to the debtor in the prescribed form. Tilok Chand, one of the plaintiffs, however kept only a joint account and sent joint notices in respect of the three loans and that too without any specification of details of the three loans. There can be no doubt, therefore, that the provisions of the Act were not complied with. The learned counsel for the appellants, Tilok Chand and Devi Das and the petitioner Hakam Chand, however, argued that they formed a joint Hindu family and therefore the joint account and notices were sufficient in the circumstances of the case. The debt was, however, nowhere shown as due to the joint Hindu family and neither the account nor the notices make any mention of a joint Hindu family. No explanation is forthcoming as to why separate bonds were executed in favour of the three brothers if the loans were advanced on behalf of the joint Hindu family. The presumption arising from the bonds is that these were separate loans and consequently it seems to me that it was incumbent on the creditors to keep separate accounts and to serve separate notices as regards the amounts due. The object of the Regulation of Accounts Act is to ensure that the accounts are kept in a clear and intelligible manner and that the notices of the balance due are also sent in a similar manner so as to be easily intelligible to the debtor. The learned counsel for the appellants urged that the debtor Subedar Mohammad Khan had acknowledged on the back of three of the notices that the statement of account was correct; but a mere admission of this kind by a debtor cannot absolve the creditor from his responsibility for keeping accounts and sending notices in the prescribed form. In my opinion the irregularities in the accounts in the present case cannot be brushed aside as accidental or immaterial. I therefore agree with the conclusion reached by the learned District Judge in

this respect and dismiss the appeals as well as the petition for revision with costs.

P.R./D.S.

Appeals dismissed.

* A. I. R. 1937 Lahore 566

BHIDE, J.

Girdhari Lal Chopra — Defendant —
Petitioner.

v.

Messrs. Scales and Adams, Ltd. —
Plaintiffs — Opposite Parties.

Civil Revn. Petn. No. 804 of 1936,
Decided on 8th February 1937, from
decree of Addl. Judge, Small Cause Court
Amritsar, D/- 9th October 1936.

(a) Contract—C. I. F.—Nature and incidents of.

A contract of C. I. F. type by a seller is performed by tendering to the buyer documents, enabling him to obtain delivery of the goods. If the contract for sale provides for payment being made by a draft upon the buyer, the buyer is bound to accept the draft upon tender of the documents. The delivery the buyer is entitled to against payment is not of the goods contracted for but of their symbol represented by the bill of lading and other documents. Upon payment he can upon arrival of the ship demand the goods themselves and should these be not forthcoming or when forthcoming not be of the nature contracted for, all his remedies at law are open to him. If therefore a buyer fails to pay the draft and take delivery, he is clearly guilty of a breach of the contract: *A I R 1923 Lah 541* and *A I R 1927 Lah 391, Rel. on.* [P 567 C 1]

(b) Contract — C. I. F. — Appropriation when complete.

Where the documents are to be delivered on payment of the draft, 'appropriation' is not complete until payment of the draft: *A I R 1927 Lah 391, Rel. on.* [P 567 C 2]

* (c) Contract—C. I. F.—Property in goods does not pass to buyer by mere acceptance of draft—Property cannot be re-sold unless it has passed to buyer.

Under C. I. F. contract the property in goods does not pass to the buyer by mere acceptance of the draft but only after payment of the draft. There is no right of 're-sale' under the law unless the property has passed to the buyer: *A I R 1927 Lah 269; A I R 1926 Lah 94; A I R 1931 Lah 260* and *24 Cal 124, Rel. on.* [P 567 C 2]

Shamsher Bahadur — for Petitioner.

R. C. Soni — for Opposite Parties.

Order.—The plaintiffs sued in this case for recovery of Rs. 340 on account of short-fall in the price of two cases of tweeds which the defendant had indented for, but which they had to re-sell owing to defendant's failure to accept them. The contract was admittedly of the type known as 'C. I. F'. The defendant's contention

was that the goods were not of the type contracted for, that although he accepted the plaintiffs' draft for the price of the goods, he did so under coercion and that as he failed to pay the draft the plaintiffs were not entitled according to law to re-sell the goods and sue for the short-fall as the property in the goods had not passed to the defendant. Several other points were raised in defence, but these appear to be concluded by findings of fact. The main point for decision therefore is whether in the circumstances stated above the property in the goods had passed to the defendant and the plaintiffs were entitled to re-sell the goods and sue for the short-fall in price.

The nature and incidents of a C. I. F. contract are described in two rulings of this Court reported in 4 Lah 215¹ at p. 219, and A I R 1927 Lah 391.² It would appear therefrom that a contract of this kind by a seller is performed by tendering to the buyer documents, enabling him to obtain delivery of the goods. If the contract for sale provides for payment being made by a draft upon the buyer as in this case, the buyer is bound to accept the draft upon tender of the documents. The delivery he is entitled to against payment is not of the goods contracted for but of their symbol represented by the bill of lading and other documents. Upon payment he can upon arrival of the ship demand the goods themselves and should these be not forthcoming or when forthcoming not be of the nature contracted for, all his remedies at law are open to him. If therefore a buyer fails to pay the draft and take delivery, he is clearly guilty of a breach of the contract.

It was held in A I R 1927 Lah 391² that the property in the goods passes to the buyer on payment of the draft. In that case also the draft had been accepted, but it was never paid. It was held that mere acceptance of the draft without payment was not sufficient to pass title to the buyer. It was urged on behalf of the respondents that the goods had been 'appropriated' and there had been part-delivery and hence the title had passed to the buyer. But there seems to be no force in the contention. As pointed out in A I R

1927 Lah 391,² when the documents are to be delivered on payment of the draft, 'appropriation' is not complete until payment of the draft. As regards part-delivery, it appears that three other cases had been accepted by the defendant. They were part of the same contract, but had been sent separately. In these circumstances, part-delivery does not appear to be tantamount to delivery of the whole: cf. Illus. 5 to S. 34, Sale of Goods Act.

In view of the propositions of law laid down in connexion with C. I. F. contracts in A I R 1927 Lah 391,² the contention of the learned counsel for the petitioner that the property in the goods had not passed to the petitioner on the mere acceptance of the draft appears to me to be correct. The documents were to be delivered on payment of the draft and if the draft had been paid and the documents delivered, the position would have been different. The learned Judge of the trial Court has relied upon A I R 1930 Lah 640,³ but that was a case of a different type, wherein the claim was based on the bills of exchange and not on any short-fall on re-sale. There seems to be ample authority in support of the petitioner's counsel's contention that there is no right of 're-sale' under the law unless the property has passed to the buyer: see e. g., A I R 1927 Lah 269,⁴ A I R 1926 Lah 94,⁵ A I R 1931 Lah 260⁶ and 24 Cal 124.⁷ These rulings have reference to S. 107, Contract Act; but the position under S. 46, Sale of Goods Act, also does not appear to be different. I therefore hold that the plaintiffs were not entitled to sue for the short-fall on re-sale. They were however (as is conceded by their learned counsel) clearly entitled to damages on account of the breach of contract, which has been established by the findings of the Court below. The only difference will be that damages will have to be assessed on the basis of the difference between the contract price and the market price of the

3. Gopal Chand Sham Lal v. Jacob Behrens & Sons, A I R 1930 Lah 640=123 I C 118=31 P L R 77.

4. Sundar Singh-Jit Singh v. Gulab Singh-Kalyansingh, A I R 1927 Lah 269=100 I C 795.

5. Balla Mal-Rakhamal v. Budhumal-Prabh Dial, A I R 1926 Lah 94=89 I C 409.

6. Kahn and Kahn of Delhi v. Premsookh Das-Rup Narain, A I R 1931 Lah 260=134 I C 1110.

7. Yule & Co. v. Mahomed Hossain, (1897) 24 Cal 124=1 C W N 71.

1. Bubby Hurry & Co. v. Hertz & Co., A I R 1923 Lah 541=73 I C 421=4 Lah 215.

2. Balkishan Basheshar Nath v. Fazal Ellahi, A I R 1927 Lah 391=102 I C 807=28 P L R 344=8 Lah 173.

goods on the date on which the breach took place: 24 Cal 124.⁷ However as there is no evidence on this point on the record, the case must be remanded. I accept the petition and remand the case for re-decision in the light of the above remarks. Costs to follow final decision. Parties to appear before the trial Court on 26th February 1937.

S.C./D.S.

*Case remanded.***A. I. R. 1937 Lahore 568**

BHIDE, J.

*Sher Singh and another—Insolvents —
Petitioners.*

v.

*Firm Bishan Lal-Suraj Bhan and
others, Creditors and Special Official
Receiver — Opposite Parties.*

Civil Revn. Petn. No. 897 of 1936,
Decided on 3rd May 1937, from order of
Dist. Judge, Hissar, D/- 29th July 1936.

Provincial Insolvency Act (1920), S. 75—
Right of appeal regulated by S. 75 cannot be
governed by provisions of O. 47, R. 7, Civil
P. C.

The provisions of the Civil Procedure Code are
made applicable to insolvency proceedings by S. 5,
Provincial Insolvency Act, but those provisions
are subject to the provisions of the Insolvency
Act. Consequently when the right of appeal is
expressly regulated by S. 75, Provincial Insol-
vency Act, it should not be taken to be governed
by the provisions of O. 47, R. 7, Civil P. C.

[P 569 C 2]

*M. C. Mahajan and Vishnu Datta —
for Petitioners.*

*R. L. Anand II, R. C. Soni and Nazir
Ahmed (Special Official Receiver)—
for Opposite Parties.*

Order. — Second Appeals Nos. 64, 65
and 66 of 1936 are connected and will be
disposed of together. These appeals arise
out of insolvency proceedings in which
two persons named Sher Singh and Rag-
bir Singh were adjudged insolvents at first
but the adjudication was set aside on
review. An appeal was presented to the
District Judge and he held that the order
granting review was unjustifiable and
remanded the case with the direction that
the order of adjudication should stand and
the case should proceed from the stage
when the order of adjudication was
passed.

It may be stated at the outset that it
was admitted by the learned counsel for
the appellants that no second appeals
were competent inasmuch as the orders
challenged did not fall within the scope of

S. 4, Provincial Insolvency Act. He, how-
ever, requested that the appeals may
be treated as petitions for revision and
they have been accordingly treated as such.
The material facts for the purpose of these
petitions for revision may be briefly sta-
ted as follows :

A firm named Bishan Lal-Suraj Bhan,
applied for Sher Singh and Raghbir Singh
being declared insolvents on the ground
that they had committed certain acts of
insolvency. Raghbir Singh and Sher-
Singh resisted the claim denying the
alleged acts of insolvency but while the
inquiry was proceeding they came to a
compromise with a large number of their
creditors and presented an application
stating that they may be adjudged insol-
vents and the composition deed embody-
ing the terms of the compromise be given
effect to. One of the creditors was oppos-
ing the adjudication, but later on he
absented himself and did not pursue the
objection. The Court, therefore, stopped
further inquiry and adjudged Sher Singh
and Raghbir Singh insolvents on 22nd
July 1935. Some of the creditors, how-
ever, resiled from the compromise and
thereupon the insolvents applied for a
review of the order of adjudication stating
that they had agreed to being adjudged
insolvents only on the assumption that
the creditors would not raise any objec-
tion to the composition deed. As, how-
ever, the creditors had resiled from the
arrangement stated in the composition
deed they prayed for the order of adjudi-
cation being set aside. The learned Judge
of the insolvency Court held that the
order of adjudication was illegal on the
face of the record inasmuch as the Court
had not come to any definite finding as to
whether Sher Singh and Raghbir Singh
had committed any act of insolvency.
He also found that Sher Singh and Rag-
bir Singh had been induced to agree to
their adjudication by the creditors by
fraud and misrepresentation. The order
for review as prayed for was accordingly
granted, the adjudication order was set
aside and the parties were directed to pro-
ceed with the evidence.

From this decision an appeal was pre-
ferred to the District Judge. A prelimi-
nary objection was raised before the Dis-
trict Judge that no appeal was competent
from an order granting a review as there
were no grounds for such appeal falling
within the scope of R. 7, O. 47, Civil P. C.

The order challenged in appeal purported to have been passed under O. 47, Civil P. C., as well as under S. 151, Civil P. C. The learned District Judge was, however, of opinion that the order was virtually one of annulment of adjudication and fell properly within the scope of S. 35, Provincial Insolvency Act, and that an appeal was competent from such an order. On merits he was of opinion that there was no justification for annulling the adjudication and that the creditors who had been parties to the composition deed were *prima facie* bound by it and could not resile from the same without proving that they had agreed to the composition deed under some fraud or misrepresentation. He, therefore, set aside the order of the Insolvency Judge and restoring the adjudication order remanded the case for being proceeded with from the stage when the order of adjudication had been passed.

It may be stated here that there were three appeals filed in this Court because there were three petitions by creditors for adjudication of Sher Singh and Raghbir Singh as insolvents. One of the petitions was by a firm named Bishan Lal-Suraj Bhan referred to already, while the other two petitions were filed by two other creditors named Brij Lal and Chandar Sain, during the pendency of the proceedings taken on the petition of Bishan Lal-Suraj Bhan. These petitions were presented after Sher Singh and Raghbir Singh had expressed their willingness to be adjudged insolvents on 7th April 1934 and were based on the composition deed itself as amounting to an act of insolvency within the meaning of S. 6, Cl. (1), Provincial Insolvency Act. The three petitions were consolidated by the learned Insolvency Judge and the same order of adjudication was passed in them. On 22nd July 1935, when application for review of that order was made by the insolvents, Sher Singh and Raghbir Singh, the learned Insolvency Judge similarly passed only one order setting aside the adjudication. Two main points have been raised before me, viz., (1) that the learned District Judge had no power to entertain the appeal as the order from which the appeal was preferred was passed under O. 47, R. 1, and S. 151, Civil P. C., and (2) that there were no grounds for interference with the order of the learned Insolvency Judge on merits.

As regards the first point there is no doubt that the order of adjudication by

the Insolvency Judge was expressly passed under O. 47, R. 1, and S. 151, Civil P. C. There was a separate issue whether the adjudication should be annulled under S. 35. The learned Judge, however, was of opinion that S. 35 was not applicable. The contention of the learned counsel for the petitioners is that no appeal lay to the District Judge because there were no grounds for any such appeal falling within the purview of O. 47, R. 7, Civil P. C., and, secondly, an order under S. 151, Civil P. C., is not appealable at all. The appeals under the Provincial Insolvency Act however are governed by the provisions of S. 75 of that Act and it would appear therefrom that any order of a Subordinate Judge exercising insolvency jurisdiction is open to appeal. The provisions of the Civil Procedure Code are made applicable to insolvency proceedings by S. 5, Provincial Insolvency Act; but those provisions are subject to the provisions of the Insolvency Act. Consequently when the right of appeal is expressly regulated by S. 75, Provincial Insolvency Act, I do not see why it should be taken to be governed by the provisions of O. 47, R. 7, Civil P. C. I am therefore of opinion that the learned District Judge was competent to entertain the appeal. Even if there were any doubt on the point, the whole case is before me on the revision side and it is therefore open to me to consider whether the learned Insolvency Judge had or had not jurisdiction to pass the order in question on a review.

The order of the Insolvency Judge setting aside the adjudication was based mainly on the ground that there were apparent errors on the face of the record. In the first place it seems clear that no order of adjudication could be passed by consent of the parties. Under the old Insolvency Act of 1907 a composition deed could be presented to the Court even before adjudication but, according to the provisions of S. 38, Provincial Insolvency Act of 1920 a composition can be submitted to the Court only after an order of adjudication is passed. It seems therefore clear that the learned Insolvency Judge had no jurisdiction to entertain the composition arrangement submitted to him. The learned Judge has no doubt remarked in his order that there was sufficient material on the record to show that acts of insolvency had been committed, but he had not yet recorded the evidence of the

insolvents, Sher Singh and Raghbir Singh, and had not and could not arrive at any definite finding as to the acts of insolvency. The learned counsel for the respondents urged that Raghbir Singh had in one of his statements admitted that his property had been attached and sold in execution of a decree, but none of the petitions was founded on this act of insolvency; nor is there any material on the record to show when the act of insolvency was committed. This act of insolvency could not serve as a foundation for any of the petitions unless it was committed within three months before the institution of the petitions.

It was further contended on behalf of the respondents that in any case two of the petitions were based on the composition deed itself as an act of insolvency and as they were instituted within three months after the date on which the composition deed was executed the adjudication was justified. The order of adjudication was however not based on this ground at all. The learned Insolvency Judge, in reviewing the order of adjudication, has referred to this fact and pointed out that the insolvents had not been given any opportunity to show that the said composition deed did not constitute an act of insolvency or that the creditors, who had presented those petitions had no right to do so for any other reason. The learned District Judge has held that the adjudication order was justified in view of the composition deed and that it was for the creditors who were parties to that deed to show that the deed was not binding on them. But he seems to have overlooked the fact that no order of adjudication could be passed merely on the basis of the composition deed without arriving at a finding as to whether the alleged acts of insolvency in the petition had been committed. In my opinion the order passed by the learned Insolvency Judge on review was just and equitable. There is prima facie evidence to show that the insolvents were induced by some of the creditors to express their willingness to be adjudged insolvents in the hope that the property would be entrusted to trustees of their choice and would not be handed over to a Court Receiver. When the insolvents found that several of the creditors resiled from the composition deed they naturally applied for a review of the adjudication order. For reasons

given above I accept the petition for revision and setting aside the order of the learned District Judge restore the order of the Insolvency Judge dated 2nd June 1936 passed on review. The proceedings will now continue from before the stage when the first order of adjudication was passed on 22nd July 1935 and after recording the evidence of the parties the question of adjudication will be decided afresh on merits. Costs will follow final decision.

It has been brought to my notice that the petitions for insolvency which have given rise to S. A. O. 64, S. A. O. 65 and S. A. O. 66 of 1936 (which have been treated as petitions for revision) have been transferred to this Court after adjudication. This was apparently done in view of the large property involved. As the adjudication has been set aside it seems desirable that the case should go back to the Insolvency Judge, Hissar, for determination of the question of adjudication and I accordingly re-transfer it to him. The Special Official Receiver of the High Court who is now in charge of the property shall remain an interim receiver till the question of adjudication is decided. If adjudication is granted it will be open to the Insolvency Judge to appoint a fresh receiver; but before appointing another receiver, he should refer the matter to this Court for orders as to whether the case is to be re-transferred to this Court.

P.R./D.S.

Petition accepted.

A. I. R. 1937 Lahore 570

BHIDE, J.

Rahim Ullah Khan — Defendant —
Appellant.

v.

Chuni Lal, Plaintiff and *others*,
Defendants — Respondents.

Second Appeal No. 1026 of 1936,
Decided on 9th January 1937.

Principal and Agent—Principal benefiting by money received through unauthorized act of agent—He is liable jointly and severally with agent to restore it.

Where, by any wrongful or unauthorized act of an agent the money or property of a third person comes to the hands of the principal, or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or value of such money or property: *Case law ref.*

[P 571 O 2]

Barkat Ali — for Appellant.

Badri Das — for Respondent (Plaintiff).

Judgment.—This was a suit for recovery of Rs. 2,370 against three persons named Raja Rahim Ullah Khan, Ayub Khan and Feroze Khan, (defendants 1 to 3), the latter two being the son and grandson of Rahim Ullah Khan. It was alleged by the plaintiff that defendant 1 had opened an account with him by borrowing Rs. 50 and had authorized him to make advances to defendants 2 and 3 in the same account when the defendants needed money. It was also alleged that defendants 2 and 3 were agents of defendant 1. The trial Court decreed the suit against defendants 2 and 3 only holding that it has not been proved that defendant 1 had opened an account with plaintiff by borrowing Rs. 50 and authorized him to make advances to defendants 2 and 3. The learned District Judge accepted the latter finding of fact but held that defendant 1 was also liable as he had enjoyed the benefit of the money borrowed by defendants 2 and 3, on the principle laid down in S. 70, Contract Act. He accordingly passed a decree against defendant 1 also. From this decision defendant 1 has preferred a second appeal and the sole point for decision is whether he had been rightly held liable.

The two rulings on which the learned District Judge has relied viz., A I R 1934 All 390¹ and A I R 1925 Nag 33² do not appear to be helpful. In the former, S. 70, Contract Act, has been applied without any discussion of its precise scope. In the latter the money was found to have been borrowed for the legal necessity of a minor and binding on his estate. The learned counsel for the appellant has cited 2 I A 131³ and A I R 1931 Mad 51⁴ and urged that the mere fact that the appellant had benefited by the payments made to defendants 2 and 3 would not create any legal obligation on his part to pay the money unless he had the option of accepting or refusing to accept the benefit thereof and chose to accept it. He relied further on (1901) A C 240⁵ in which it was held that

contract made by a person intending to act on behalf of another but not disclosing any such intention cannot be ratified subsequently by the other person so as to make it binding on him. The learned counsel for the respondent on the other hand contended that defendants 2 and 3 were acting as agents of defendant 1 and although he is found to have not given any authority to them to raise loans from the plaintiff, defendant 1 is still liable jointly with defendants 2 and 3 for such money as was applied for his benefit. In support of this proposition he relied on Art. 103 in Bowstead on Agency, A I R 1931 Lah 457,⁶ A I R 1933 Lah 14,⁷ 11 Lah 375⁸ and other authorities to the same effect. In my opinion, the contention of the learned counsel for the respondent is sound. There is no doubt that defendants 2 and 3 were managing the land of defendant 1 as his agents. The entries in the plaintiff's account show that the money was borrowed for payment of land revenue and other purposes connected with this land. It may therefore be reasonably held in the circumstances that the money was borrowed by defendants 2 and 3 as agents of defendant 1 and for his benefit though they may have done so without proper authority to raise the loans. The learned District Judge has found that the money was used for the benefit of defendant 1. Art. 103 in Bowstead on Agency runs as follows :

Where, by any wrongful or unauthorized act of an agent, the money or property of a third person comes to the hands of the principal, or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or value of such money or property.

In view of the law as stated in this article and the other authorities cited by the learned counsel for the respondent, defendant 1 was I think rightly liable. (1901) A C 240⁵ cited by the learned counsel for the appellant would also appear to support this view. 2 I A 131³ on which stress was laid by the learned counsel for the appellant is clearly distinguishable as it was not a case of money

1. Shahzadi v. Beni Prasad, A I R 1934 All 390 =154 I C 405.

2. Lachmiram v. Pahladsingh, A I R 1925 Nag 33=84 I C 580.

3. Ramtuhul Singh v. Biseswar Lal Sahoo, (1875) 2 I A 131=23 W R 305=3 Sar 477 (P O).

4. Sampath Ayyangar v. Rajah of Venkatagiri, A I R 1931 Mad 51=129 I C 828.

5. Keighley Maxsted Co. v. Durant, (1901) A C 240=70 L J K B 662=84 L T 777=17 T L R 527.

6. Bhandari Brothers v. Municipal Committee, Amritsar, A I R 1931 Lah 457=134 I C 1028 =32 P L R 546.

7. Ramchand Lotia & Sons v. Municipal Committee, Lahore, A I R 1933 Lah 14=145 I C 687.

8. Secy. of State v. G. T. Sarin & Co., A I R 1930 Lah 364=120 I C 615=11 Lah 375 =31 P L R 765.

being advanced to an agent. I dismiss the appeal with costs.

S.C./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 572

ADDISON AND DIN MOHAMMAD, JJ.

Oma Parshad — Plaintiff— Appellant.

v.

Secretary of State — Defendant —

Respondent.

Second Appeal No. 493 of 1936, Decided on 21st December 1936, from decree of Dist. Judge, Karnal, D/- 1st February 1936.

(a) Act of State—Secretary of State taking property by act of Sovereignty — No suit lies against him — If possession is taken under colour of legal title then his act will be within jurisdiction of Courts — Stolen property recovered from accused's person lost while in custody of police — Suit by owner for recovery thereof — Liability of Secretary of State having arisen under Criminal Procedure Code, i. e., under Municipal Law of land, defence of act of State held could not be invoked.

The act of State is an act which the King executes in the exercise of his absolute and extraordinary power. [P 573 C 2]

If the Secretary of State takes the property in suit by an act of Sovereignty, then no suit will lie; but if, on the other hand, he takes it under the colour of legal title, then his act will be within the jurisdiction of the Courts. [P 574 C 1]

Certain stolen property recovered from the accused was lost while it was in the custody of the police. The owner of the property, therefore, filed a suit against the Secretary of State for India for recovery of the property. It was contended on behalf of the Secretary of State that as the property came into his possession in the exercise of a Sovereign right and thus an act of State, no suit lay against him :

Held : that as the stolen property was recovered from the offenders under the provisions of the Criminal Procedure Code and disposed of also under the provisions of the same Code, there was no occasion for the exercise of any absolute power of the Sovereign in this matter and whatever was done, was done under the Municipal law of the land. The liability of the Secretary of State having thus arisen under the Municipal law of the land, the defence that the act was an act of State, could not be invoked : *A I R 1928 All 276, Disting.* [P 574 C 1]

(b) Master and Servant—Offence by servant — Master is not liable for unlawful and unauthorized acts of his servants — Liability of Secretary of State for acts of his servant is same as in case of master and servant.

The master is not liable where his servant does an unlawful act which the master did not authorize. Where the servant does an act which is not done in the course of his employment nor is it done within the scope of his authority, the

master is not responsible for the consequences of his acts. [P 576 C 1]

The Secretary of State is not altogether immune from liability on account of his servant's acts but can be held liable in those circumstances in which a private employer can be rendered liable. [P 575 C 2]

Stolen property recovered from the accused's person was kept in the custody of a person in charge of the Malkhana. The person in charge absconded with the property :

Held : the Secretary of State could not be held responsible for his acts : *5 S L R 82 ; Cheshire v. Bailey, (1905) 1 K B 237 and British Mutual Banking Co. Ltd. v. Churnwood Forest Ry. Co., (1887) 18 Q B D 714, Rel. on ; 9 C W N 495, Disting.* [P 575 C 2]

(c) Trusts Act (1882), S. 94 — Applicability — Stolen property recovered from accused person kept in custody of person in charge of Malkhana—Servant absconding with property — Suit by owner of property against Secretary of State for recovery of same — No implied trust held created between owner and Secretary of State under S. 94—Secretary of State, held, not liable for felonious act of his servant even if relationship of trustee was created, in absence of proof of negligence on his part.

A trustee who, without being guilty of negligence, gives to his servant the custody of his trust property, is not liable for loss occasioned to the trust estate by the felonious acts of the servant. [P 576 C 1, 2]

Certain stolen property recovered from the accused person was kept with the person in charge of Malkhana who absconded with the property :

Held : that S. 94, Trusts Act, did not apply and no implied trust was created between the owner and the Secretary of State for India. [P 576 C 1]

Held also : that even if such trust was held to be established between them, the Secretary of State was not responsible as there was no negligence on his part : *Jobson v. Palmer, (1892) 1 Ch 71, Rel. on.* [P 576 C 1]

(d) Contract Act (1872), Ss. 148, 151 and 152 — Applicability — Stolen property recovered from accused person under Criminal Procedure Code and kept with person in charge of Malkhana—Such person embezzling such property — Relationship of bailor and bailee held, could not exist between owner and Secretary of State—Secretary of State, held, not liable.

The servants of the Secretary of State in exercise of the rights vested in them under the provisions of the Criminal Procedure Code came into possession of the plaintiff's property which they had recovered from the thieves. The property was then handed over to the person in charge of the Malkhana for safe custody but he absconded with the property. Thereupon the owner of the property sued the Secretary of State for recovery of the property or the value thereof :

Held : that though the property was bound to be returned to the owner on the direction of the Magistrate in that behalf no relationship of bailor and bailee could come into existence between the plaintiff and the Secretary of State. Even if there was a quasi-bailment, the Secretary of State could not be liable for the tort committed by his

servant in embezzling the property inasmuch as it was not proved that the Secretary of State failed to take care of the property as required by S. 151, Contract Act : 90 P R 1900, Rel. on. [P 576 C 2 ; P 577 C 1]

Achhru Ram — for Appellant.

Diwan Ram Lal and *R. C. Soni* — for Respondent.

Din Mohammad, J.—This appeal originally came on for hearing before Jai Lal, J., but he referred it to a Division Bench in view of the importance of the question involved therein. The facts giving rise to this appeal are these : On the night between 3rd and 4th July 1929, the house of Lala Oma Parshad, a retired Subordinate Judge, was broken into and a considerable amount of property stolen. On investigation, the culprits were arrested and a part of the stolen property was recovered from them. Their trial resulted in conviction on 25th November 1929, and their appeal from that order was also dismissed on 11th December. At the conclusion of the trial, the Magistrate ordered that the stolen property recovered from the offenders be delivered to the complainant. Afterwards, a case under S. 411, I. P. C., was started against the father of one of the convicts and the stolen property was then detained in connexion with that case. Throughout the trial of these cases the stolen property remained in the custody of the police. On 10th May 1932, Lala Oma Parshad was informed by the District Magistrate that his property had been lost. On 7th July 1934, Lala Oma Prashad brought the suit out of which this appeal has arisen against the Secretary of State for India in Council for recovery of the property mentioned above or, in the alternative, of its price which was assessed at Rs. 1,500.

The defendant resisted the claim on various grounds. It was contended, among other things, that the stolen property was not lying in trust with the police, that the Secretary of State was not liable to return the property or refund its price both at law and in equity, that the plaintiff had no cause of action against the defendant and that the suit was time-barred. Issues arising from the pleadings of the parties were duly framed. It transpired at the trial that one Humayun Akhtar, who was in charge of the Malkhana where the property had been deposited for safe custody, had absconded with it. The Subordinate Judge came to the conclusion that the Secretary of State for India in Council

was liable to make good the loss caused by a servant of his and that the plaintiff was entitled to receive Rs. 1,200 on that account. From this order an appeal was preferred by the Secretary of State to the District Judge who came to the conclusion that the plaintiff had disclosed no cause of action against the Secretary of State. In the course of arguments before us a question was raised that the act by which the Secretary of State came into possession of the property being in the exercise of a Sovereign right and thus an act of State, no suit lay against him. We have however no hesitation in repelling this contention. An act of State is described as an act of high power standing outside of and above not only the ordinary judicial but also the executive regime.

It should be an act of a higher nature referring to the King's supreme and imperial power of sovereignty which ought not to be disputed and handled in vulgar argument,

or, in other words, an act which the King executes in the exercise of his absolute and extraordinary power. Bacon, J. defined it as follows :

I call matter of State not merely the parts of sovereignty, but whatever introduceth any great alteration or dangerous precedent, or concerneth manifestly any great portion of people : Moore's Act of State in English law, pp. 6 to 14.

In 7 M I A 476,¹ where the defence contended that the ordinary Courts had no jurisdiction on account of the act complained of being an act of State, at p. 531 it was observed as follows :

The next question is, what is the real character of the act done in this case ? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law ? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Raja in trust for those who, by law might be entitled to it on the death of the last possessor ? If it were the latter, the defence set up, of course, has no foundation.

This passage was quoted with approval in 12 Beng L R 120² at p. 149. The principle enunciated in these two judgments is that if the possession is taken under colour of a legal title, the defence of the act of possession being an act of State is not available. In A I R 1926 Pat 321,³

1. Secy. of State v. Kamachee Boye Sahaba, (1857-59) 7 M I A 476 (P C).

2. Forester v. Secy. of State, (1874) 12 Beng L R 120=I A Sup Vol 10=1 P R 1872=18 W R 349=3 Sar 1 (P C).

3. Khursaidi Begum v. Secy. of State, AIR 1926 Pat 321=94 IC 433=5 Pat 539=7 PLT 679.

the two cases referred to above as well as some other cases relating to the question at issue were reviewed by a Division Bench of the Patna High Court and the conclusion deducible from them was stated as follows :

These decisions make it clear that if the Secretary of State took the property in suit by an act of Sovereignty, then no suit will lie ; but if, on the other hand, he took it under the colour of a legal title, then his act will be within the jurisdiction of the Courts.

The liability incurred in this case clearly arose under the provisions of the Criminal Procedure Code and we are of opinion that if a liability is incurred under the Municipal law of the land, the defence that the act is an act of State, cannot be invoked. S. 154, Criminal P. C., provides for information in cognizable cases, and S. 156 empowers a police officer to whom such offence is reported to investigate the case. S. 165 authorizes search of the offenders for recovery of any property which a police officer considers necessary for the purposes of investigation. Under S. 173 the Local Government requires an investigating officer to forward to a Magistrate any stolen property recovered from the offenders. Under S. 516-A the Court is empowered to make such order as it thinks fit for the proper custody of any property regarding which any offence appears to have been committed, and under S. 517 a criminal Court is empowered on the conclusion of an inquiry or trial to make such order as it thinks fit for the disposal (by delivery to any person claiming to be entitled to possession thereof) of any property produced before it or in its custody, or regarding which any offence appears to have been committed. It would thus appear that the stolen property is recovered from the offenders under the provisions of the Criminal Procedure Code and disposed of also under the provisions of the same Code. There is therefore no occasion for the exercise of any absolute power of the Sovereign in this matter and whatever is done is done under the Municipal law of the land. Moreover, as laid down in A I R 1934 Bom 277⁴ :

An act of State is a term which is not applicable to an action of the Sovereign towards its own subjects in its territory in time of peace. The expression is usually applied to an action of the Sovereign towards foreign subjects, whether it be in time of war or in time of peace. There can

be an act of State as between the Sovereign and its own subject in time of war. It would however be a misnomer to call the administrative acts of a Sovereign against its own subjects in time of peace as acts of State and to claim immunity in respect of them, although they may amount to a contract in the ordinary sense between the Sovereign and his subjects.

The Government Advocate relied on 44 All 573,⁵ where the plaintiff alleged that he being in lawful possession as a pawnee of certain ornaments had made over the same to the Court Inspector of Faizabad as they were required to be produced in a criminal case. Subsequently however the ornaments instead of being returned to him were made over by the Court of the Pargana Officer at Faizabad to the original owner. The Court of the Assistant Sessions Judge, which was the proper Court to pass orders regarding the disposal of property, passed an order directing the original owner to replace the ornaments in the possession of the Court, but the original owner became insolvent and the property could not be realized from him. Thereupon, the plaintiff sued the Secretary of State for India in Council for damages. It was held by a Division Bench of the Allahabad High Court that the plaint disclosed no cause of action against the Secretary of State, as it was nowhere alleged that any of those officers was acting as a servant or an agent of the Secretary of State or how the Secretary of State was liable for damage suffered through the act of any one of them. It would be obvious, therefore, that this judgment does not help the defendant as it proceeds on different facts. We, accordingly hold that the contention raised cannot prevail.

This, however, does not conclude the matter. It still remains to consider whether the Secretary of State for India in Council is liable in the circumstances of the present case for the embezzlement committed by Humayun Akhtar. The Government Advocate has referred us in this connexion to 143 P R 1919⁶ decided by a Division Bench of the Punjab Chief Court, and contended that the Secretary of State for India in Council cannot be held liable for the tortious acts of his servants. The authority relied upon, how-

4. Municipal Corporation Bombay v. Secy. of State, A I R 1934 Bom 277=152 I O 947=58 Bom 660=36 Bom L R 568.

5. Panchaeti Akhara Maha Nirbani v. Secy. of State, A I R 1922 All 276=67 I O 70=44 All 573=20 A L J 420.

6. James Symonds Evans v. Secy. of State, A I R 1920 Lah 362=54 I O 950=143 P R 1919=77 P L R 1920.

ever, does not lay down any proposition in such general terms. After holding that the suit did not lie on another ground, which we need not discuss here, the learned Judges without any discussion remarked as follows :

Apart from this objection the suit must also fail on the ground that the Secretary of State cannot be held civilly liable for tortious acts committed by police officers in the performance of duties imposed upon them by the Legislature.

They further added :

It is unnecessary for us upon the view that we take to discuss the more general question regarding the civil liability of the Secretary of State for wrongs committed by the servants and agents of Government.

It is clear, therefore, that the question now before us was left open. This judgment was based among others on 9 C W N 495,⁷ which said that:

In cases of torts committed by Government officials, the person to be sued is the person who has actually done the alleged wrongful act, and that:

Where the act complained of was done by a Government official occupying such a position that for all practical purposes the Government had no control over him and the Government did not cause or authorize or adopt such act and gained no profit from it, the Government could not be made liable for it.

That judgment too does not afford much help in the decision of the present case as its facts were quite different. In 11 I C 58⁸ the Judicial Commissioners of Sind held that :

The Secretary of State for India in Council can be made liable for the torts of Government servants in India.

They based their judgment on a decision of Sir Barnes Peacock, C. J., delivered in 1861. The question then referred for decision to the High Court of Bombay ran as follows :

Whether the Secretary of State was liable for damages occasioned by the negligence of servants in the service of Government, assuming them to have been guilty of such negligence as would have rendered an ordinary employer liable.

It was held that for the torts of servants employed by Government, the East India Company would have been liable and the same liability attached to the Secretary of State in Council who was liable to be sued for the purpose of obtaining satisfaction out of the revenues of India. The learned Judicial Commissioners pointed out that the principle laid down by Sir Barnes Peacock had been consis-

tently followed by every High Court in India. It appears to us, therefore, that the Secretary of State is not altogether immune from liability on account of his servants' acts but can be held liable in those circumstances in which a private employer can be rendered liable. This takes us to the discussion of the problem, whether a private employer of Humayun Akhtar would in the same circumstances have been made liable on account of his embezzlement. We have referred to various English authorities on the point, though not cited at the bar, and have come to the conclusion that, on the facts found in this case, a private employer could not be made liable for the act of his servant and consequently no liability attaches to the Secretary of State on account of the criminal act of Humayun Akhtar. In para. 597 of Vol. 20 of Halsbury's Laws of England the following remarks are pertinent :

Where, however, the servant, merely avails himself of the opportunity afforded by his employment to commit the tort solely for his own purposes, the master is not liable.

Similarly in para. 598 the following passage occurs :

Where, however, the commission of the crime has the effect of severing the connexion between the master and his servant, or otherwise, falls outside the scope of the servant's employment, the master is not liable.

In (1905) 1 K B 237,⁹ the Court of appeal held that:

The defendant was not responsible in respect of the criminal act of his servant, the same not having been done within the scope of his employment.

In that case the plaintiff, a wholesale silversmith, hired from the defendant, a job-master, brougham, horse and coachman for the purpose of driving the plaintiff's traveller about London with samples of the plaintiff's wares to be shown to customers. It was known to the defendant that, in the course of business, occasions would arise when the traveller would have to leave the brougham with samples in it in charge of the coachman. On one of such occasions the coachman, in pursuance of an arrangement made with confederates, drove the brougham to a place where a great portion of the samples in it was stolen by them. The plaintiff sued the defendant for damages but his case was dismissed with the above-

7. Moti Lal Grose v. Secy. of State, (1905) 9 C W N 495=1 C L J 955.

8. Mathra Das v. Secy. of State, (1911) 5 S L R 82=11 I C 58.

9. Cheshire v. Bailey, (1904) 1 K B 237=74 L J K B 176=92 L T 142=53 W R 322=21 T L R 130.

remarks. In (1887) 18 Q B D 714¹⁰ it was held by the Court of appeal that :

A principal is not liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's or agent's private ends.

At p. 266 of Smith's Law of Master and Servant, it is stated that the master is not liable where his servant does an unlawful act which the master did not authorize. The principle enunciated in this passage is clearly applicable to the case before us. In this case also the act of embezzlement by Humayun Akhtar was not done in the course of his employment, nor was it within the scope of his authority. It was a felonious act unauthorized by his employer and unlawful in its nature and his employer therefore cannot be held responsible for the consequences of his acts. Counsel for the appellant, however relied on S. 94, Trusts Act and urged that a sort of an implied trust had been established between the Secretary of State and the appellant. In the first instance we are not inclined to think that S. 94 applies to the present case, or that there was any such trust in existence as is relied on by the appellant. S. 94 reads as follows :

In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

To this section are appended three illustrations which throw a good deal of light on the intention of the Legislature in enacting this section. Those illustrations deal with an entirely different matter and in our view do not apply to the present case. But even if there were any trust established between the Secretary of State and the appellant, the Secretary of State would not be held liable in the circumstances of the present case. At p. 260 of Smith's Law of Master and Servant, it is observed on the basis in (1893) 1 Ch 71¹¹ that :

A trustee who, without being guilty of negligence, gives to his servant the custody of trust property, is not liable for loss occasioned to the trust estate by the felonious acts of the servant.

10. British Mutual Banking Co., Ltd. v. Oharnwood Forest Ry. Co., (1887) 18 Q B D 714=56 L J Q B 449=57 L T 833=35 W R 590=52 J P 150.

11. Jobson v. Palmer, (1892) 1 Ch 71=62 L J Ch 180=3 R 173=67 L T 797=41 W R 264.

In the case before us, it is clear that there was no negligence on the part of the Secretary of State. Counsel next contended that in this case the relationship of bailor and bailee can be presumed to have existed between the Secretary of State and the appellant. He urged that this was closely analogous to a case of bailment inasmuch as the servants of the Secretary of State under the provisions of the Criminal Procedure Code came into possession of the property for which they were bound to account to the appellant. Here also he is on weak ground. Bailment under the Contract Act is established only where there is a delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. It includes the case of a person already in possession of the goods of another which he contracts to hold as a bailee, although the goods may not have been delivered by way of bailment. Here there was no contract of bailment entered into between the appellant and the Secretary of State. The servants of the Secretary of State in exercise of the rights vested in them under the provisions of the Criminal Procedure Code came into possession of the appellant's property which they had recovered from the thieves. They were no doubt bound to return the property to the appellant if so directed by the Magistrate, but in no case the relationship of bailor and bailee came into existence between them and the appellant. Even if there were a quasi-bailment the Secretary of State will not be liable for the tort committed by his servant in embezzling the property. In an English case quoted in Smith's Law of Master and Servant at p. 260, Lord Kenyon held that the action could not be supported when it appeared that the bailee had taken as much care of plaintiff's goods as he had of his own. He further observed :

To support an action of this nature positive negligence must be proved. It has appeared in evidence in this case that the goods were lodged in a place of security, and where things of much greater value were kept. This is all that it is incumbent on the defendant to do ; and, if such goods are stolen by the defendant's own servants, that is not a species of negligence of a description sufficient to support this action, inasmuch as he has taken as much care of them as of his own.

In another case quoted at the same page, the Privy Council, in a case where a custo-

mer deposited with his bankers for safe keeping certain securities which were stolen by a clerk of the bankers, held that the bankers, as gratuitous bailees, were not liable unless the loss was occasioned by their gross negligence. On the principles deducible from these judgments Ss. 151 and 152, Contract Act appear to have been based. S. 151 runs as follows :

In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

Section 152 is as follows :

The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in S. 151.

In the present case it is not at all proved that the Secretary of State did not take as much care of the appellant's property lying with him as a man of ordinary prudence would, under similar circumstances have taken of his own goods, and consequently no liability will attach to him. In 90 P R 1900,¹² a Division Bench of the Punjab Chief Court, in a case in which the jewellery deposited by the plaintiff with the defendants for safe keeping had been lost observed as follows :

As the articles were actually stolen from defendants' shop, and they had taken as much care of the articles bailed to them as an ordinary prudent man would, under similar circumstances, take of his own goods, . . . the defendants were not liable.

On these grounds, we hold that the Secretary of State cannot be held liable for the embezzlement committed by Humayun Akhtar and we, accordingly, affirm the decision of the lower appellate Court, though for different reasons, and dismiss this appeal with costs.

K.B./A.L.

Appeal dismissed.

12. Lakhmi Das v. Babu Megh Raj, (1900) 90 P R 1900.

A. I. R. 1937 Lahore 577

COLDSTREAM AND JAI LAL, JJ.

Gurmukh Singh — Appellant.

v.

Risaldar Deva Singh and others —

Respondents.

First Appeal No. 1491 of 1935, Decided on 12th January 1937, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 17th July 1935.

1937 L/73 & 74

Punjab Sikh Gurdwaras Act (8 of 1925), S. 16 (2) (iii) — Institution found by person describing his occupation as granthi — Proprietors of village all Sikhs and gifting land to institution in name of Granth Sahib — Another institution in village known as Sikh Gurdwara — Institution in dispute held Sikh Gurdwara — Presence of another Sikh Gurdwara held not inconsistent with its being Sikh Gurdwara also.

In order to bring an institution within the definition of Cl. (3), sub-s. (2), of S. 16, Punjab Sikh Gurdwaras Act, it is necessary to prove not only that the institution has been used for public Sikh worship, but also, independently that it was founded for such worship. [P 578 C 1]

An institution known as the dharamsala was founded in 1852 by a person, who described his occupation as a granthi, from which it could justly be inferred that at that time the Guru Granth Sahib was being read by him. The proprietors of the village were all Sikhs and made gifts of land to the institution in the name of the Granth Sahib. There was another institution in the village, which was a Sikh Gurdwara:

Held: that the institution in dispute was a Sikh Gurdwara. The fact that there was another institution known as Sikh Gurdwara was not inconsistent with the institution in dispute having been formed as a place of public worship.

[P 577 C 2; P 578 C 1]

Mehr Chand Mahajan and Bhagat Singh — for Appellant.

Jai Gopal Sethi and Manohar Lal Mehra for *Harnam Singh* — for Respondents.

Coldstream, J.—This is an appeal by Gurmukh Singh, manager of an institution known as the dharamsala (or dera) Bhai Vir Singh in the village of Patto Hira Singh in Moga Tahsil of the Ferozepore District, against a judgment by the Sikh Gurdwaras Tribunal dismissing a petition presented by him under S. 8, Sikh Gurdwaras Act, praying that the institution in dispute should not be declared to be a Sikh Gurdwara. The evidence in the case has been described in detail in the judgment of Rai Bahadur Dwarka Parsad in which the learned President and the third member of the Tribunal concurred, and I do not propose to describe it again here. It is contended before us by the counsel for the appellant that there are circumstances proved or admitted which are consistent with this institution not having been founded for public worship by Sikhs, but as a private charitable institution, for instance, the fact that there is admittedly another institution in the village which is a Sikh Gurdwara. It is also contended that there is no direct evidence of the purpose for which the institution was founded and in this connection our atten-

tion has been drawn to a judgment of this Court in which it has been pointed out that in order to bring an institution within the definition of cl. (3), sub-s. (2) of S. 16, it is necessary to prove not only that the institution has been used for public Sikh worship but also, independently, that it was founded for such worship.

The fact that there is another institution in the village which is a Sikh Gurdwara does not help the appellant. The evidence is that the village proprietors are all Sikhs and I can see no reason why they should not have two Sikh Gurdwaras in their village. It is proved that Vir Singh, the founder and first manager of the institution, described his occupation as a granthi in 1852. From this, I think, we may justly infer that at that time the Guru Granth Sahib was being read by him. From time to time the proprietors of the village have made presents of land to the institution. In three cases, the gifts were described in the revenue records as having been made in favour of the Granth Sahib. The first of these gifts, it appears, was made in the time of Vir Singh himself, although the gift was not recorded by mutation until after his death. As regards the necessity of an independent finding regarding the purpose for which the dharamsala was established, I am unable to see why the Tribunal should not infer what this purpose was from evidence showing the purpose for which it has been used for a long time. Each case has to be decided on the whole evidence put forward by the parties in that particular case. In this case I have no doubt that the finding of the Tribunal is correct and I would therefore dismiss the appeal with costs.

Jai Lal, J.—I agree.

V.B.B./A.L. *Appeal dismissed.*

A. I. R. 1937 Lahore 578

ADDISON AND DIN MOHAMMAD, JJ.

Munshi and others — Defendants —
Appellants.

v.

Beli Ram and others — Plaintiffs —
Respondents.

Letters Patent Appeal No. 58 of 1934,
Decided on 21st January 1937, from decree
of Jai Lal, J., D/. 15th March 1934.

(a) Co-sharers—Tenants-in-common — Suit by five for possession of certain share in land — Suit dismissed—Appeal by four only—Suit can be decreed only to extent of shares of four and cannot be decreed in toto.

A suit was brought by five persons for possession of certain share in some land. The parties followed the custom and each was entitled as a tenant-in-common and not as a joint tenant to his specific share. The suit was dismissed and an appeal was filed by four out of the five co-sharers. The suit was decreed in toto :

Held : that the suit should have been decreed only to the extent of the shares in the land of the four appellants and not in toto. [P 579 O 1]

(b) Co-sharer — Adverse possession — Absentee co-sharer—Possession of one co-sharer is possession of all other co-sharers — For adverse possession against absentee co-sharers, co-sharer in possession must prove some overt act to the knowledge of other co-sharers.

The possession of one co-sharer must be deemed to be the possession of all the other co-sharers, and in order to defeat the title of absentee co-sharers, it is for the co-sharer in possession to prove that by some overt act he converted his possession into adverse possession to the knowledge of the other co-sharers : *A I R 1934 Lah 456, Rel. on ; A I R 1929 Lah 276 and 114 P R 1880, Dissent.* [P 579 O 1]

Shamair Chand and Chiranjiva Lal Aggarwal — for Appellants.

Mehr Chand Mahajan and Vishnu Datta — for Respondents.

Addison, J.—The plaintiffs sued for possession of a one-third share of the land comprized in certain specified field numbers, alleging that they were the descendants and heirs of persons who were recorded as absentee proprietors. On behalf of the defendants it was pleaded that there had been abandonment and that in any case the suit was time-barred. The trial Court and the District Judge on appeal held that there had been no abandonment. The District Judge further found that there had been no overt act done by the defendants to the knowledge of the plaintiffs which would start adverse possession running, but following *A I R 1929 Lah 276*,¹ he held that, though an absentee co-sharer himself could recover possession on his return, yet the limitation period allowed to an immediate heir of the absentee was twelve years from the date of the absentee's death. For this reason he held the suit to be barred by time, as had the trial Judge. The suit was therefore dismissed and so was the appeal.

1. *Buta Shah v. Murad Ali*, *A I R 1929 Lah 276* =116 I O 310.

There were five plaintiffs, Beli Ram, Kanshi, Parso, Khazano and Mangtu. These five, were appellants before the District Judge as well. Being dissatisfied with the District Judge's decision, the first three plaintiffs and Ram Ditta, Munshi and Phula, the sons of the fourth plaintiff Khazano preferred a second appeal to this Court. Mangtu, plaintiff 5, and appellant before the District Judge, did not prefer an appeal nor was he made a respondent. The parties follow custom and each one is entitled as a tenant-in-common and not as a joint tenant to his specific share. The appeal, therefore, could not have been instituted for the benefit of Mangtu even if he had been made a respondent, as it was his duty to appeal against the decision of the District Judge. This was not noticed when the appeal came for hearing before a Single Judge of this Court. He accepted the appeal and decreed the suit in toto in favour of the first three plaintiffs and the sons of plaintiff 4. This is evidently wrong and the suit should only have been decreed to the extent of the shares in the land to which Beli Ram, Kanshi, Parso and Khazano were entitled. This appeal under the Letters Patent must be accepted to this extent and the decree of the Single Judge of this Court set aside with respect to Mangtu's share. Mangtu has been proved to be alive, for he was served as a respondent in this Letters Patent Appeal which is against the decision of the Single Judge.

Before the Single Judge, the question of abandonment was not raised, and it was admitted before him that there was no overt act of those in possession which amounted to notice to the plaintiffs that the possession of the former had become adverse to the latter. He, therefore, held: see 15 Lah 907² that the possession of one co-sharer must be deemed to be the possession of all other co-sharers, and in order to defeat the title of absentee co-sharers, it was for the co-sharer in possession to prove that by some overt act he converted his possession into adverse possession to the knowledge of the other co-sharers. This means that he disapproved of the decision in A I R 1929 Lah 276¹ and did not follow it. Before us, an attempt was made to argue that abandonment had been established. In

the settlement of 1890 it was recorded that certain persons were absentees and that the co-sharers in possession were holding the land on behalf of them and that the absentee owners would be entitled to be restored to possession on their return by paying losses and the value of improvements. In 1904, however, the co-sharers in possession applied to the revenue authorities to strike off the names of the absentee owners and this was done by mutation in 1908. An attempt was made to serve the absentee owners by letters but these letters were not delivered as apparently the owners, whose names were given in the settlement record of 1890, had died. There are authorities of this Court that an absentee cannot take advantage of an agreement in his favour if his conduct has been such as to evince an intention to relinquish the ownership of the land which once belonged to him. But the question of abandonment is primarily one of fact and for that reason as well as for the reason that this was not raised before the Single Judge, it cannot be agitated before us.

This leaves the question of adverse possession. On the finding that there had been no abandonment and that the co-sharers in possession were holding on behalf of the absentees, it necessarily follows that the decision of the Single Judge is correct; for there was no overt act done by the co-sharers in possession to the knowledge of the absentees, this being also admitted before the Single Judge. This means that the suit was properly held to be within time unless the decision in A I R 1929 Lah 276¹ is correct. This decision appears to be based on 114 P R 1880³ and certain other decisions. In that case the absentees whose names were recorded had died and their sons brought a suit more than twelve years after their death. It was held that the suit was barred by limitation as the recorded absentees had died twelve years before suit. These decisions, however, do not appear to us to be correct. If the co-sharers in possession were holding on behalf of the absentees and no abandonment was established, it necessarily follows that they were also holding on behalf of their heirs after their death unless some overt act is proved. In the present case, it is admitted that there was no overt

2. Beli Ram v. Munshi, A I R 1934 Lah 456=154 I C 983=37 P L R 195=15 Lah 907.

3. Arora v. Mohra, (1880) 114 P R 1880.

act. We, therefore, endorse the decision of the Single Judge. For the reasons given, we accept the appeal only to the extent of Mangtu's share in the land in suit and dismiss the suit so far as it refers to his share. This is a suitable case in which the parties should bear their own costs throughout and we so direct.

S.C./D.S. *Appeal partly allowed.*

A. I. R. 1937 Lahore 580

SKEMP, J.

Dasaudhi Ram — Plaintiff.

v.

Ajmer Singh and others — Defendants.

Civil Ref. No. 31 of 1936, Decided on 21st January 1937, made by Collector, Ambala, D/- 19th August 1936.

Punjab Tenancy Act (16 of 1887), S. 77 (3) (g) and (i)—Occupancy tenant transferring land to landlord on condition of certain annual payment to tenant and landlord getting rent from his tenants — Landlord paying rent for some time but his son after his father refusing payment — Suit by occupancy tenant instituted in Assistant Collector's Court for possession—Suit held to be one to establish right to occupancy and so rightly instituted in revenue Court.

Section 77 (3) (g) and (i), Punjab Tenancy Act, cover all conceivable causes of litigation between a landlord and his tenant qua tenant. An ex-tenant in that capacity can look for no relief outside the revenue Courts. This applies even if the tenant is out of possession. [P 581 C 1, 2]

An occupancy tenant transferred his land to the landlord on condition that landlord would pay certain amount to the occupancy tenant per annum for occupancy rights and himself get the rent from his tenants. The rent was paid by the landlord for some time but after his death his son refused to pay the amount. The occupancy tenant instituted a suit for rent due and possession in the Assistant Collector's Court. The occupancy tenant was not in physical possession and the actual tenants were not cultivating under him:

Held: that it was a suit by a tenant to establish a claim to a right of occupancy and was rightly instituted in a revenue Court. Though the occupancy tenant was not in physical possession, he was in juristic possession and when the land was transferred, the landlord became in a sense his tenant. When the rent ceased to be paid, the constructive possession of the occupancy tenant could not be said to have come to an end: *Case law discussed.* [P 580 C 2; P 581 C 1, 2]

Mela Ram — for Plaintiff.

Tek Chand — for Defendants.

Order.—This is a reference to the High Court under S. 100 (1) (a), Punjab Tenancy Act, and the sole question for determination is whether the suit in question was properly tried in a revenue Court. The

plaintiff sued for possession of land as an occupancy tenant for recovery of Rs. 40 on the following allegations: That he and his brother Khushi Ram were occupancy tenants of the land in dispute. During the plaintiff's minority his relations cultivated the land and paid rent (lagan malikana). Subsequently, Khushi Ram mortgaged part of the land to Dalip Singh owner of the land and father of the contesting defendants. Later still, Khushi Ram transferred the land to Dalip Singh, on condition that Dalip Singh should pay to the occupancy tenants Rs. 20 per annum on account of occupancy rights and himself get the rent from tenants whom he might name. During the minority of the plaintiff and in the absence of Khushi Ram, plaintiff's maternal uncle received Rs. 20 per annum until 1933. Then Dalip Singh died and the contesting defendants, his sons, refused to pay any longer.

The suit was filed in the Court of the Assistant Collector, Rupar, who decided all the issues in favour of the plaintiff and decreed the suit. An appeal was lodged to the Collector and the first ground was that the suit was triable only by a civil Court. The Collector accepted this argument and made a reference under S. 100, Tenancy Act. The suit was lodged under S. 77 (3) (d) and (i). Cl. (d) includes suits by a tenant to establish a claim to a right of occupancy. A "tenant" is defined in S. 4 of the Act as a person who holds land under another person and is, or but for a special contract would be, liable to pay rent for that land to that other person. It includes the predecessor and successor-in-interest of a tenant. Prima facie under the wording of the statute this was a suit by a tenant to establish a claim to a right of occupancy. The Collector thought that the case was not triable in a revenue Court because it was admitted by the plaintiff that he was not in possession and that the actual tenants were not cultivating under him. He also relied on certain rulings, 44 P R 1891,¹ 12 P R 1909² and A I R 1930 Lah 934.³

There is no formal admission on the record by the plaintiff that he was not in possession; of course he sued for possession and there is no doubt that he was

1. Joti v. Maya, (1891) 44 P R 1891 (F B).

2. Shib Dayal v. Mt. Chiragh Bibi, (1909) 12 P R 1909=1 I C 321=124 P L R 1908.

3. Ram Kaur v. Khushal Singh, A I R 1930 Lah 934=128 I C 541=31 P L R 615.

not in physical possession. But according to the allegations in the plaint, I think he had been in juristic possession. According to the allegations in the plaint Rs. 20 per annum had been paid to him or to persons on his behalf until June 1933 and it was only on the death of Dalip Singh that Dalip Singh's son had ceased to pay. According to these allegations, the landlord became in a sense his tenant. When the rent ceased to be paid I do not think that the constructive possession of the plaintiff can be said to have come to an end. Of the rulings relied on by the Collector 44 P R 1891¹ was a case in which the alleged heirs of a deceased occupancy tenant claimed that they were entitled to succeed to his holding but that the defendants, the proprietors, had wrongfully prevented them from doing so. The suit was heard by the civil Courts and the Full Bench held rightly so. 12 P R 1909² followed 64 P R 1898⁴ which was expressly overruled by 90 P R 1918.⁵ The law as laid down in 12 P R 1909² is therefore incorrect. A I R 1930 Lah 934³ dealt with entirely a different point. There an occupancy tenant had alienated his rights. The landlord got the alienation declared void and obtained possession of the holding. It was held that a suit by the tenants for possession of the occupancy holding was cognizable only by civil Courts. The trend of recent rulings is to give full effect to the terms of S. 77, Tenancy Act, and to look with disfavour the limitations laid down, e. g. in 45 P R 1891.⁶ In 90 P R 1918⁵ the plaintiff sued his landlord for recovery of possession more than a year after dispossession. It was held that the suit was cognizable only by a revenue Court. 64 P R 1898⁴ was overruled and 45 P R 1891⁶ was distinguished. As subsequently pointed out in 9 Lah 38⁷ it was virtually overruled because the reasoning in 90 P R 1918⁵ is contrary to the reasoning in 45 P R 1891.⁶ In 90 P R 1918⁵ LeRossignol, J. said :

Section 77 (3) (g) and (i) appear to me to cover all conceivable causes of litigation between a landlord and his tenant qua tenant. My conclusion is that an ex-tenant in that capacity can look for no relief outside the revenue Courts.

4. Imam Din v. Feroz Khan, (1898) 64 P R 1898.

5. Akbar Hussain v. Karm Dad, A I R 1919 Lah 475=48 I C 8=90 P R 1918 (F B).

6. Kesar Singh v. Nihal Singh, (1891) 45 P R 1891.

7. Cheta v. Baija, A I R 1927 Lah 452=105 I C 507=9 Lah 38=29 P L R 489 (F B).

This would apply even if the plaintiff be regarded as out of possession. In my opinion, this suit was rightly heard in a revenue Court, and I return the case to the Collector of Ambala for hearing in accordance with law. The plaintiff's costs of this hearing in the High Court are to be borne by the defendants 1 to 5 who took the point in the grounds of appeal before the Collector and supported the reference before me.

V.B.B./A.L.

Case remanded.

A. I. R. 1937 Lahore 581

TEK CHAND AND SKEMP, JJ.

Firm Lala Ganpat Mal-Sundar Das—
Plaintiffs — Appellants.

v.

Firm Bhai Kher Singh-Balwant Singh
& Co. — Defendants — Respondents.

First Appeal No. 1762 of 1935, Decided on 4th February 1937, from decree of Sub-Judge, First Class, Sialkot, D/. 10th July 1935.

(a) Contract — Pakki adat — Incidents of relationship between arhti and his client in respect of forward contracts.

When a constituent places an order with pucca arhti to sell or buy for forward delivery, the pucca arhti can either appropriate or allocate the order to himself or enter into a contract with another merchant in pursuance of the order. In either case, the constituent looks to the pucca arhti alone and regards his order as a contract with him as if he (pucca arhti) were so far as the constituent is concerned, the principal. Where the pucca arhti, instead of allocating the order to himself enters into a contract with another merchant, the constituent never inquires who the merchant is and the pucca arhti never gives the name of the merchant to the constituent. The reason is that the constituent and the merchant have nothing to do with each other; each regards his transaction as one with the pucca arhti as the principal responsible to him. As an incident of this relationship, the pucca arhti is entitled in such a case to enter into a cross-contract before the due date with the same merchant either on his own account or in pursuance of an order from another constituent. In neither case is the pucca arhti bound to substitute another contract for the first contract entered into by him in fulfilment of the order of the original contract: and in either case the pucca arhti is entitled, without any such substitution, to call upon the constituent, when the due date arrives, to give delivery, if the order was to sell, or to take delivery if the order was to buy, and to pay or receive differences, as the case may be: 15 Bom L R 750 and 7 Bom L R 57, *Foll.* [P 585 C 1, 2]

(b) Contract — Pakki adat — Custom in Lyallpur and Amritsar markets — Market going down—Deposit insufficient—Arhti can settle transactions only if further deposit

demand from purchaser is not furnished within reasonable time.

A custom is well settled both in the Lyallpur and Amritsar markets that if the market is going down and the deposit is found to be insufficient the arhti can make a demand from the purchaser for a further deposit, and it is only if the latter fails to comply within a reasonable time that the arhti is competent to settle the transactions.

[P 586 C 2]

Qabul Chand and *M. L. Puri* — for Appellants.

J. G. Sethi and *Anant Ram* — for Respondents.

Tek Chand, J.—This appeal arises out of a suit brought by firm Ganpat Mal-Sundar Das, Sialkot (plaintiffs-appellants) against firm Kehr Singh-Balwant Singh of the same place (defendants-respondents) for recovery of Rs. 6,069-5-0 alleged to be due out of the amount paid by plaintiffs to defendants in connexion with certain forward contracts for the purchase of wheat. It is common ground between the parties that on 7th and 8th August 1932 the plaintiffs entered into eight forward contracts with the defendants for the purchase of wheat. (After giving details the judgment proceeded further.) In the first four contracts delivery was to be given at Amritsar and in the last four at Lyallpur. The date of delivery in the first two transactions was 1st Asauj 1989 (=16th September 1932), in the third and fourth it was 1st Maghar 1989 (=15th November 1932); and in the last four (Nos. 5 to 8) the 30th Asauj 1989 (=15th October 1932). The total purchase price of the entire quantity, covered by the eight contracts at the rates fixed, was Rupees 85,770-5-0.

It is admitted that the plaintiffs paid the defendants Rs. 8,000 in cash on the following dates: 9th August 1932 — Rs. 2,000; 11th August 1932—Rs. 4,000; 19th August 1932—Rs. 2,000. The plaintiffs' case, as set out in the plaint, was that the parties had entered into the contract as principal to principal. They alleged that on 23rd August 1932 they instructed the defendants by telegram (Ex. D.29) to sell the wheat covered by the four Amritsar transactions at the market rate, which was Rs. 3-0-6 per maund for Asauj deliveries (Nos. 1 and 2) and Rs. 3-9-0 for Maghar deliveries (Nos. 3 and 4); and on the following day they sent another telegram (Ex. D.30) asking the defendants to settle the Lyallpur transactions (Nos. 5 to 8) also at the current rate, which

was Rs. 2-15-3. The defendants however replied that they had already sold all the goods at Lyallpur and Amritsar on the 19th, as the amount deposited by the plaintiffs as margin money had exhausted and the plaintiffs had failed to keep with the defendants sufficient funds to cover further losses, anticipated owing to the continued fall in prices. The plaintiffs denied that under the terms of the contracts there was any obligation on them to keep the defendants in funds sufficient to cover the losses at any particular time, and averred that the sum of Rs. 8,000 above-mentioned had been paid by them as a part of the price and not as margin money. They therefore maintained that the alleged sales by the defendants on the 19th were unauthorized and not binding on them and that the bargains should have been settled at the market rates prevailing at Amritsar on 23rd August, and at Lyallpur on 24th August 1932, when the plaintiffs had instructed the defendants to sell the goods. If the defendants had done so, the sale-price at the rates prevailing on those dates would have been Rs. 83,535. Deducting from this Rs. 77,770-5-0 (the purchase price Rs. 85,770-5-0 less Rs. 8,000 already paid by the plaintiffs) and adding Rs. 2-1-6 as telephone charges met by the defendants the balance due by the defendants to the plaintiffs was Rs. 5,763-1-0. On this sum they claimed Rs. 306-4-0 as interest at 6 per cent. per annum from 24th August 1932 to 2nd July 1933, or Rs. 6,069-5-0 in all, for which, they prayed, a decree be passed in their favour with future interest at the Court rate till realization.

The defendants admitted having entered into the contracts in dispute as stated in the plaint, but denied that the transactions were as between principal and principal. They pleaded that they, as commission agents, had purchased on their own responsibility forward goods on behalf of the plaintiffs, and in order to secure them (defendants) against loss the plaintiffs were bound, under the terms of the contracts as well as according to trade usage, to deposit with them sufficient margin money, that the amount actually deposited by them was insufficient for the purpose, and as the market was falling rapidly, the defendants, after notice to the plaintiffs and with their consent, had sold the goods at Lyallpur and Amritsar on 19th August 1932 at the current rates,

resulting in a loss of Rs. 7,056-13-6. The defendants further averred that the plaintiffs had also entered into another forward contract for the purchase of 1,000 bags of *toria* of Asauj delivery at Lyallpur at Rs. 4 per maund and that under their instructions this transaction also had been settled on 20th August 1932. Deducting the losses on the wheat and the *toria* transactions from the sum of Rs. 8,000, which had been received from the plaintiffs as margin money, the balance due to the latter was Rs. 344-5-0 only, which the defendants offered to deposit in Court.

On these pleadings the following issues were framed : (1) (a) Whether the defendants contracted the bargains in question with the plaintiffs as principal, and not as commission agent ? (b) If so, what is the effect ? (2) (a) Whether the defendants were competent to settle the bargains as alleged in para. 7 of the written statement ? (b) If so, did the defendants settle the bargains in question and at what rates ? (3) If Issue 2 is found against the defendants, is the plaintiff bound by the said settlement by his conduct ? (4) If Issues 2 and 3 are found against the defendants what was the market rate of the goods sold on 23rd August 1932 and on 24th August 1932 ? (5) Relief.

The learned Subordinate Judge found that the defendants had entered into the transactions in dispute with the plaintiffs not as principals but as *pucca arhtis*, that in order to cover themselves against losses in these transactions, they had entered into bargains with firm Thakur Singh-Gian Singh of Lyallpur and firm Gurmukh Singh-Thakur Singh of Amritsar, that according to the terms of the contracts in dispute as well as the mercantile usage the plaintiffs were bound to deposit with them sufficient funds to meet the losses but they had failed to do so. He accordingly held that in the circumstances the defendants were justified in settling the bargains on 19th August at the market rates. He found, however, that the defendants had failed to prove that the plaintiffs had entered into any transaction for the purchase of 1,000 bags of *toria* and, therefore, disallowed their claim to recover from the plaintiffs the loss incurred in it. He accordingly held that out of the sum of Rs. 8,000 deposited by the plaintiffs with the defendants Rs. 944-5-0

only was due, and adding Rs. 45-11-0 as interest, he passed a decree for Rs. 990 against the defendants with proportionate costs. From this decree the plaintiffs have preferred a first appeal to this Court and pray for a decree for the full amount claimed. The defendants have filed cross-objections challenging the finding of the Court below relating to the transaction for the purchase of *toria* and claim Rs. 600 to cover the loss sustained by them. They also urge that interest on the sum found due to the plaintiffs should not have been allowed.

Before us it has been admitted by counsel for both parties that in the transactions in dispute the defendants acted as *pacca arhtis*, though they are not agreed as to the nature of their rights and obligations as such. It is also admitted on behalf of the plaintiffs that the sum of Rs. 8,000 was not paid as part of the sale price as alleged in the plaint, but had been deposited as margin money to secure the defendants against loss. The main point in dispute between the parties is whether the defendants were justified in selling the goods on the 19th August and are entitled to recover from the plaintiffs the difference between the contract price and the sale price as calculated according to the rates prevailing in the Amritsar and Lyallpur markets on that date. As already mentioned, the contracts in question were entered into on 7th and 8th August 1932, the due dates of delivery being the 16th September (for Nos. 1 and 2), the 15th October, (for Nos. 5 to 8), and the 15th November (for Nos. 3 and 4). At the time of entering into the contracts the defendants did not require the plaintiffs to deposit anything with them as margin money to cover the losses that might arise on the transactions. It appears, however, that the market soon became unfavourable, and on demand by the defendants, the plaintiffs deposited with them Rupees 2,000 on the 9th August. Two days later, on the 11th August, on further demand, the plaintiffs deposited Rs. 4,000 more. These facts are no longer in dispute. There is no proof on the record as to what happened between the 11th and 18th. On the morning of the 19th, the defendants communicated with the plaintiffs by telegram, though both of them lived in the same town. This telegram Ex. D.4 was despatched at 9-14 a. m. and reads as follows : "Send deposit before 10 a. m.;

otherwise settling your all goods, your responsibility."

It is common ground that after the receipt of this telegram, Sundar Das of the plaintiff firm, went to the shop of the defendants and paid Rs. 2,000 in cash at about 11 a. m., thus bringing the total amount deposited with them to Rs. 8,000. The parties are not agreed as to what transpired further at the time. The defendants allege that after despatching the telegram Ex. D.4 at 9-14 a. m. they waited for the plaintiffs, but as there was no compliance by them till 10 a. m., they telephoned to Messrs. Thakar Singh-Gian Singh of Lyallpur, (from whom they had arranged to buy the requisite quantity of wheat in order to supply 5900 bags to the plaintiffs on transactions Nos. 5 to 8) to settle these bargains at current rates. About an hour later at about 11 a. m., Sunder Das, one of the proprietors of the plaintiff firm, came and paid Rs. 2,000, for which a written receipt was given to him. After payment he remained at the defendants' shop to watch the rise or fall of the market. While he was still there, at about 1 p. m. the defendants received a telegram from Lyallpur, despatched at 12-15 p. m., intimating the sale of 1500 bags at Rs. 2-13-9 per maund, 3600 bags at Rs. 2-13-6, and 800 bags at Rs. 2-13-3 all of Asauj deliveries. The defendants allege that Sundar Das was present at the time and orally confirmed the sale. Shortly afterwards a telephonic message was received from Amritsar to the effect that the rates had gone down considerably and that a further fall was likely. It is alleged by the defendants that they verbally asked Sundar Das to make a further deposit to cover the anticipated loss, but he declined to do so, and under his instructions and with his consent, the defendants instructed their Amritsar sellers, Messrs. Gurmukh Singh-Thakar Singh, to settle bargains Nos. 1 to 4 at the prevailing market rates. Accordingly, the Amritsar firm sold the goods the same evening and informed the defendants at Sialkot, and they, in turn, communicated with the plaintiffs by telegram (Ex. D-6) despatched on the 19th August at 19-28 o'clock as follows: "Deposit finished, settled your all wheat Lyallpur Amritsar". The plaintiffs appear to have ignored this telegram altogether and kept quiet for three days. On the afternoon of the 23rd August, however, they wired to the defen-

dants as follows (Ex. D-29): "Sell wheat Asauj 4500 maundas, Maghar 7500 maunds at Amritsar kharid shuda market rate". The defendants replied the next day (24th August) by wire (Ex. D-5) as follows:

Received telegram 23rd August 1932 18-30. Your deposit finished, wheat settled 19th August 1932 Amritsar, and Lyallpur toria settled 20th August 1932. You were informed telegraphically, your no bargain standing.

In reply the plaintiffs wired back as follows (Ex. D-30):

You not authorized to settle without my consent, settle just now Amritsar as intimated yesterday Lyallpur 5900 bags wheat Asauj, otherwise liable present rate.

The case for the defendants-respondents is that in view of these telegrams, and also the alleged oral authority given by Sundar Das on the 19th, the plaintiffs are bound by the sales of wheat effected on that day, and it is urged that the decision of the lower Court on this point is correct.

For the plaintiffs-appellants, however, it is contended that there was no obligation on them, under the terms of the contracts in dispute, or trade usage, or the general law, to keep a constant watch on the market and to deposit with the defendants sufficient funds to cover the difference between the contract price and the prices current at any particular time from the dates of entering into the contracts till the due dates. They further contend that, though they were not bound to make any such deposit they had actually complied with the defendants' demands, whenever made, and had paid them Rs. 2,000 on the 9th, Rs. 4,000 on the 11th, and Rs. 2,000 within an hour of the receipt of their telegram on the 19th, that the defendants were quite satisfied with the last payment and made no further demand on that or any other day. They repudiate entirely the defendants' allegations as to the oral talks with Sundar Das on the 19th and deny that he had confirmed the so-called sale of the goods at Lyallpur by the defendants' vendors, or authorized the settlement of the Amritsar transactions at the rates prevailing on the 19th. They maintain that it was not competent to the defendants to sell the goods before the due dates without express instructions from them, and that these instructions were not given till the 23rd for the sale of the Lyallpur and the 24th for that of the Amritsar goods. Finally, they allege that the alleged sales on the 19th were fictitious and had been collusively arranged

by the defendants and their friends at Amritsar and Lyallpur to unlawfully appropriate the sum of Rs. 8,000 which the plaintiffs had deposited with them. Before considering these arguments, it seems necessary to bear in mind the incidents of the relationship between a pucca arhti and his client. And in this connexion I cannot do better than refer to the lucid judgment of Macleod, J. of the Bombay High Court in 20 I C 882,¹ where it is pointed out that :

The legal relationship between the client and the arhti is that of a vendor and purchaser, whether the contract is written or oral, or whether an order is sent by telegram and accepted by the arhti. There is however this additional incident to the contract that the arhti is entitled to charge commission and brokerage in addition to the price.

It is also stated that in forward contracts entered into with a pucca arhti there is no obligation on his part to find buyers or sellers. As between him and his client the business is finished when an order for purchase or sale is accepted. Whether the pucca arhti takes the risk himself, or covers himself by selling again, is entirely within his own discretion. The client cannot claim as of right the benefit of any covering contracts entered into on the same day as his sales, because no privity of contract exists between him and the opposite contracting parties—there being in fact no parties to the selling contract but the client and the arhti.

This position is further elucidated by Chandavarkar, J. in 7 Bom L R 57² at pp. 64 and 65 in the following terms :

When a constituent places an order with a pucca arhti to sell or buy for forward delivery, the pucca arhti can either appropriate or allocate the order to himself or enter into a contract with another merchant in pursuance of the order. In either case, the constituent looks to the pucca arhti alone and regards his order as a contract with him as if he (pucca arhti) were so far as the constituent is concerned, the principal. Where the pucca arhti, instead of allocating the order to himself enters into a contract with another merchant, the constituent never enquires who the merchant is and the pucca arhti never gives the name of the merchant to the constituent. The reason is that the constituent and the merchant have nothing to do with each other ; each regards his transaction as one with the pucca arhti as the principal responsible to him. As an incident of this relationship, the pucca arhti is entitled in such a case to enter into a cross-contract before the due date with the same merchant either on his own account or in pursuance of an order from another constituent. In neither case is the pucca arhti bound to substitute another contract for the first contract entered into by him in fulfilment of the order of the original contract : and in either case the pucca arhti is entitled, without

any such substitution to call upon the constituent, when the due date arrives, to give delivery, if the order was to sell, or to take delivery if the order was to buy, and to pay or receive differences, as the case may be.

These dicta were approved on appeal in 30 Bom 205,³ where Lawrence Jenkins, C. J. summarized the rights and obligations of the pucca arhti in more or less the same terms (page 215). In this view of the relationship of the parties the plaintiffs were in no way concerned with the transactions which the defendants had entered into on their own account with the firms of Thakar Singh-Gian Singh at Amritsar and Gurmukh Singh-Thakar Singh at Lyallpur in order to cover themselves against losses in the transactions in dispute. If, therefore, the defendants, with a view to minimise their loss, had settled their own bargains with these firms on the 19th, the plaintiffs are not in any way affected, unless, of course, they had actually taken over these bargains. There is, however, no proof of this on the record. Further, it is important to note that the quantities actually purchased by the defendants from their Amritsar and Lyallpur vendors were far short of those which they had agreed to deliver to the plaintiffs on the contracts in dispute. For instance, there is no proof of any agreement by the defendants to buy wheat to cover transaction No. 3 for 2,500 maunds of wheat. Similarly the quantity alleged to have been purchased by them to perform the 6th and 7th transactions were short by 400 and 100 bags respectively.

The defendants, however, contend that there was a specific agreement between them and the plaintiffs, under which the latter were bound to keep them in sufficient funds to cover the loss and if at any time it was discovered that the amount was insufficient, the defendants would be justified in selling it. In support of this contention, reliance is placed on certain documents, called parchis which passed between the parties at the time of entering into the transactions in dispute. These are Ex. P-1 relating to transactions Nos. 1 and 2; Ex. P-2 for Nos. 3 and 4; and Ex. P-3 for No. 5. These parchis are signed by the defendants and were made over to the plaintiffs. Their counter-parts, Exs. D-3, D-2 and D-9, are signed by the plaintiffs and were handed over to the

1. Chhogmal v. Jainarayan, (1913) 15 Bom L R 750=20 I C 882.

2. Kanji v. Bhagwan Das, (1905) 7 Bom L R 57.

3. Bhagwan Das v. Kanji, (1906) 30 Bom 205=7 Bom L R 611.

defendants. These parchis, however contain numerous blanks. As for instance, Ex. P-1 reads as follows :

To

Lala Ganpat Mal-Sundar Das.

Dear Sirs,

We have to inform you that we have transacted the undermentioned goods in your account at Amritsar through on the conditions mentioned below on the telephone.

You will be bound by the terms of the contracted form of . . . excepting those relating to arbitration and expenses and will have to pay our commission at the rate of per cent. We will charge Rs. for . . . Maunds as deposit and will be empowered to settle your goods when your deposit exhausts, you will have to pay the loss in the course of settling the goods. We are fully authorized to sign and enter into the contract with . . . on your behalf without any objection on your part. Our responsibility will be only that of an agent.

Dated 7th August 1932.

(Here follow the particulars of the transaction).

It will be seen that none of the blanks in these parchis had been filled in and, therefore, it cannot be said that it was one of the terms of the contract that the purchasers were bound to make the deposit, or that on their failure to do so, the arhtis, were entitled to sell the goods at the purchasers' risk. There is no other proof of the alleged agreement. This part of the case was not pressed by Mr. Sethi, and it must be held that there was no express agreement as alleged by the defendants.

It was next contended that there was a mercantile usage governing the transactions in dispute. Before us this custom was stated by the respondents' counsel to be that the purchaser was bound to make an initial deposit of Rs. 100 per transaction of 200 bags (each bag containing 2½ maunds of goods) for Lyallpur deliveries, and Rs. 125 per transaction of 200 bags (each bag containing 2 maunds and 28 seers) for Amritsar deliveries, and that it was the duty of the purchaser to keep himself acquainted with the market rate prevailing at any particular time, and to put the defendant in sufficient funds to cover the calculated loss, without any further demand by the purchaser, and that on his failing to keep the arhti sufficiently covered, the latter had the right to sell the goods without reference to the purchaser. After hearing counsel, I have no doubt that the defendants have entirely failed to prove the alleged usage on the present record. Indeed, it appears that their own case, as set out in the jawab-i-dawa and as supported by their witnesses, was different,

inasmuch as they tried to prove at the trial that if at any given time the market went down and the deposit was found insufficient the arhti was to make a demand from the purchaser for a further deposit, and it was only if the latter failed to comply within a reasonable time that the arhti was competent to settle the transactions. This is clear from the evidence of D. W. 8 Gurbakhsh Singh (p. 33, line 27), D. W. 9 Harnam Singh (p. 35, line 13), Balwant Singh defendant himself as his own witness (D. W. 10), and P. W. 2 Ishar Das (p. 20, line 18). See also para. 2 of the jawab-i-dawa. It appears to me that the custom as stated by these witnesses is well-settled both in the Lyallpur and Amritsar markets. According to this custom, it was necessary for the defendants to make a demand and if the plaintiffs failed to comply with it within a reasonable time, it was only then that the defendants had a right to settle the bargains on the plaintiffs' account. In their jawab-i-dawa the defendants had pleaded that on the 17th they found that the sum of Rs. 6,000 deposited by the plaintiffs was insufficient to meet the loss and, therefore, they made a further demand from the plaintiffs; they waited for compliance on the 18th, but the plaintiffs failed to comply; and on the 19th they sent them the telegram (Ex. D.4). The plaintiffs deny that any such demand was made on the 17th or 18th and Mr. Sethi conceded that there is no evidence whatever to prove that any demand was made at any time before the defendants despatched the telegram on the 19th. It is significant that no member of the defendant firm, nor any of their employee went into the witness-box to support the allegations in the jawab-i-dawa. It must, therefore, be held that the first demand made for additional deposit was by the telegram Ex. D.4.

The time for compliance with the demand made by the telegram was, however, unreasonably short. As already stated, the telegram was despatched at 9'14 a. m. requiring the plaintiffs to send the deposit before 10 a. m.; otherwise the goods were to be settled at their responsibility. Now the defendants could not possibly have expected compliance within the time given. As it is, the telegram was not delivered to the plaintiffs until 10 a. m. This is deposed to by Sundar Das, and seems to me to be true. And yet the defendants

allege that at 10 a. m. they satisfied themselves that the plaintiffs were not willing to make a further deposit and they telephoned to their Lyallpur sellers to settle the bargain. It is obvious that this demand cannot be regarded as sufficient and valid, nor could the plaintiffs' failure to pay within the specified time afford a justification to the defendants to sell. That the defendants themselves believed that this was so, is clear from the fact that when Sunder Das came to them within an hour of the receipt of the telegram and paid them Rs. 2,000, they quietly accepted the amount and gave him a receipt (Ex. D-23) stating that the payment was "on account of deposit in loss." Balwant Singh one of the proprietors of the defendant-firm, when examined as his own witness (D. W. 10), deposed that this amount was too small and that he had demanded a larger sum from Sunder Das, but the latter expressed his inability to pay more. Balwant Singh admitted, however, that he did not secure any writing to this effect from him. On the other hand, he stated that Sunder Das made him (Balwant Singh) :

put down on the back of the telegram sent by us to him that he was unable to make further advance and that if the rates went down my firm should settle the goods. The said telegram remained with him. Thereafter he came and took the printed receipt from me.

The original telegram has not been produced by the plaintiffs, and they say that it had been mislaid and could not be found. This explanation is, perhaps, not very satisfactory. But none the less it is difficult to believe the defendants' story as related by Balwant Singh. If Sunder Das had really stated that he was unable to make a further deposit and had actually authorized the defendants to "settle the goods," it is incredible that an experienced and keen businessman like Balwant Singh should not have secured a writing to this effect from him. It is still more incredible that he himself should have made a note of this important verbal communication by Sunder Das on the back of the telegram and then handed it over Sunder Das. Further, on his own showing, shortly after this incident, he gave a receipt to the plaintiffs for Rs. 2,000 received earlier in the day. But the contents of the receipt (Ex. D-23) do not indicate that this was final deposit, the plaintiffs having refused to pay more and having authorized them to sell the goods.

But, perhaps, the strongest evidence against this part of the defendants' story is furnished by their own telegram (Ex. D-6) despatched the same evening, which gave as the reason for the sale that the "deposit had finished" and not that they had oral authority to sell, which is now stated to have been given them expressly by the plaintiffs earlier in the day.

Again, we find that at the rates given by the defendants themselves, the total loss at 11 a. m. on the Lyallpur goods was Rs. 3,037.8.0 and that on Amritsar goods at about Rs. 3,000. The defendants had got already Rs. 6,000 of the plaintiffs in deposit with them. At 11 o'clock, they got Rs. 2,000 more, and it seems that they considered this amount to be sufficient to meet any further loss, that could have been anticipated at the time. Subsequently however they found that the downward tendency of the market had not been checked and therefore they thought it expedient to settle their own transactions with the Amritsar and Lyallpur firms without further waiting. But, as already shown, the plaintiffs were in no way concerned with these transactions, there being no privity between them and the defendants' sellers either under the general law or under custom, and they were in no way bound by these sales. In order to foist responsibility on the plaintiffs however the defendants have alleged that Sunder Das orally confirmed the settlement of the Lyallpur transaction already made, and verbally authorized the defendants to settle the Amritsar bargains. The only evidence in support of this allegation is the uncorroborated testimony of Balwant Singh defendant himself. For the reasons already given, and especially in view of the wording of the telegram, (Ex. D-6) I find myself unable to accept it as sufficient. Indeed, so far as the Amritsar sale is concerned, Mr. Sethi, at the conclusion of his argument, frankly conceded that he could not rely on the alleged oral authority given by the plaintiff. For all these reasons, I hold that the defendants had no authority to settle any of the bargains in dispute on the 19th on behalf, or at the responsibility, of the plaintiffs.

Mr. Sethi however raised a further point which does not appear to have been urged in this form in the Court below. He contended that assuming that the settlements made by the defendants on 19th August were unauthorized, the plain-

tiffs must be taken to have ratified them, inasmuch as intimation of these sales was duly sent to them on the evening of the 19th by telegram, Ex. D.6, but they did not repudiate the settlement; on the other hand, they kept quiet for three days and it was not till the 23rd, when the market had improved to some extent, that they sent the telegram, Ex. D.29, followed by another telegram, Ex. D.30, despatched on the 24th. In support of this contention, reliance is placed on S. 197, Contract Act, and 49 I C 758⁴ and A I R 1930 Mad 476.⁵ In my opinion this contention is without force. S. 197 merely lays down the general rule that a principal may ratify an unauthorized act of his agent, and that ratification may be express or implied. In the rulings cited, the facts were wholly dissimilar to those of the case before us. In 49 I C 758,⁴ there was not only no repudiation by the principal for several months, but he had actually written several letters indicating that he had approved of the agent's act. In the other case, the agent, who had no authority to borrow money, had taken loans from third parties for carrying on the business of the principal and had informed the principal, but the latter did not repudiate the loans for a considerable time, and, apparently in the meantime, the money had been used in the business. He was accordingly held bound by the agent's act. In the present case, all that is proved is mere silence for three days after receipt of intimation of the sale by the defendants of their own transactions with third parties, with which the plaintiffs had no concern, but for which the defendants wrongly purported to fix responsibility on them. In my opinion the plaintiffs were entitled to ignore this intimation and I cannot see how their silence for three days, without more, can amount to ratification of the act of the defendants.

I hold therefore that the plaintiffs are not bound by the sales of the 19th, and that the loss is to be ascertained according to the rates prevailing at the earliest time, when the defendants could have sold the goods, after receipt of the telegrams, Exs. D.29 and D.30. The former telegram was received on the 23rd, late in

the evening, when the market had closed. It is therefore agreed by counsel that the rates of the 24th should be taken for the sales at both stations. It was also agreed that on the findings given above, the total loss on the eight transactions, calculated at the rates proved by the defendants, was Rs. 4,167-15-6. (After giving details the judgment proceeded.) In their cross-objections the defendants claim Rs. 600 as loss on the transaction relating to purchase of 1,000 maunds of *toria*, stated to have been originally entered into by the plaintiffs jointly with one Bhagat Ram, but subsequently taken over by the plaintiffs alone. The plaintiffs denied this transaction. The defendants were unable to give the date on which the alleged contract was entered into or produce any parchi or other writing evidencing it. The only documentary evidence produced by the defendants is an entry in their *bahi* written by themselves on 13th August 1932 stating that Bhagat Ram had dropped out of the contract, on receipt of Rs. 170 from Sundar Das. This is obviously insufficient to fix the plaintiffs with liability. The oral evidence is that of Bhagat Ram, but he has not been believed by the lower Court, in my opinion, rightly. I uphold the finding of the learned Subordinate Judge that the defendants have failed to prove this part of their case.

The other point raised in the cross-objections relates to interest. Admittedly there was no agreement to pay interest. The lower Court has not given any reason why interest should have been allowed in this case, nor has the appellants' counsel been able to bring to our notice any special circumstances in support of their claim for interest. To this extent the cross-objections must succeed. On the findings given above the total amount due to the plaintiff-appellants is Rs. 3,320. For the foregoing reasons, I would accept this appeal in part and, in modification of decree of the lower Court, grant the plaintiffs a decree for Rs. 3,320 against the defendants. Having regard to the fact that none of the parties has been wholly successful, I would leave them to bear their own costs throughout.

Skemp, J.—I agree.

S.C./D.S.

Decree modified.

4. Lakshumanan Chetty v. Chidambaram Chetty, A I R 1919 Mad 343=49 I C 759.

5. Sultan Mahomed v. Muhammad Yusuf, A I R 1930 Mad 476=122 I C 501.

* A. I. R. 1937 Lahore 589

ADDISON AND DIN MOHAMMAD, JJ.

Mt. Nawab Begum and others —

Defendants — Appellants.

v.

Hussain Ali Khan — Plaintiff —

Respondent.

First Appeal No. 147 of 1936, Decided on 20th October 1936, from order of Addl. Sub-Judge, 1st Class, Lahore, D/. 11th December 1935.

(a) **Mahomedan Law—Dower — Widow's lien—No other outstanding debt at husband's death—Widow though unsecured creditor has first charge on deceased's property.**

Where, there is no other outstanding debt at the time of husband's death, his widow has a first charge on the property of the deceased so long as her dower debt is not paid off, even though she is an unsecured creditor. [P 590 C 1]

* (b) **Benami—Purchase of house by husband with his money in name of wife—Whether absolute gift or benami transaction—Intention of husband, is deciding factor—Party averring absolute gift must so prove by clear and cogent, preferably, documentary evidence.**

Where a husband purchases some property with his money in the name of his wife, it is the intention of the husband that mainly counts in the determination of the question whether he intended to make an absolute gift in favour of his wife or whether the transaction was merely intended to be a benami transaction, and if a party avers that an absolute gift was intended, clear and cogent and preferably documentary evidence should be produced in support of that allegation : *Case law discussed.* [P 591 C 2]

Mohamed Alam and Mohamed Monir —
for Appellants.

D. Mehr Chand — for Respondent.

Din Mohammad, J. — Khan Sahib Mohammad Khair Din Khan, M.B.E., died on 20th March 1931, leaving him surviving a widow Mt. Nawab Begum, a son, Hussain Ali Khan and three daughters, Ejaz Begum, Akhtar Begum and Jamila Begum. On 30th May 1933 Hussain Ali Khan instituted a suit, out of which the present appeal has arisen, for possession by partition of 14/40ths share of two houses described in the plaint. He alleged that one of the two houses was ancestral and that the other was purchased by his father in the name of his wife Mt. Nawab Begum and as the purchase was benami, he was entitled to treat it as his father's property and to claim a share of it, to which he was entitled under Mohammadan law. The ancestral house appears to have been

mortgaged by Khair Din Khan to Mohammad Latif on 2nd January 1931 and the mortgagee was also impleaded as a defendant in the case. The mortgagee had no real interest in the matter and he consequently put in a written statement praying that so long as his charge was protected, the Court might pass any decision it considered just. Mt. Nawab Begum, however resisted the suit on the ground that the house alleged to have been purchased benami in her name was, in fact, purchased by her with her own money and that neither Khair Din Khan during his life time nor his heirs after him had any concern with it. She further pleaded that Hussain Ali Khan himself had in a previous suit, which had been brought by her for recovery of her dower, admitted that the house belonged to her and that he was consequently estopped from denying her ownership in the present suit. She also claimed a lien for her dower debt on the ancestral house and Rs. 5,000 for improvements and Rs. 1,000 on account of expenses incurred by her on the funeral of Khair Din Khan. After examining the parties on the matters on which they joined issue, the Subordinate Judge framed the following issues: 1. Was house A purchased by the plaintiff's father in the name of defendant 1? 2. Did the father of the plaintiff leave any debts; if so, what? 3. Whether such debts are the first charge upon the property in dispute? 4. Is the plaintiff estopped from claiming the house A by his admission and conduct?

The Subordinate Judge came to the conclusion that the sale deed in favour of Mt. Nawab Begum was benami, that the only debt that was outstanding against Khair Din Khan at the time of his death was the dower debt of Rs. 5,000, that this debt could not be treated preferentially and consequently could not form a first charge on the property of the deceased and that the plaintiff's admission relied on by Mt. Nawab Begum did not constitute an estoppel in law. On these grounds the plaintiff's suit was decreed as prayed for. From this decision Mt. Nawab Begum and her daughters have preferred the appeal now before us. Counsel for the appellants has raised substantially the same points here as were raised in the Court below and has advanced the same arguments as have been discussed in the judgment under appeal. In Addition, he has particularly laid great stress on the point that even if

it were held that the money required for the purchase of the house was advanced by Khair Din Khan, the transaction could not be treated as a mere benami transaction but amounted to an absolute gift by Khair Din Khan in favour of his wife, which under Mohammadan law he was quite competent to do.

We may say at once that we are not prepared to uphold the decision of the Court below against the lien claimed by Mt. Nawab Begum for her dower. It is true that she is an unsecured creditor but in face of the finding recorded by the Subordinate Judge himself that there was no other outstanding debt at the time of Khair Din Khan's death, it cannot be denied that this dower is a first charge on the property of the deceased and that so long as this debt is not paid off, Mt. Nawab Begum has a lien on the property which is found to belong to Khair Din Khan. The so-called admission of Hussain Ali Khan however is of no avail to the appellants. It is clear that the written statement which contained the said admission was neither signed nor verified by him. It is further evident on the record that within a month of the so-called admission he put in an application to the Court withdrawing the admission and disclaiming all responsibility for it.

We are also not satisfied that the money for the purchase of the house was paid by Mt. Nawab Begum. The Subordinate Judge has very rightly rejected the evidence of Mt. Nawab Begum on this point and we find no reason to differ from his conclusion. It is not even denied by counsel appearing for Mt. Nawab Begum that the mortgage effected on the house on the date of the sale was redeemed by Khair Din Khan out of the bonus that he received on his retirement from the railway service. It is further clear on the record that shortly before the sale deed of the house in question was executed, Khair Din Khan sold his mortgagee rights in another property to Siraj Din for Rs. 8,000. These circumstances undeniably point to the conclusion that it was Khair Din Khan who had supplied the money to Mt. Nawab Begum for the purchase of this house. This being so, the only question that falls to be determined now is whether the transaction was benami in the popular sense of the term or was a gift as is contended in the alternative by Mt. Nawab Begum's counsel. It is true that in one or two decided cases

it has been held that in determining this question relevant circumstances other than the source of money should also be considered; but the authorities are unanimous on the point that the main consideration in such cases is to determine the source of the money. On behalf of the appellants reliance is placed on A I R 1934 Mad 671,¹ A I R 1935 Rang 24² and 33 Cal 773.³ In A I R 1934 Mad 671,¹ a Single Judge of the Madras High Court in a case where a sale deed had been executed in favour of a married woman, despite the finding that the money was supplied by her husband, decided on the authority of 33 Cal 773³ that the source of money not being the sole criterion in the case, the advance of money by the husband should be treated as a gift to his young wife with a view to exclude his son from inheritance. In 33 Cal 773,³ their Lordships of the Privy Council observed as follows :

The fact, therefore, remains that the properties purchased by the sale proceeds were purchased no doubt in Hafiz Boo's name, but were purchased out of funds emanating from her mother's estate. This circumstance no doubt, if taken alone, affords evidence that the transaction was benami, but there is, in their Lordships' opinion, enough in the facts of the case to negative any such inference. It seems clear that what was done in 1889 was prompted by hostility to the son and was with the purpose of excluding him from inheritance, an object which could not have been attained by any benami transaction. And the strong words of gift contained in the power of attorney are in accordance with this intention and calculated to give full effect to it. The question being purely one of intention, their Lordships think that the evidence points to an absolute gift, not to a benami transaction.

In A I R 1935 Rang 24² a Single Judge of the Rangoon High Court held that where a person advanced money on a mortgage but the names of his children were mentioned in the mortgage deeds and his name was omitted therefrom, the presumption arose that he intended these mortgages as advancements for the benefit of his children who were respectively named in the deed. As against these decisions counsel for the contesting respondent has drawn our attention to 37 All 557.⁴

1. Thulasi Ammal v. Official Receiver, Coimbatore, A I R 1934 Mad 671=153 I O 478=67 M L J 541.

2. Maung Ba Kywe v. Ma Nyain, A I R 1935 Rang 24=155 I O 234.

3. Ismail Mussajee Mookerdum v. Hafiz Boo, (1906) 33 Cal 773=33 I A 86=10 O W N 570=3 O L J 484 (P O).

4. Mt. Bilas Kunwar v. Des Raj Ranjit Singh, A I R 1915 P O 96=30 I O 299=42 I A 202=37 All 557 (P O).

A I R 1925 Lah 511⁵ and A I R 1931 Lah 419.⁶ In 37 All 557⁴ a Hindu Taluq-dar of Oudh had purchased a house in favour of his Mahomedan mistress by whom he had two children. On a question arising whether the transaction was benami or otherwise, their Lordships of the Privy Council remarked :

The exception in our law by way of advancement in favour of wife or child does not apply in India, but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is benami or not. The general rule in India in the absence of all other relevant circumstances is thus stated by Lord Campbell in *Dhurm Das Pandey v. Shama Soondri Dibiah*⁷ : 'The criterion in these cases in India is to consider from what source the money comes with which the purchase money is paid'.

On the facts in that case their Lordships came to the conclusion that the transaction was and remained throughout benami. In A I R 1925 Lah 511,⁵ a Single Judge of this Court held :

Where one person pays the price and the instrument of sale is obtained in the name of another, the presumption is that the person paying the price is the owner and the person in whose name the sale is obtained, occupies the position of a trustee only.

In that case the shop in suit had been purchased in favour of a nephew of the purchaser. In A I R 1931 Lah 419⁶ a Division Bench of this Court re-affirmed the principle enunciated above. Besides the cases cited at the Bar, there are among others, two important decisions of their Lordships of the Privy Council, which we have considered in the determination of the case before us. They are 46 Cal 566⁸ and 48 Mad 605.⁹ In 46 Cal 566,⁸ their Lordships of the Privy Council lent a judicial recognition to the benami system prevalent in India and remarked that there was nothing inherently wrong in it and that it accorded within its legitimate scope with the ideas and habits of the people. In 48 Mad 605,⁹ the judgment of their Lordships deals with a

matter which is identical with the present case. In that case, too, a husband had purchased property out of his own money in the name of his wife and it was contended that the transaction was intended to be a marriage settlement. In the course of their judgment a few observations were made by their Lordships, which may with advantage be reproduced here, as they appear to us to apply exactly to the present case. At page 608 their Lordships observed :

There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a benami transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India.

This observation of their Lordships was based on three previous decisions of the Privy Council. At p. 612 it is remarked :

The property in question was purchased in May 1909 and *L* lived until 1912 and if *C* had agreed to settle the property in question there was plenty of time in which he could have executed a proper deed of settlement upon her.

At p. 613 the following remarks are very pertinent :

Their Lordships do not decide that an ante-nuptial agreement may not be orally proved in an Indian case, but they consider that it would be unwise of a Judge to act in a disputed Indian case upon oral evidence that there had been an ante-nuptial agreement which would in effect be a marriage settlement, unless there was contemporaneous written evidence to corroborate the oral evidence.

The main principle deducible from the cases cited by either side appears to us to be this that it is the intention of the husband that mainly counts in the determination of the question whether he intended to make an absolute gift in favour of his wife or whether the transaction was merely intended to be a benami transaction, and that if a party avers that an absolute gift was intended, clear and cogent and preferably documentary evidence should be produced in support of that allegation. In the case before us not only no attempt has been made to bring on the record any evidence to the effect that Khair Din Khan intended to make an absolute gift in favour of his wife Mt. Nawab Begum by purchasing the house in suit in her name, but there are clear indications to the contrary. The last cheque which was paid to redeem the mortgage was issued by him in his own

5. Maqsoodan Lal v. Ram Chander Ram Rachhpal, A I R 1925 Lah 511=88 I C 289=26 P L R 358.

6. A. N. Johnstone v. Gopal Singh, A I R 1931 Lah 419=133 I C 628=12 Lah 546=32 P L R 840.

7. (1841-46) 3 M I A 229=6 W R 43=1 Sar 271=1 Suther 147 (P C).

8. Gur Narayan v. Sheo Lal Singh, A I R 1918 P C 140=49 I C 1=46 Cal 566=46 I A 1 (P C).

9. Lakshmiah Chetty v. Kothandarama Pillai, A I R 1925 P C 181=88 I C 327=48 Mad 605=52 I A 286 (P C).

name in favour of the mortgagee on the Imperial Bank where his personal account was lying. Moreover, it is significant that this aspect of the case was not even pressed in the Court below. Had there been any grain of truth in the allegation now made, Mt. Nawab Begum would never have withheld this defence in the trial Court. As the case was put forward by her in the Court below, the sole issue to be determined was whether it was she or her husband who advanced the sale price and as it has been clearly found that the money came from the coffers of her husband, her alternative plea carries no weight. In any circumstances, there is no material on the record to justify an inference that he had any intention to make an absolute gift of the house purchased in Mt. Nawab Begum's name and on this ground alone this appeal must fail. We accordingly affirm the decree of the Court below subject, however, to this modification that Mt. Nawab Begum shall have a lien on the entire property of the deceased for an amount of Rs. 5,000 which is admittedly due to her on account of her dower. With this modification we dismiss the appeal. The appellants having partially succeeded, we make no order as to costs of this appeal.

M.D./D.S.

*Order accordingly.***A. I. R. 1937 Lahore 592**

SKEMP, J.

Ishar Dass — Judgment-debtor —
Appellant.

v.

Bhana Mal and others, Judgment-debtors and another — Respondents.

Exn. Second Appeal No. 871 of 1936, Decided on 13th January 1937, from order of Dist. Judge, Amritsar, D/- 16th July 1936.

Civil P. C. (1908), S. 47 (1)—Scope—Section applies even where parties are both judgment-debtors and decree-holders.

Sub-s. (1), S. 47, Civil P. O., should not be restricted to parties ranged against each other on opposite sides. It also applies where the parties are both judgment-debtors and decree-holders. Appeal lies from the order under the section and even second appeal lies where the parties are both decree-holders and judgment-debtors at the same time : *A I R 1936 Lah 116, Rel. on.* [P 593 C 1]

Qabul Chand — for Appellant,

Balkishen Mehra and L. C. Mehra —
for Respondents.

Judgment.—This appeal is a stage in a long and tangled history. Six separate persons or firms obtained decrees in separate suits against a firm called Har Dayal Dhanpat Rai. The first of these decrees in order of time, obtained by the firm Faqir Chand Kesho Das, was made a charge on half of the judgment-debtor's shop; the other decrees were not charged on the judgment-debtor's property. The shop was attached and sold and the sale proceeds were distributed pro rata among the various decree-holders without any regard to the charge of Faqir Chand-Kesho Das. Faqir Chand-Kesho Das then brought a suit to assert their special rights and obtained a decree on 12th May 1930, which was upheld on appeal by the learned District Judge. It was held that defendants 4 to 8, i. e., the other five decree-holders should refund into Court the amounts which they had previously drawn. The proceeds were to be applied (1) in defraying the expenses of the sale, (2) in discharging the amount due to Faqir Chand-Kesho Das under their decree and (3) rateable distribution among defendants 4 to 8 on account of their decrees.

Faqir Chand-Kesho Das applied for execution and out of defendants 4 to 8 Bhana Mal, defendant 5, Kunj Lal-Balkishen, defendant 6, and Daulat Ram, defendant 7, paid into Court the amounts due from them; Ishar Das, defendant 4, and Mt. Tara Devi, defendant 8, did not so pay. Counsel for Faqir Chand-Kesho Das at this stage stated that he did not want warrants of attachment against Ishar Das and Mt. Tara Devi but desired to have the entire decretal amount paid out of the money already deposited. The executing Court upheld this contention and ordered that he should be paid his dues out of the amounts deposited. The executing Court further ordered that the other persons who were to receive pro rata shares should file separate applications. Bhana Mal, one of the persons who had paid into Court the sum due, appealed to the District Judge on two main grounds: (1) That Faqir Chand-Kesho Das should not have been paid their dues until the amounts due from the defaulting defendants had been realized; and (2) that the Court should have continued the proceedings for realization of the money from the defaulting defendants instead of directing that separate applications should be filed. The learned District

Judge repelled the first contention but accepted the second. He accepted the appeal so far as to direct that proceedings for recovery of the amounts due should be continued if the appellant paid the necessary process fees. Ishar Das, i. e., one of the defendants who did not pay his dues, has appealed to this Court.

In my opinion his appeal should succeed. Faqir Chand-Kesho Das have now obtained all they want and drop out of the proceedings. I do not see how Bhana Mal can obtain what is due to him on an application made with a totally different object by Faqir Chand-Kesho Das. This seems quite simple. The main argument before me was on the questions whether or not an appeal lay to the District Judge and whether or not a further appeal lies here. The discussion revolved round the point whether a dispute between judgment-debtors inter se falls within the wording of S. 47 (1), Civil P. C. In my opinion it is unnecessary to go into that question here because defendants 4 to 8 of the decree of 1930 are all of them both decree-holders and judgment-debtors. "Decree-holder" is defined in S. 2(3) and "judgment-debtor" in S. 2 (10), Civil P. C. A decree-holder means any person in whose favour a decree has been passed or an order capable of execution has been made. A judgment-debtor means any person against whom a decree has been passed or an order capable of execution has been made. All the five persons are both decree-holders and judgment-debtors — judgment-debtors because they had to pay sums in Court; decree-holders because they were entitled to receive sums payable under the decree. Therefore I think that most of the rulings quoted before me are to be distinguished. An appeal certainly lay to the District Judge because Bhana Mal appealed against Faqir Chand-Kesho Das. I think the appeal also lies here because of the peculiar character of the parties.

In a very recent ruling by a Division Bench of this Court, A I R 1936 Lah 116¹ it was held that sub-s. (1), S. 47, Civil P. C., should not be restricted to parties ranged against each other on opposite sides and the example of a partition taken. I think the principle there laid down would also apply to the present case. I accept the

¹ Sundar Das v. Bishan Das, A I R 1936 Lah 116=158 I C 521=37 P L R 699.

appeal, set aside the order of the District Judge and restore the order of the executing Judge. Ishar Das and Bhana Mal are to bear their own costs in this Court. The decree-holder is to get his costs as ordered by the District Judge and in this Court also. The cross-objections are also dismissed. No order as to costs.

S.C./D.S.

Appeal allowed.

A. I. R. 1937 Lahore 593

ADDISON AND DIN MOHAMMAD, JJ.

Hasta Ismail and others — Convicts — Appellants.

v.

Emperor.

Criminal Appeal No. 1364 of 1936, Decided on 12th February 1937, from Order of Sess. Judge, Lahore, D/. 19th November 1936.

(a) Evidence—Document—Proof of — Production of document by person who is neither writer nor one on whose behalf it was written is not tantamount to proof.

Mere production of a document is not tantamount to proof, especially when the production is by a person who is neither the writer of the document nor the person on whose behalf the document has been written. [P 595 C 1]

(b) Evidence — Certified copy of police report—Admissibility.

A mere certified copy of a police report does not prove itself in the sense that its contents do not require further proof before being used. Therefore in the absence of any legal proof of such document it is improper for a Judge to allow it.

[P 595 C 2]

(c) Penal Code (1860), S. 300 (4)—Applicability—Clause 4 applies only when no other clause applies.

Clause (4) of S. 300, Penal Code, comes into play only if no other clause applies and in a case where the intention of the assailants as inferred from the result of their act could at least be that of causing such bodily injuries as the assailant would have known to be likely to cause the death of their victim, the invocation of Cl. (4) is altogether erroneous: 32 P R 1887 Cr and A I R 1914 Lah 117, Ref.

[P 595 C 2]

Abdul Haye — for Appellants.

D. C. Ralli for Govt. Advocate —

for the Crown.

Din Mohammad, J. — This judgment will dispose of Criminal Appeals Nos. 1364 and 1365 of 1936. Criminal Appeal No. 1364 has been presented by Hasta, Rahmat and Taja, while Criminal Appeal No. 1365 has been presented by Sadiq. They along with two other persons, Nawab and Amir, brothers of Hasta, were tried before the Sessions Judge, Montgomery, for hav-

ing caused the death of one Kamiru during the course of a riot. They were acquitted of the charge of rioting but were convicted under S. 302, I. P. C., and sentenced to transportation for life. Their co-accused were acquitted.

The case for the prosecution is that the deceased, who was a notorious bad character and a confirmed rogue, was suspected of carrying on with Mt. Fateh, a married daughter of Hasta, and that owing to the grudge that the members of Hasta's family bore towards the deceased on account of this misconduct of his as well as on account of certain other domestic disputes arising from the exchange marriages that had taken place between the family of the complainant and that of the accused, the accused in company with three other persons set upon Kamiru and beat him to death. Those three persons were Ghulam, Bakhtawar and Anwar. They were not however sent up by the police. This occurrence was said to have been witnessed by Machhia and Amir, brothers of the deceased, Ahmada, son of Machhia and Najabat, a cousin and brother-in-law of the deceased, besides Chaugatta and Mughla, who however have been disbelieved by the Sessions Judge. It was further stated that the two batches of the assailants, one consisting of five persons including the four appellants, and the other consisting of four persons, all of whom have been acquitted, lay in ambush near the haveli of one Said and as soon as the deceased came into sight, rushed upon him and assaulted him with the different weapons that they were holding. This story too has been discarded by the Sessions Judge.

The defence, on the other hand, alleged that the deceased visited the house of Hasta at bed time with the object of stealing his mare and that he was detected in the course of removing the chain from the mare's feet. Thereupon an alarm was raised by Hasta and his son Rahmat which attracted many people to the spot and all the persons assembled there caused injuries to the deceased in the exercise of the right of private defence of Hasta's property and person. This version also has been disbelieved by the Sessions Judge, and counsel for the appellants has not referred to it before us.

The only point that has been raised before us is that in view of the unsatisfactory nature of the prosecution evidence as

well as in view of the fact that the prosecution has been found by the Sessions Judge to have introduced exaggerations and improvements in their story and presented it in a varnished manner with a view to implicate innocent persons, it is unsafe to convict those of the appellants who do not admit their presence there. After hearing counsel on both sides, we are disposed to hold that the position taken up by the appellants' counsel is sound. As stated above, even the police did not consider that three of the persons originally implicated by the relatives of the deceased were in any way involved in the affair.

Besides the three persons found innocent by the police, the Sessions Judge has given the benefit of the doubt to two more accused persons who were the brothers of Hasta. The two appellants on whose behalf this argument is advanced are decidedly more remotely related to Hasta and would therefore be less likely to be present at the spot than his own brothers who have been acquitted. The prosecution evidence consists of interested persons alone and the only two disinterested persons who were produced to corroborate them have been found to be unreliable. In these circumstances, we consider that the two appellants, Taja and Sadiq, are also entitled to the benefit of the doubt. They may or may not have been there; but it is difficult to hold on the testimony before us that they were there. We accordingly acquit both Taja and Sadiq.

So far as Hasta and Rahmat are concerned, we find no reason to interfere either with their conviction or sentence. Whatever the origin of the attack, we do not consider that either of them could be convicted of any less serious offence. They have admitted their presence at the spot and although Rahmat has dissociated himself from the beating administered to Kamiru, Hasta has not made a very clear statement in that respect. We are convinced that even if there were other persons there, these two appellants did partake in the attack on Kamiru. Even if it were believed that Kamiru had trespassed into the house of Hasta with the object of stealing his mare, the case of these accused, in the absence of any reliable evidence, will not fall under any of the general or special exceptions specified in the Penal Code. The post mortem

examination revealed at least 44 injuries on the body of Kamiru, including two injuries on the head. Several of his ribs were found fractured and his legs, arms, face, lips, buttocks and thighs were all injured. We have considered the defence evidence produced by these accused persons but we are not impressed by it. In these circumstances, there is no doubt whatever that the sentence of transportation imposed on them was amply justified. We accordingly dismiss the appeal and confirm their sentence.

Before concluding, we wish to draw the attention of the Sessions Judge to some matters appearing in his judgment where we consider he has evidently gone wrong. In the course of his judgment, he has referred to the contents of a document, Ex. D. B, which was said to have been "produced and proved by the Sub-Inspector." It was a petition alleged to have been made by one Ghaus, a relation of the accused, to the Superintendent of Police. This reference to the contents of the document was clearly unwarranted in law. The method of proving a document is detailed in the Evidence Act and that is the only method to be followed when a document is intended to be proved. Mere production of a document is not tantamount to proof, especially when the production is by a person who is neither the writer of the document nor the person on whose behalf the document has been written. In this case, the document was alleged to have been written on behalf of one Ghaus by a person whose name has not been disclosed. Neither of them was produced in the Court of the Sessions Judge and these were the chief persons who could prove the contents of the document. The Sub-Inspector could only prove the existence of the document and not its substance. It was, therefore, unjustifiable in law on the part of the Sessions Judge to have referred to this document at all. We do not think that he was in any way influenced by it, but all the same he should not have referred to its contents when the document had not been legally proved.

Another document which has been illegally used is a certified copy of a police report said to have been produced by the Public Prosecutor after the close of the prosecution evidence. The report was alleged to have been made by a prosecution witness named Machhia. It appears

from the judgment of the Sessions Judge that Machhia was not questioned about this report nor was the report proved in any other manner. In the absence of any legal proof of this document it was unfair for the Public Prosecutor to have produced the document after the close of the prosecution evidence and improper for the Sessions Judge to have allowed him to do so. A mere certified copy from the police records does not prove itself in the sense that its contents do not require further proof before being used. Another matter on which we consider the Sessions Judge has gone wrong is the use of Cl. 4thly, S. 300, while convicting the accused. It has often been pointed out by this Court that this clause comes into play only if no other clause applies and in a case like this where the intention of the assailants as inferred from the result of their act could at least be that of causing such bodily injuries as the assailants would have known to be likely to cause the death of their victim, the invocation of Cl. 4thly was altogether erroneous. We would bring to the notice of the Sessions Judge 32 P R 1887 Cr,¹ which is a leading authority on the subject of culpable homicide as well as 31 P R 1914² where a Division Bench of the Chief Court has made pertinent remarks in relation to Cl. 4thly; S. 300.

Further, the Sessions Judge, while enumerating the injuries found on the person of Kamiru, pointed out that two of the injuries were located on his head. Later, while discussing the gravity of the offence committed by Kamiru's assailants he remarked that the assailants deliberately avoided attacking his vital parts. We do not think that this remark was justified in view of the fact that two of the injuries were located on Kamiru's head and in our view 'head' is a vital part of the body. The word 'vital' in relation to parts has been defined in the Oxford Dictionary as "essential or necessary to life; performing the functions indispensable to the maintenance of life" and we do not consider that it is justifiable to preclude 'head' from that category.

S.C./D.S.

Appeal dismissed.

1. Barkat-ullah v. Empress, (1887) 32 P R 1887 Cr.
2. Peoples' Bank of India Ltd. v. Narain Das Bhagwan Das, A I R 1914 Lah 117 = 21 I C 577=31 P R 1914=337 P L R 1913.

A. I. R. 1937 Lahore 596

, TEK CHAND, J.

Firm Shankar Das-Bhagmal —

Decree-holders—Appellants.

v.

Labh Singh — Judgment-debtor —

Respondent.

Exn. Second Appeal No. 649 of 1936, Decided on 18th December 1936, from order of Dist. Judge, Lyallpur, D/- 29th February 1936.

Custom (Punjab) — Ancestral property — Occupancy rights in favour of third parties in time of M's ancestors—Long after death of M's father, M purchasing occupancy rights with his own money—Property so purchased cannot be regarded ancestral but is self-acquired property of M—It can therefore be attached in execution of decree against his estate for his unsecured loans.

In the time of M's ancestors, occupancy rights had been created in certain land in favour of third parties and the estate so carved out had passed away from their hands. All that devolved on M on his father's death was the proprietary rights in the land. It was long after his father's death that M had purchased these valuable rights from tenants for a considerable sum of money belonging to himself. A decree was passed against M's estate in hands of his son for M's unsecured loans:

Held: that the property purchased by M could not be regarded as having devolved on him by inheritance from his father. It was his self-acquired property and hence could be attached in execution of decree against his estate. [P 596 C 2]

*Arjan Dev Bagai — for Appellants.**Amar Nath Chopra — for Respondent.*

Judgment.—One Mahna Singh had borrowed a certain sum of money from the appellant firm Shankar Das-Bhag Mal. After Mahna Singh's death the appellant obtained a decree for the amount due on the loan against his son Labh Singh, recoverable from the estate of the deceased, and in execution 268 kanals, 17 marlas of agricultural land was attached. Labh Singh objected that the land was ancestral of Mahna Singh and after his death was not liable for the satisfaction of an unsecured debt of Mahna Singh. The decree-holder denied the ancestral character of the land. On enquiry it was found that Mahna Singh had got the land by descent from his father, but that certain third parties had been holding it as occupancy tenants under S. 6, Punjab Tenancy Act, from the time of Mahna Singh's ancestors, paying a nominal rent to them. In 1921 Mahna Singh purchased the occupancy rights in one half of the land for Rs. 1,380 and became full owner of that half. The

other half remained under the occupancy tenants as before. On these facts the executing Court held that the proprietary rights in one-half of the land, which was still subject to occupancy tenure were ancestral and, therefore, were not liable to attachment; but the other half of which Mahna Singh had become full owner by purchase of occupancy rights could not be said to be ancestral in his hands and was liable for his debts and could be attached in execution of the decree. He accordingly directed execution to proceed against this half.

On appeal, the learned District Judge came to a contrary conclusion and held that the entire land was ancestral and was, therefore, exempt from attachment. On this finding he accepted Labh Singh's appeal and dismissed the execution in its entirety. Before me, it is conceded that the proprietary rights in one half of the land which is still subject to occupancy rights are ancestral and have been rightly released from attachment, and this matter is no longer in dispute. With regard to the other half, however, it is contended on behalf of the decree-holder that on the facts as found it was rightly held by the executing Court to be liable for payment of Mahna Singh's unsecured debts. It is beyond dispute, that only that property can be held to be ancestral in the hands of Mahna Singh qua his son which had devolved on him (Mahna Singh) from his father. It has been found that in the time of Mahna Singh's ancestors, occupancy rights had been created in this land in favour of third parties, and the estate so carved out had passed away from their hands. Therefore, all that devolved on Mahna Singh on his father's death was the proprietary rights in the land. At that time occupancy rights were held by third parties, and it was long after his father's death that Mahna Singh had purchased these valuable rights from the tenants for a considerable sum of money belonging to himself. This was clearly his own self-acquisition and the estate so acquired could not possibly be immune from attachment in execution of a decree against his estate.

The learned District Judge has observed that on the purchase of occupancy rights by the landlord they had merged in the proprietary rights and thereafter the occupancy rights should not be taken as

existing and the land should be viewed as proprietary land'. But it does not follow from this, as has been supposed by the learned Judge, that the entire interest in the land had become ancestral. The act, which brought about this state of affairs, was the purchase by Mahna Singh with his own money, and it is difficult to see how the interest so purchased could be regarded as having devolved on him by inheritance from his father. The property so acquired is, therefore, not exempt from attachment and is available for the satisfaction of the appellant's decree by temporary alienation for a period not exceeding twenty years. I accept the appeal, set aside the judgment of the learned District Judge and restore that of the executing Court. Having regard to all the circumstances I leave the parties to bear their own costs in all Courts.

S.C./D.S.

Appeal allowed.

A. I. R. 1937 Lahore 597

YOUNG, C. J. AND MONROE, J.

Harnam Singh and others—Convicts—Appellants.
v.

Emperor.

Criminal Appeal No. 1353 of 1936,
Decided on 4th March 1937, from order of
Addl. Sess. Judge, Amritsar, D/- 21st
November 1936.

Criminal Trial — Conviction — Evidence—
Every witness contradicting his own state-
ment subsequently—It is unsafe to convict.

Where every one of the witnesses has been demonstrated at the trial to have contradicted the statement that he made before the committing Magistrate, it is not safe to convict the accused.

[P 597 C 2]

B. R. Puri, Mehtab Singh and B. A. Cooper—for Appellants.

Des Raj Sawhney—for the Crown.

Young, C. J.—Harnam Singh, Karam Singh, Amar Singh, Hari Singh and Sadhu Singh have been convicted of the murder of Chanan Singh and of having injured Balwant Singh and Natha Singh and have been condemned to death under S. 302, Penal Code. Sentences of imprisonment have been inflicted in respect of the assaults on Balwant Singh and Natha Singh. The case for the prosecution was that there had been disputes between the party of the appellants on the one side and the party of the prosecution witnesses

on the other and that on 23rd July 1936 the five appellants made a sudden attack on Chanan Singh. According to the evidence three of them were armed with deadly weapons. The incident took place about 8 o'clock in the morning or soon afterwards. Bur Singh lambardar, who claims to have been present, made the first information report at a police station one mile distant at 11 o'clock. He named certain persons in it who afterwards appeared as eye-witnesses and omitted the names of others. The first information report reads as though he claimed to be himself an eye-witness of the murder and also of both the assaults, though before the Court he had to admit that he was not a witness of either assault. The learned Sessions Judge has examined the evidence of witnesses in detail and he has found every witness unsatisfactory considering it doubtful whether Bur Singh, Hardit Singh or Jail Singh saw the occurrence at all. He does rely on one witness—Balwant Singh—who himself was beaten. All of the assessors were dissatisfied with the evidence for the prosecution and said that there was no prosecution witness who was worthy of trust. Three of the assessors, notwithstanding that, said that the case was a true one. The fourth was more logical and found that the accused were not guilty.

We have examined the evidence of the witnesses in detail, particularly that of Balwant Singh, on whom the learned Sessions Judge relied. An interesting feature of this case is the able manner in which the witnesses were cross-examined at the trial by Mr. Gian Chand Sharma. His questions were almost invariably to the point and the result of his cross-examination is that we feel that none of these witnesses can be trusted at all, not even Balwant Singh. We do not feel, therefore, that on evidence of this character where every one of the witnesses has been demonstrated at the trial to have contradicted the statement that he made before the Committing Magistrate, it would be safe to convict. We allow the appeal and acquit the appellants.

V.B.B./A.L.

Appeal allowed.

A. I. R. 1937 Lahore 598

SKEMP, J.

Sher Khan and another — Plaintiffs
— Petitioners.

v.

Akhtar Din — Defendant —
Opposite Party.

Civil Revn. Petn. No. 661 of 1936,
Decided on 14th January 1937, from de-
cree of Judge, Small Cause Court, Lahore,
D/- 15th May 1936.

**Contract Act (1872), S. 17 — Minor exe-
cuting pro-note—No false representation as
to age—Creditor not making enquiry about
age—Mere non-disclosure of minority is no
misrepresentation or fraud—Creditor cannot
recover money.**

Where a promissory note is executed by a minor without making false representation as to his age and the creditor does not make enquiry regarding his age, the mere non-disclosure of his minority by the minor does not amount to misrepresentation or fraud within the meaning of S. 17, Contract Act. The creditor therefore is not entitled to recover the money. No doubt it is the moral duty of the minor to inform the creditor of his minority, just as it is his moral duty to pay his just debt but 'duty' in the Explanation to S. 17 clearly means a legal duty: *A I R 1928 Lah 609, Disting.* [P 598 O 2]

Panna Lal Bahl — for Petitioners.

Abdul Aziz — for Opposite Party.

Order.—The plaintiff sued for Rs. 500, principal and interest, on the basis of a promissory note for Rs. 400 executed by the defendant. The defendant pleaded (a) that he received no consideration and (b) that he was a minor at the time. The Judge of the Small Cause Court dismissed the suit on the ground that the contract was void ab initio. It was further suggested in that Court that in equity the defendant should be compelled to return the money but the learned Judge repelled the suggestion. The plaintiff has come here in revision against the order of the Judge, Small Cause Court. His plea is that the minor was guilty of fraud in concealing his minority. The plaint says nothing about the defendant's minority and it would appear that the plaintiff only discovered the defendant's minority during the present trial. At the time of executing the promissory note the defendant was between 19 and 20 years of age, but he was a minor because his mother had been appointed as his guardian by order of the Senior Subordinate Judge. The defendant pleaded that he was a minor and in his statement the plaintiff

admitted that he did not know that a guardian had been appointed by the Court and that he made no enquiry regarding his minority. The only point is whether the defendant is guilty of fraud in not informing the plaintiffs that he was a minor. The petitioner's counsel relies on S. 17, Contract Act, which defines "fraud", including, inter alia, the active concealment of a fact by one having knowledge or belief of the fact. The Explanation says :

Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

No case was quoted where failure of a minor to reveal his age had been regarded as fraud. The respondent's counsel suggests a distinction between active and passive concealment of a fact. Active concealment of a fact might be silence in answer to questions. Here there was no enquiry. No doubt it was the defendant's moral duty to inform the plaintiff of his minority just as it is now his moral duty to pay his just debt, but "duty" in the Explanation clearly means a legal duty. I am of opinion that the defendant did not commit fraud as defined in S. 17, Contract Act, and, therefore, the Full Bench ruling, 9 Lah 701,¹ does not apply. That ruling lays down that a minor, who has entered into a contract by means of a false representation as to his age, though not liable under the contract, may, in equity, be required to return the benefit he has received by making a false representation. Here the minor made no false representation; no enquiry was made as to his age. For these reasons I am reluctantly constrained to dismiss this petition, but in the circumstances, like the Judge, Small Cause Court, I direct the parties to bear their own costs.

S.C./D.S.

Petition dismissed.

1. *Khan Gul v. Lakha Singh*, A I R 1928 Lah 609=111 I O 175=9 Lah 701=30 P L R 60 (F B).

A. I. R. 1937 Lahore 599

ADDISON AND DIN MOHAMMAD, JJ.

Hazura Singh and others—Plaintiffs—
Appellants.

v.

Mohindar Singh and others — Defen-
dants — Respondents.Second Appeal No. 1195 of 1936, De-
cided on 3rd March 1937, from decree of
Dist. Judge, Ambala, D/. 6th June 1936.(a) Evidence Act (1872), S. 32, Cls. (5) and
(6) — Definite person must be indicated as
author of statement.Clauses (5) and (6) of S. 32, Evidence Act,
become operative only when it is proved that the
maker of the statement intended to prove is dead
or cannot be found, etc.; and unless a definite
person is indicated as the author of the statement
it would be impossible to hold the conditions
precedent to be established in his case: *Case law*
discussed. [P 600 C 1](b) Evidence Act (1872), S. 90 — Entries in
bahis of priests—Presumption is permissible
only if evidence is led to prove identity,
signature and handwriting of writer.In relation to the entries in the bahis of the
priests, the presumption under S. 90, Evidence
Act, will be permissible to the Courts only if evi-
dence is led to prove the identity, signature and
handwriting of the writer; otherwise it will nei-
ther be possible to determine the age of the docu-
ment nor to presume that the signature and
every other part of the document alleged to be in
the handwriting of a particular person is in that
person's handwriting. In cases where no signa-
tures appear on the face of the document and it
is not alleged who the writer is, S. 90 will not
come into play at all. [P 601 C 1]*Mehr Chand Mahajan* —

for Appellants.

Bishan Narain — for Respondents.

Din Mohammad, J.—The only question
involved in this appeal is, whether the
plaintiffs who seek to have a gift made by
a widow, Har Devi, set aside are colla-
terals of her deceased husband, Atru.
Oral evidence produced by the plaintiffs
has been disbelieved by both the Courts
below. The adjacency of land and houses,
relied upon by the Senior Subordinate
Judge has been considered to be insuffi-
cient by the District Judge to justify an
inference of relationship. The only factor
that remains to be considered is the
admissibility of the bahis of the family
priests. Such documents can be admitted
only under Cls. (5) and (6) of S. 32 or S. 90,
Evidence Act, and the simple answer to
this question therefore is that these docu-
ments are admissible only if they satisfy
all the requirements laid down by those

provisions of law and not otherwise. Both
Cls. (5) and (6) of S. 32 are controlled by
the opening paragraph of that section and
cannot be considered in an independent
and detached position. Looked at in this
manner, Cl. (5) would apply only if:
(a) the statements, written or verbal,
intended to be relied upon, were made by a
person who is dead, or who cannot be
found or who has become incapable of
giving evidence or whose attendance can-
not be procured without an amount of
delay or expense which, under the circum-
stances of the case, appears to the Court
unreasonable; (b) the statements relate to
the existence of any relationship by blood,
marriage or adoption; (c) the relationship
exists among those persons as to whose
relationship the person making the state-
ment had special means of knowledge;
and (d) the statements should relate to a
period before the question arose. Under
Cl. (6), besides the conditions (a), (b) and
(d) specified above, the following addi-
tional requirements must be satisfied:
(1) the statements should relate to a rela-
tionship that existed between persons
deceased; and (2) the statements should
have been made in any will or deed relat-
ing to the affairs of the family to which
any such deceased person belonged or in
any family pedigree or upon any tomb-
stone, family portrait or other thing on
which such statements are usually made.

It will be seen that under both Cls. (5)
and (6) the basic requirement is that the
statement intended to be proved should
be that of a person who is dead or who
cannot be found, etc., and while under
Cl. (5) that person must have had a special
means of knowledge, under Cl. (6) this
condition is absent. We are aware of the
fact that certain learned commentators on
the Indian Evidence Act have, on the
authority of certain rulings of the High
Courts in India, observed that under
Cl. (6) it is not necessary to prove by
whom the statements were made, but
with all respect, we are not disposed to
agree with them, if what they intend to
convey is that a statement under Cl. (6) is
admissible even if it is not known who had
made it. If this were so, how will it be
possible to say that the maker of the
statement is dead or cannot be found, etc.,
and so long as that material is wanting,
neither Cl. (5) nor Cl. (6) can be invoked.
It may be necessary here to examine the
various authorities cited at the Bar. The

first authority is that of the Privy Council reported in 30 All 510.¹

In that case two pedigrees were admitted by their Lordships of the Privy Council. One of them was filed by a deceased member of the family in a previous civil suit instituted by him and bore his signatures (p. 522). The second had been obtained from a deceased member of the family as a statement of the family descent, for the purpose of being given in evidence in certain criminal proceedings (p. 523). Both these documents therefore fulfilled all the conditions laid down in the relevant provisions of the Evidence Act. In 37 All 600,² a Division Bench of the Allahabad High Court, while referring to Cl. (6) of S. 32, Evidence Act, no doubt remarked :

Neither the section nor the clause provides that it is necessary to show who it was that made the statements. In the case of an old pedigree it would be generally quite impossible to give evidence as to who was the author of the statements.

But with all respect, we are not prepared to endorse a proposition and reasoning couched in such wide terms. As stated above, Cls. (5) and (6) become operative only when it is proved that the maker of the statement intended to be proved is dead or cannot be found etc; and unless a definite person is indicated as the author of the statement, it would be impossible to hold the conditions precedent to be established in his case. If the reasoning employed by the learned Judges is followed and their principle adopted, every forged entry in an old *bahi* of *pandas* would become sacrosanct and immune from attack and this could never be the intention of the Legislature in enacting Cls. (5) and (6). In 46 All 665,³ the entries which were held to be admissible were proved to be in the handwriting of the father and grandfather of the witness who deposed to their correctness (p. 669). In 15 I C 625,⁴ which referred, among other authorities, to 30 All 510,¹ Piggott, J., at pp. 630 and 631 of the report, has made certain pertinent observations in regard to the *bahis* of the Hindu priests and they are well

worth perusal. We are in complete accord with most of those observations, especially where he has emphasized the need of receiving such books with caution and of subjecting them to a severe scrutiny in order to guard against the possibility of fabrication. But with all respect we demur to the remark that

Such an entry might be treated as admissible under the clause above referred to [Cl. (5) of S. 32], if the Court were of opinion that there was a fair presumption that it represented a statement made by some person who had special means of knowledge, even though that person could not with certainty be named.

If a person cannot be named with certainty, in other words, if a person's identity is not established, how can a Court presume that, that unnamed, uncertain person had a special means of knowledge in relation to the fact stated by him. It would further be clear from the remark, "I think also that such entries might be admissible under Cl. (6) of S. 32 aforesaid" that the learned Judge did not consider Cl. (6) properly and his opinion about the admissibility of these entries under that clause was indefinite. In 11 Lah 503,⁵ all that was remarked was:

The admissibility of such entries for proving relationship under S. 32, Evidence Act, has been recognized in several judicial decisions: *vide*, *inter alia*, *Anandi v. Nand Lal*,³ and has not been disputed before us. But the entries produced do not appear to be reliable enough or sufficient to establish the alleged relationship (p. 514).

In the first place, we have already pointed out above that in 46 All 665,³ the entries were proved to be in the handwriting of definite persons who had long before died. Secondly, as the admissibility of the entries in question was not disputed before the learned Judges, they did not consider it necessary to discuss the matter from all its aspects. In A I R 1936 Lah 261,⁶ the learned Judges observed :

The defendants relied in this connection on some documentary evidence. They relied on certain extracts from *pandas'* books from Hardwar, but after hearing arguments we are of opinion that these particular entries are inadmissible in evidence. Two witnesses were called, Ram Prasad, a semi-blind old man, aged 70, from whose custody the books were produced, and his clerk, Balmokand. Neither of them wrote the entries in question and neither of them could say by whom they were written. Ram Prasad himself said he

1. *Kalka Parshad v. Mathura Parshad*, (1909) 30 All 510=1 I C 175=35 I A 166=11 O C 362 (P C).

2. *Jahangir v. Sheoraj Singh*, A I R 1915 All 334=30 I C 505=13 A L J 817=37 All 600.

3. *Anandi v. Nand Lal*, A I R 1924 All 575=83 I C 618=46 All 665=22 A L J 657.

4. *Collector of Farrukhabad v. Gajraj Singh*, (1912) 15 I C 625.

5. *Balak Ram High school, Panipat v. Nanun Mal*, A I R 1930 Lah 573=128 I C 532=11 Lah 503=31 P L R 509.

6. *Harnam Singh v. Mt. Bhagi*, A I R 1936 Lah 261=161 I C 916=38 P L R 26=16 Lah 1007.

never saw Bhag Singh. It, therefore, appears that these particular entries are inadmissible.

We are in respectful agreement with these remarks and consider that on those facts that was the only proper decision to be made. Coming now to S. 90, Evidence Act, the material portion of that section reads as follows :

Where any document, purporting or proved to be thirty years old, is produced from any custody . . . the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person is in that person's handwriting. . .

Here again, it will be obvious that among other things it is necessary to establish that (a) the document is thirty years old, (b) it bears the signature of a particular person and (c) any part of the document is in the handwriting of a particular person. It is then and then alone that the Court is empowered to presume that the document is in that person's handwriting. In relation to the entries in the *bahis* of the priests, this presumption, therefore, will be permissible to the Courts only if evidence is led to prove the identity, signature and handwriting of the writer, otherwise it will neither be possible to determine the age of the document nor to presume that the signature and every other part of the document alleged to be in the handwriting of a particular person is in that person's handwriting. In cases where no signatures appear on the face of the document and it is not alleged who the writer is, S. 90 will not come into play at all. Applying the principles enunciated above to the present case, we have no hesitation in holding that the entries relied upon by the plaintiffs are inadmissible in evidence under Cls. (5) and (6) of S. 32, nor can any presumption under S. 90 be made in their favour. The *bahis* in question were produced by a person who admitted that he was a mere servant of the priest to whom the books belonged. He was unable to say when those entries were written and by whom. Being a stranger to the entries themselves he could not even swear to their being written by a priest of the family. In these circumstances, it cannot be said that the conditions precedent for applying Cls. (5) and (6) are fulfilled or that the requirements of S. 90 are satisfied.

Before concluding we may remark that the admissibility of such entries has nothing to do with their genuineness nor with the weight to be attached to them.

These things will have to be decided in every case that arises on its own facts. All that we intend to lay down in this judgment is that the question of admissibility of *bahis* produced by the priests is covered by Cls. (5) and (6) of S. 32 as well as S. 90, Evidence Act, and if all the conditions laid down therein are fulfilled, they are relevant and admissible in evidence. But if those requirements are not satisfied, they are mere waste paper, however old or genuine they may purport to be. With these remarks we dismiss this appeal and affirm the decision of the lower appellate Court. As the point was not very clear, we leave the parties to bear their own costs throughout.

S.C./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 601

TEK CHAND, J.

Girdhari — Defendant — Appellant.

v.

Ram Kala and *others*, Plaintiffs and *others*, Defendants — Respondents.

First Appeal No. 8 of 1937, Decided on 19th April 1937, from order of Senior Sub-Judge, 4th Class, Rohtak, D/- 20th November 1935.

Civil P. C. (1908), O. 1, R. 8—Procedure—Permission granted to limited persons to conduct suit on behalf of proprietary body—One of them withdrawing—It is for Court to decide whether or not remaining plaintiffs should continue to prosecute suit.

Where permission is granted to certain persons under O. 1, R. 8, Civil P. C., to conduct the suit on behalf of the proprietary body and one of them withdraws, it is for the Court to decide whether it will permit the remaining plaintiff or plaintiffs, to whom the general sanction has been given, to continue to prosecute the suit, or whether it will insist upon the original number, in which case it should notify to the members of the proprietary body to ask them so that they may authorize another person to conduct the case on their behalf as a co-plaintiff : *A I R 1931 Mad 452, Foll.*

[P 602 C 1]

Shamair Chand — for Appellant.

L. M. Datta — for Respondents

(Plaintiffs).

Judgment.—In execution of a decree obtained by *Girdhari*, defendant 1, against defendant : 2 to 4, who are non-proprietors in the village, the decree-holder got attached the house occupied by the judgment-debtors. *Ram Kala* and *Hari Singh*, who are two of the proprietors of *Pana Pachosian* of village *Bhaprauda*, brought

a suit on behalf of the proprietors of the Pana for a declaration to the effect that the house belonged to the proprietors of the Pana and was not liable to be attached and sold in execution of the decree against defendants 2 to 4, who were non-proprietors and were in occupation as kamins. The suit was brought after the necessary permission had been obtained from the Court under O. 1, R. 8, Civil P. C. After the case had proceeded for some time, Ram Kala, plaintiff, filed an application stating that on enquiries he had satisfied himself that the house belonged to defendants 2 to 4 and that it was liable to attachment and sale in execution of the decree; he consequently intimated to the Court that he did not wish to prosecute this suit. The other plaintiff, Hari Singh, did not join in the application and wished to prosecute the suit. The defendant Girdhari objected that permission having been granted to two persons to conduct the suit on behalf of the proprietary body and one of them having withdrawn, the suit should be dismissed. The trial Judge upheld the plea and dismissed the suit.

On appeal by Hari Singh the learned Senior Subordinate Judge came to a contrary conclusion and held that it was competent to Hari Singh to continue the suit. He accordingly accepted the appeal and remanded the case under O. 41, R. 23, Civil P. C., for decision on the merits. Girdhari has preferred an appeal under O. 43, R. 1 to this Court. In the memorandum of appeal it was attempted to support the order of the Court of first instance dismissing the suit but at the time of arguments Mr. Shamair Chand expressed his inability to do so; he frankly admitted that the suit should not have been dismissed forthwith. In such a case the proper course to follow was the one suggested in 54 Mad 527,¹ namely that it is for the Court to decide whether it will permit the remaining plaintiff or plaintiffs, to whom the original sanction had been given, to continue to prosecute the suit, or whether it will insist upon the original number in which case it should notify to the members of the proprietary body to ask them so that they may authorize another person to conduct the case on their behalf as a co-plaintiff. I accept

the appeal and in modification of the order of the lower appellate Court remand the case to the Court of first instance with the direction that the procedure laid down above may be followed. Having regard to all the circumstances of the case I leave the parties to bear their own costs.

V.B.B./A.L.

Case remanded.

A. I. R. 1937 Lahore 602

ADDISON AND DIN MOHAMMAD, JJ.

Raja Har Indar Singh — Plaintiff
— Appellant.

v.

Shiv Ram — Defendant — Respondent.

First Appeal No. 52 of 1936, Decided on 10th December 1936, from decree of Senior Sub-Judge, Ferozepore, D/- 6th November 1935.

Adverse Possession—Declaratory suit under O. 21, R. 63, Civil P. C. — During pendency plaintiff wrongly dispossessed of property — Plaintiff neither amending his original suit nor instituting fresh suit within twelve years of wrongful dispossession — Possession would be adverse — Decision in declaratory suit in his favour would not affect adverse possession.

Where a person has instituted a suit under O. 21, R. 63, Civil P. C., for a declaration of his title to certain property on the ground that a cloud has been cast on his title by a certain act, and if during the pendency of such suit he is wrongly dispossessed of the property, then it is his duty to protect himself from adverse possession either by amendment of his original suit for declaration or by instituting a fresh suit even though the fresh suit would be decided after the decision of the first suit. If he takes no such steps within twelve years from the date of dispossession, the possession would be adverse and a decision in the declaratory suit in his favour would not affect the adverse possession : *Case law discussed.*
[P 606 C 2; P 607 C 1]

J. N. Aggarwal and Jhanda Singh —
for Appellant,

Achhru Ram Bhagwan Das —
for Respondent.

Addison, J.—This suit was brought by His Highness the Maharaja of Faridkot for recovery of the sum of Rs. 15,067-2-9 against Messrs. Ram Lal and Shiv Ram, Advocates of Ferozepore. The history of the case is fully detailed in 104 P R 1917¹ and 10 Lah 447² and will be restated

1. Brij Indar Singh v. Lala Kanshi Ram, A I R 1917 P C 156=42 I C 43=104 P R 1917=44 I A 218=45 Cal 94 (P O).

2. Maharaja of Faridkot v. Anant Ram, A I R 1929 Lah 1=114 I C 62=10 Lah 447=31 P L R 521.

1. Venkatakrishna Reddi v. Srinivasachariar, A I R 1931 Mad 452=130 I C 761=54 Mad 527=61 M L J 135.

here so far as is necessary. A Mr. Coates sold the suit property in Ferozepore Cantonment to the Agra Bank, Lahore, by means of a sale deed, dated 17th January 1895. Maharaja Bikrim Singh, the predecessor-in-title of the present plaintiff, purchased it from the Bank on 27th September 1897, benami, in the name of Kanwar Gajindar Singh. Certain creditors of Mr. Coates had the property attached in execution of a decree against Mr. Coates, whereupon Maharaja Balbir Singh, son of Maharaja Bikrim Singh, put in an objection against the attachment on the ground that the property was his and did not belong to Mr. Coates. This objection was dismissed by the executing Court on 24th April 1903. After this on 16th June 1903, Maharaja Balbir Singh instituted a suit under the provisions of S. 283 of the old Civil P. C., which corresponds to O. 21, R. 63 of the new Civil P. C. There is no essential difference in the two sections. This suit was dismissed by the then District Judge of Ferozepore on 16th March 1908, on the ground that it had abated. Against this order, Maharaja Brij Inder Singh preferred an appeal in the Chief Court which was dismissed on 20th January 1911. On 1st July 1911 the Maharaja applied for leave to appeal to His Majesty in Council, and this was granted on 30th April 1914. By order of the Privy Council, dated the 19th July 1917, the appeal was accepted and the suit remanded for trial on the merits. Their Lordships' decision is reported in 104 P R 1917.¹ Thereafter the suit was again dismissed by the Subordinate Judge, First Class, Ferozepore, on 12th June 1920. An appeal was preferred from this decision which was decided on 15th October 1928 : see 10 Lah 447.² This Court accepted the appeal and decreed the suit, holding that the property attached in 1901, belonged to the Maharaja and not to Mr. Coates.

In the meantime, after the appeal of the Maharaja had been dismissed on 20th January 1911, by the Chief Court of the Punjab and before the application for leave to appeal to His Majesty in Council had been put in on 1st July 1911, the property was sold in execution of the decree of the creditors of Mr. Coates on 31st May 1911, the sale certificate being granted on the 30th June 1911. Possession was given to the auction purchasers, who are the present defendants, by the District Judge, Ferozepore, on 14th August 1911. The

retainers of the Maharaja seem to have taken back possession and there were criminal proceedings instituted by the auction purchasers under the provisions of S. 145, Criminal P. C. In those proceedings possession was again given to the auction purchasers by a Magistrate, First Class, on 8th February 1912. It must thus be taken that the purchasers were given possession on 14th August 1911. They lost possession thereafter for a brief period and again obtained possession, which was never disturbed, on 8th February 1912. In the meantime, the property was required by Government for a public purpose and it was accordingly acquired under the provisions of the Land Acquisition Act, the date of the Collector's award being 8th December 1926. The sum awarded was Rs. 12,414, this amount being taken by the defendants half and half. The plaintiff, having succeeded on 15th October 1928, in his suit instituted under the provisions of S. 283 or O. 21, R. 63, Civil P. C., instituted this suit on 7th July 1930 against the auction-purchasers for recovery of the sum of Rs. 12,414, awarded by the Collector, together with interest amounting to Rs. 2,653-2-9, total Rs. 15,067-2-9. During the pendency of this suit, one of the defendants, Ram Lal, entered into a compromise with the plaintiff, as a result of which the suit was dismissed so far as he was concerned. It continued, however, against Mr. Shiv Ram to the extent of one-half, that is, for recovery of the sum of Rs. 7,533-9-4½. This suit has been dismissed and the Maharaja has appealed.

Various defences were raised, but most of them are no longer in dispute. The trial Court held that Mr. Coates' decree-holders were not necessary parties, that the decision in the suit, instituted under the provisions of S. 283, Civil P. C., bound the auction-purchasers though they were not parties to it, that the decision in the suit instituted by the Maharaja in his personal capacity on 18th May 1912 did not affect the decision in this case, that the principle of *lis pendens* applied to the auction sale though it was an involuntary transfer, that the plaintiff's right to the property was not affected by the sale in favour of the defendants at the time when it took place and finally, however, that the suit was barred by time, possession having been adverse from the date when possession was taken, that is, either from 14th August 1911 or 8th February 1912.

It was on the last finding that the suit was dismissed.

The arguments before us have been confined to the question as to whether possession has been adverse since 1911 or 1912, and it was admitted that if this is so the suit is time barred. At the time when the suit under S. 283, Civil P. C., was instituted, a suit for a declaration did lie and on the authority of 16 Lah 729,³ the plaintiff could continue his declaratory suit in spite of the sale in 1911. The question is whether he could have amended his first suit after 1911 so as to include consequential relief against the auction-purchasers or instituted a fresh suit against them, which would have depended on the result of the first suit. If he could, there can be no question but that the present suit is time-barred. The decision of this Court in 10 Lah 447² was merely to the effect that in 1903 the property belonged to His Highness the Maharaja. This merely emphasized that the property was wrongfully sold in 1911. Normally, therefore, possession would be adverse from 1911 or 1912 unless it can be held that there was no other remedy open to the Maharaja except to continue his suit, instituted in 1903 under the provisions of S. 283, Civil P. C. There is ample authority for the proposition that in a suit instituted under the provisions of S. 283 or O. 21, R. 63, the plaintiff can sue any person who in the meantime after the rejection of his objections has come to have any interest in the disputed property, including the auction-purchasers. This was so held in 9 Lah 167,⁴ while 12 Cal 696⁵ lays down the same proposition.

In 16 Bom 608,⁶ it was said that there is nothing in the words of S. 283, Civil P. C., to limit the party unsuccessful in the attachment proceedings to a suit for a mere declaration of his alleged right. He is at liberty to pray, in the same suit, for consequential relief to which he may be entitled. It was held in 13 Lah 143⁷ that

3. Hurmat Ali Shah v. Tufail Mohamed, A I R 1935 Lah 332=156 I O 830=16 Lah 729=37 P L R 99.

4. Tulsi Das v. Shiv Dat, A I R 1927 Lah 631=103 I C 763=9 Lah 167=29 P L R 375.

5. Kishori Mohan Rai v. Hursook Das, (1886) 12 Cal 696.

6. Sadu Raghu v. Ram Govind, (1892) 16 Bom 608.

7. Abdul Aziz v. Alliance Bank of Simla, A I R 1931 Lah 483=132 I O 215=13 Lah 143=33 P L R 345.

a suit under O. 21, R. 63 is of a comprehensive character and the plaintiff can establish therein the claim made by him in the execution proceedings as well as other consequential relief, while a Full Bench of the Madras High Court held in 40 Mad 733⁸ that the words "to establish the right which he claims to the property" which occur in O. 21, R. 63, Civil P. C., are wide enough to cover not only a suit for a declaration but also one for relief consequential on such declaration. It is unnecessary to refer to other authorities on the point. It follows that, if anything further has been done before the suit of the plaintiff instituted under the provisions of S. 283 or O. 21, R. 63, the plaintiff claimant can sue in that suit not only for a declaration as to his right but for further relief against the acts which have been done to his prejudice before the suit is instituted. That being so, it would seem to follow that a suit which was instituted before any prejudicial acts have been done can be converted by amendment into a suit to protect the plaintiff against those acts when those acts take place, and that in any case the plaintiff can certainly institute a fresh suit to protect himself against those subsequent acts even although that fresh suit would be decided after the suit for a mere declaration had been decided and would depend upon the declaratory decree granted.

Reliance, however, was placed by the learned counsel appearing for the appellant upon 44 Bom 934.⁹ In that case the defendants had brought a suit against the plaintiffs for a declaration that they were entitled to a half share in the right to manage a Devasthan property. The plaintiffs then pleaded that they were solely entitled to the management as they were in adverse possession for over 12 years prior to the suit. It was, however, held that the plaintiffs' adverse possession commenced only from 1885, and a decree declaring the joint management of the plaintiffs and the defendants was passed on 7th July 1896. After the decree, the plaintiffs remained in possession and the defendants took no active step to execute the decree in their favour until they were

8. Basivireddi v. Ramayya, A I R 1917 Mad 393=36 I O 445=40 Mad 733=31 M L J 894 (F B).

9. Akbaralli Mir Inayatalli v. Abdul Ajiz, A I R 1920 Bom 61=58 I O 96=22 Bom L R 916=44 Bom 934.

let into possession by the Collector's order, dated 1st August 1908. The plaintiffs thereupon brought a suit in 1912 to establish their sole right to manage the Devasthan property and contended that by non-execution of the decree in the suit of 1893 they became entitled to tack on the period of adverse possession before the date of that decree to the period after the decree thereby acquiring an absolute title by adverse possession. It was held that the decree in Suit No. 96 of 1893 put an end to adverse possession on 7th July 1896 and that, though the execution of that decree was barred, the right remained and therefore the plaintiff could not get absolute title by adverse possession. There are, however, numerous authorities which have dissented from what is laid down in the above decision. In A I R 1930 Lah 472,¹⁰ 44 Bom 934⁹ was not followed and it was held that a decree not accompanied by actual effective assertion of rights and taking possession of those rights does not help to stop adverse possession running. In A I R 1930 Bom 400,¹¹ the same proposition was laid down and 44 Bom 934⁹ was not followed. In 46 Mad 525¹² a Division Bench dissented from the decision in 44 Bom 934⁹ and held that a judgment of a Court, declaring that a party in possession of immovable property has no title to it, has not the effect of interrupting the continuity of his adverse possession as against the real owner. There are numerous other authorities on this point, such as 63 I C 881,¹³ a decision of a Division Bench of this Court, A I R 1929 Lah 524,¹⁴ another decision of a Division Bench of this Court, 9 I C 795,¹⁵ a decision of a Division Bench of the Madras High Court, 37 Bom 64¹⁶ and A I R 1936 All 466.¹⁷ It follows that, though the decision of this Court in 10 Lah 447,²

to the effect that the property in 1903 belonged to the Maharaja, is binding upon the auction purchasers, although they were not parties, by the principle of *lis pendens*, it is not a necessary consequence of that decision that adverse possession, which had commenced to run, was interrupted by that decision.

The question seems to be set at rest by the decision of their Lordships of the Privy Council in 46 Mad 751.¹⁸ That was a suit instituted by the appellant-plaintiff to recover, as against a purchaser under an execution sale and those who claimed under him, certain property which had by two deeds, dated 21st February 1890 and 13th December 1894, been devoted to charitable purposes. The first of these two documents declared that the heirs of the settlor in the order of primogeniture should be trustees and conduct the said charities. The settlor died in 1895, leaving him surviving his widow and Arunachellam, his only son. Arunachellam was the father of the plaintiff-appellant and became trustee of the charity under the deeds referred to. He became involved in debt and one of his creditors sued him, obtaining a decree in execution of which the endowments of the charity were attached. The plaintiff, who was then a minor, applied through his grandmother, the settlor's widow, to the executing Court, objecting to the attachment. This objection was dismissed on the ground that during the life-time of the appellant's father Arunachellam, who succeeded as trustee upon the death of the settlor, the plaintiff had no *locus standi*. This was in 1897. In the same year, a regular suit was instituted by the minor, acting through the same next friend, his grandmother, seeking to establish the validity of both deeds. It is not clear whether this suit was brought under the provisions of S. 283, Civil P. C., or was an ordinary suit for a declaration as to the trust property, but it would seem that this makes no difference, as the nature of the suits would have been the same. Whilst this suit was pending (in fact a decree was not passed in it till 31st December 1904) the property was brought to sale under the decree against the plaintiff's father, Arunachellam, on 22nd March 1898. It was purchased by one Maracayar. The sale was

10. Jaimni Das v. Phullakhan, A I R 1930 Lah 472=129 I C 703=31 P L R 572.

11. Mulchand Chouthmal v. Hira Bai, A I R 1930 Bom 400=129 I C 338=32 Bom L R 695.

12. Singaravelu Mudaliar y. Chokka Mudaliar, A I R 1923 Mad 88=70 I C 994=46 Mad 525=43 M L J 737.

13. Hans Raj v. Maulu, (1921) 63 I C 881.

14. Bahawal v. Ghulam Muhammad, A I R 1929 Lah 524=117 I C 808.

15. Puthia Valapil Ayissa v. Lakshmana Prabhu, (1911) 9 I C 795.

16. Babaji Akoba v. Dattu Laxman, (1913) 37 Bom 64=17 I C 642=14 Bom L R 923.

17. Mahommed Tahir v. Bechey Lal, A I R 1936 All 466=163 I C 545=1936 A L J 583.

18. Subhaiya Pandaram v. Mohammed Mustafa Maracayar, A I R 1923 P C 175=74 I C 492=50 I A 295=46 Mad 751 (P C).

confirmed on 11th August 1898 and delivery of possession was made to the purchaser. From that day the purchaser and those claiming under him had been in uninterrupted possession. The regular suit was decreed on 31st December 1904, it being declared that the properties, including those seized under the execution sale, formed a trust for the purpose specified in the deed. The auction-purchaser Maracayar after his purchase had applied to be joined as a defendant in that suit and his application was granted. The plaintiff-appellant came of age on 6th August 1910 and petitioned the District Court on 9th November 1911 for leave to bring a suit to remove his father Arunachellam from the office of trustee. This leave being granted, he instituted a suit for removal accordingly, and on 21st July 1913 obtained a decree removing Arunachellam, the plaintiff-appellant succeeding him as trustee.

The plaintiff-appellant then brought the suit which came before their Lordships of the Privy Council, on 23rd July 1913 to recover the property. Both Courts in India decided against the plaintiff-appellant and their Lordships agreed with this decision. They said that there was no doubt that whatever period of limitation be assigned, the full period had run before these proceedings were instituted, unless it could be alleged that by virtue of the regular suit, to which the auction-purchaser was a party on his own application, there was some interruption in the period. It was contended before their Lordships in that case that the decision in the regular suit of 1897 acted as *res judicata* and prevented the auction-purchaser and his successors from asserting that the property was theirs. (The only difference between that case and the case now before us is that the auction-purchasers before us were not parties to the first suit. The claim before their Lordships therefore was that the first suit acted as *res judicata* and the claim before us is that under the principle of *lis pendens* the decision of the first suit was effective against the auction-purchasers who were not parties.) Their Lordships then went on to say that they did not think that the decree had that effect. At the moment when it was passed the possession of the purchaser was adverse, and the declaration that the property had been properly made subject to a trust disposition, and therefore ought not to have been seized, did not disturb or

affect the quality of the auction-purchaser's possession; it merely emphasized the fact that it was adverse. No further step was taken in consequence of that declaration until fresh proceedings were instituted when it was too late.

It is impossible to distinguish this decision of their Lordships of the Privy Council from what has occurred in the present case. It is true that the proceedings were delayed in the Courts but the fault seems to have been as much that of the plaintiff as of anyone else. He could continue with his declaratory suit and obtain the declaration he sought but, if in the meantime adverse possession commenced to run against him, it became his duty to protect himself either by amendment of his original suit or by instituting a fresh suit which would have been stayed, pending the decision of the first suit. When the case was remanded for retrial in 1917 by their Lordships of the Privy Council, he could then have amended his suit; for he was well within limitation. Limitation expired in 1923 or 1924, when the property had not been acquired by Government. It was for the plaintiff to protect himself further and not merely to go on with his declaratory suit. A hypothetical case might here be stated. A plaintiff has sued for declaration of his title on the ground that a cloud has been cast upon it by a certain act. While that suit is pending, actual possession is taken of the property by the defendant by a wrongful act. The declaratory suit continues, as it can, and the plaintiff is successful, but he takes no steps within twelve years to obtain possession of the property of which he has been wrongfully deprived.

On the authorities a suit brought after twelve years from the date of dispossession would be time-barred. Similarly, a plaintiff sues for a declaration as to his right in certain properties or for possession thereof. The suit is delayed. It will be necessary for him to institute the necessary rent suits against tenants of the property or they will be barred by time. It may be that these rent suits would have to be stayed, pending the decision of the title suit, but that consideration does not affect limitation. It follows, therefore, that in the present case the Maharaja should have taken steps to protect himself from the act of wrongful possession taken in 1911 or 1912 by the auction-purchasers. His

declaratory decree obtained in 1928 merely emphasized the fact that that possession was wrongful and adverse. The plea that the fault was due to delay in the Courts cannot be listened to. He could have protected himself as already indicated but he took no steps to do so. The declaration given in 1928 did not affect the question of adverse possession. It only declared that the property belonged to the Maharaja in 1903 and was still his when it was sold in 1911 and wrongful possession taken thereof. For the reasons given we dismiss the appeal with costs.

P.R./D.S.

Appeal dismissed.

* A. I. R. 1937 Lahore 607

JAI LAL, J.

Firm S. Nasir-ud-Din — Appellants.
v.

Firm Durga Prashad and others —
Respondents.

Second Appeal No. 861 of 1936, Decided on 15th December 1936, from decree of Dist. Judge, Delhi, D/- 11th May 1936.

* Contract Act (1872), Ss. 69 and 230—Scope—Agent undertaking by contract with firm abroad to pay it for all goods supplied by it and not paid for by purchaser — Order by purchaser to firm not through such agent — Purchaser refusing payment for goods supplied — Agent making payment for goods and suing purchaser for it — There being no privity of contract between agent and purchaser, agent cannot claim benefit of S. 69 — Letters by purchaser to agent showing willingness to make payment to him cannot so override S. 230 as to give agent right to sue.

The mere fact that the agent had, by a separate contract made with a firm abroad, undertaken to pay it for all goods supplied by it and not paid for by the purchaser does not entitle him to sue the purchaser for the recovery of the price of goods paid by the agent to the firm if the order is not placed through him. The agent under such circumstances is not entitled to claim the benefit of S. 69, Contract Act on the ground that he is a person interested in making the payment, as there is no privity of contract between the agent and purchaser. [P 608 C 1]

In such a case even if by his letters to the agent and by payment of a part of amount to him, the purchaser has given an occasion to the agent to believe that he would pay the amount to him, still it cannot override the provisions of S. 230 as to give the agent right to recover the amount from the purchaser. [P 608 C 1]

Niaz Ali — for Appellants.

Bishan Narain — for Respondents.

Judgment.—The appellant was appointed an agent of a firm in Paris by their

representative who had arrived in Delhi to secure orders for the firm. The appellant had to get commission on all orders secured by that representative or by the appellant himself and was also to get commission on all orders secured by him subsequent to the departure of the representative from Delhi. The appellant also undertook to recover the amounts due to the Paris firm from those to whom the goods ordered were to be supplied and authorized it to draw bills on him in case of need for the price of the goods along with the consignee of the goods. Three days subsequent to the appointment of the appellant the representative of the Paris firm secured an order from the respondent for supply of perfumes, etc.; it has been found by the learned District Judge that it is not correct as alleged by the appellant that the order was secured through him by the Paris firm from the respondent. In the indent, however, it appears that the signature of the appellant appears, though on behalf of the respondent it is suggested that this signature was put some time subsequently for the purpose of this case. A copy of the indent was produced by the respondent but it has mysteriously disappeared from the record. The existence of the signature of the appellant on the indent will not, however, materially affect the decision of this case in view of the finding of the District Judge that the appellant did not secure the order from the respondent. It is obvious that under the circumstances the appellant is not entitled to maintain a suit in his own name for the recovery of the amount due as price of goods alleged to have been sent to the respondent and refused delivery by him.

Under S. 230, Contract Act, an agent is entitled to maintain a suit personally for the recovery of the price if the contract is made by him for the sale or purchase of goods of a merchant resident abroad. The contract in this case was not made by the appellant. It is, however, contended that the appellant is entitled to recover the price under S. 69, Contract Act, on the ground that he was interested in the payment of the amount to the Paris firm. It appears that the goods were despatched by the Paris firm and the invoice was received by the respondent, the draft accepted by him about 15 days after the receipt of the invoice and Rs. 50 paid to the bank in the account of the

appellant on account of the goods, and subsequently he made a request to the appellant to wait for payment. Finally he refused to pay on the ground that the goods did not conform to the order. Whether there is justification for this refusal or not is not a question which I need decide on the present occasion. Subsequently it appears that the appellant received the goods and he is still in possession of the same; he returned the draft in terms of his agreement with the Paris firm. The present suit is instituted by him for recovery of the amount paid by him to the Paris firm.

In my opinion, the learned District Judge has rightly held that under the circumstances the plaintiff is not entitled to claim the benefit of S. 69 on the ground that he is a person interested in making the payment, as that expression has been interpreted in several cases decided by different Courts. There was no privity of contract between the appellant and the respondent. The only ground on which a decree was claimed by the appellant against the respondent was that the order had been placed by the latter with the Paris firm through its agent, the appellant. This has been found to be wrong by the learned District Judge. The mere fact that the appellant had by a separate contract made with the Paris firm, undertaken to pay it for all goods supplied by it and not paid for by the purchaser does not entitle him to sue the purchaser, when the order was not placed through him. In my opinion, the learned District Judge has reached the correct conclusion, but there is no doubt that the respondent has given an occasion to the appellant to believe that he would pay the amount to him by his letters and by the payment to him, but that does not override the provisions of S. 230, Contract Act. I dismiss this appeal but direct that the parties shall bear their own costs throughout in this litigation.

W.D./A.L.

Appeal dismissed.

* A. I. R. 1937 Lahore 608

BHIDE, J.

Firm Gujar Mal-Kundanlal — Applt.

v.

Firm Paras Ram-Sundar Lal and others — Judgment-debtors—Respds.

Exn. Second Appeal No. 906 of 1936,
Decided on 5th January 1937.

* Vendor and Purchaser—Vendor of immoveable property leaving purchase money with vendee for payment to his creditors—Vendee failing to pay it within reasonable time—Vendor is entitled to recover it as debt as he has lien on property for unpaid purchase money—Such money in hands of vendee is liable to attachment in execution of decree against vendor.

Where a person sells some of his immoveable property to a vendee and leaves the purchase money with him for payment to his creditors, the amount so left cannot be said to be transferred in trust to the vendee in the legal sense of the expression but it is a mere direction to pay the amount to the creditor on behalf of the vendor within a reasonable time; and when the amount is not so paid, the vendor is entitled to recover it as a debt as he has a lien on the property for the unpaid balance. Such money in the hands of the vendee is therefore liable to attachment in execution of a decree against the vendor: *A I R 1931 All 95, Rel. on; A I R 1936 Lah 727, Disting.; A I R 1935 Lah 26; A I R 1935 Lah 50; A I R 1933 Lah 695 and A I R 1935 Lah 354, Ref.* [P 609 C 1]

Shamair Chand and Qabul Chand —
for Appellant.

A. R. Aggarwal and K. S. Thapar —
for Respondents.

Judgment.—The sole point for decision in this case is whether certain sums which were left by a judgment-debtor with a vendee to whom he had sold some immoveable property for payment to his creditors, but which were not so paid within a reasonable time can be looked upon as a debt due to the judgment-debtor and attached and sold in execution of a decree against him. The learned District Judge has held that it could not be looked upon as such a debt as no time limit had been fixed for payment of the amount to the creditors. From this decision the decree-holder has preferred a second appeal. A preliminary objection is raised that no appeal is competent; but this contention seems to have no force in view of O. 21, R. 63-A, Civil P. C., as framed by this Court. In view of this rule, the decision of the learned District Judge would appear to fall within the purview of S. 47, Civil P. C., and consequently appealable. On merits the learned counsel for the appellant has relied upon *A I R 1935 Lah 26*¹ and *A I R 1935 Lah 50*² in support of his contention that the money left with a vendee for payment to creditors can be recovered as a debt by the vendor, if the money is not

1. *Jai Gopal v. Sundar Singh*, *A I R 1935 Lah 26*=159 I O 763.

2. *Bahadur Chand v. Bahadur Singh*, *A I R 1935 Lah 50*=152 I O 645.

paid to the creditors by the vendee within a reasonable time. The learned counsel for the respondents on the other hand contended that the above rulings cannot be held to lay down the law correctly in view of a Division Bench ruling of this Court reported in A I R 1936 Lah 727.³ In my opinion the present case is distinguishable as this is a case of a sale and not of a mortgage and the agreement on the part of the vendee cannot be looked upon merely as an agreement to lend money. The vendor has in such cases a lien on the property sold for the unpaid balance and this implies I think that he is entitled to recover the unpaid balance.

The present case seems to be analogous to 52 All 761⁴ which has been distinguished in A I R 1936 Lah 727.³ It is true that the vendee was directed to pay the money to certain creditors, but the amount cannot be said to be transferred in trust to the vendee in the legal sense of the expressions: *cf.* 14 Lah 675⁵ and 16 Lah 118.⁶ He was merely directed to pay the amount to the creditors on behalf of the vendor, but when he failed to do so, the vendor must, I think, be held to be entitled to recover it. The learned District Judge has remarked that no time limit was fixed for payment. But even if no definite period was fixed, the parties must be presumed to have intended that the amounts should be paid within a reasonable time. In the present instance it seems clear that they were not so paid, as the creditors had to take out execution proceedings to recover the amount. The executing Court gave the vendee two months to pay the amount to the creditors. This was perhaps unnecessary. But if the vendee failed to pay the amounts even within this period, I think they can certainly be looked upon as debts due to the vendor. I therefore accept the appeal with costs and restore the order of the executing Court.

K.B./A.L.

Appeal allowed.

3. Sewa Singh v. Milkha Singh, A I R 1936 Lah 727=164 I O 582=17 Lah 270=38 P L R 574.

4. Sheopati Singh v. Jagdeo Singh, A I R 1931 All 95=124 I O 764=52 All 761=1930 A L J 1141.

5. Maghi Mal v. Darbara Singh, A I R 1933 Lah 695=143 I O 753=14 Lah 675=34 P L R 601.

6. Ganesh Das v. Mt. Banto, A I R 1935 Lah 354=158 I O 387=16 Lah 118=37 P L R 552.

A. I. R. 1937 Lahore 609

COLDSTREAM AND JAI LAL, JJ.

Relu Mal and others — Defendants —
Appellants.

v.

Mukandi Lal, Plaintiff and *others*,
Defendants — Respondents.

Second Appeal No. 901 of 1928, Decided on 11th March 1935, from preliminary decree of Dist. Judge, Ambala, D/. 31st January 1928.

(a) Custom (Punjab)—Evidence—Mutation records—Parties not agriculturists or of land-holding class—Mutation records are not important piece of evidence.

Where a custom clearly at variance with Hindu law is sought to be proved, no doubt documentary evidence is ordinarily of great importance, but where the parties are not agriculturists or an important land-holding class, the absence of copies of mutation records—the kind of documentary evidence commonly produced to prove custom—is not of prime significance. [P 610 C 1]

(b) Custom (Punjab) — Succession — Collaterals—Aggarwal Baniyas of Ambala District.

Among Aggarwal Baniyas of Ambala District, the collaterals succeed in preference to daughter. [P 610 C 1, 2]

M. C. Mahajan, *Shamair Chand* and
Qabul Chand — for Appellants.

Tek Chand — for Respondents.

Yashpal Gandhi — for Plaintiff
(Mt. Jhando).

Coldstream, J.—One Rama Nand, an Aggarwal Bania of Raipur in Tahsil Naraingarh, District Ambala, died in 1896 leaving a widow Mt. Chhaoni and a daughter Mt. Jhando. After Mt. Chhaoni's death Rama Nand's landed property which had been acquired by himself was recorded by mutation in the revenue records as having passed to his collaterals namely Mukandi, his nephew, Kasturi, Bichha and Ram Rattan, the grandsons of his brother Mula and Sawan Ram, the grandsons of his brother Girdhari. No land was recorded as the property of his daughter Jhando. In May 1925, four months after the mutation had been effected, Mukandi instituted the suit from which this appeal arises for partition of Rama Nand's property against Sawan Ram and the descendants of Mula. Sawan Ram admitted the claim. The descendants of Mula resisted the suit putting forward the plea that Rama Nand's property ought to have passed to his daughter Jhando in whose presence the plaintiffs could not take possession of any part of it. The main

issue in the case was whether the collaterals of Rama Nand were by custom entitled to succeed to his property in preference to his daughter. Mt. Jhando, when she was impleaded as a defendant, after first admitting in her jawab-i-dawa that the defendants were entitled to the property, went on to state that she was her father's heir. On the evidence produced by the parties the Senior Subordinate Judge, Ambala, decided that the special custom pleaded by the plaintiff had been proved and gave a decree for partition of eight pieces of house property and Rama Nand's share in the ancestral haveli. Mt. Jhando and the descendants of Mula preferred appeals to the District Judge of Ambala. The appeals were dismissed and the descendants of Mula have come to this Court on further appeal, a certificate under S. 41, Punjab Courts Act, having been granted by the District Judge.

It is contended before us by appellants' counsel that the onus lay heavily upon plaintiff to show that the parties followed the special custom pleaded and that the evidence on the record upon which the lower Courts have relied is wholly inadequate to justify a finding in favour of a custom clearly at variance with Hindu law which is ordinarily followed by the parties in matters of succession. He has referred us to a number of rulings in which the evidence produced has been held insufficient by the Indian Courts to establish the customs pleaded by the parties, including some which have stressed the importance of documentary evidence in such cases. These judgments however are not in my opinion relevant. It is for the Court to decide in each case upon the evidence before it what has and what has not been proved. No doubt documentary evidence in such cases is ordinarily of great importance but in the present case where the parties are not agriculturists or an important land holding class, the absence of copies of mutation records—the kind of documentary evidence commonly produced to prove custom—is not of prime significance.

In the plaintiff's evidence reference was made to no less than 86 instances of succession among Aggarwal Banias of the District in support of the custom which he pleaded. The Senior Subordinate Judge had relied on 35 of these as supporting the plaintiff's case. The learned District

Judge however rejected 13 out of the 35 as, in his opinion, they did not afford any valuable indication of the custom in respect of self acquired property. The remaining 22 the learned Judge found were of assistance. Seven of these however had been attacked by the appellants' counsel on various grounds in some of which the learned District Judge found force. But even if these seven instances were eliminated, the remaining 15 provided in his opinion a sufficient quantum of proof to justify his concurrence in the finding of the Senior Subordinate Judge to the effect that the custom was proved. The evidence produced by the defendants on the other side was meagre. Five instances only were alleged in which a daughter had excluded collaterals. These were all found by the District Judge to be cases of gift or cases in which it was not clear whether the deceased had left any collaterals or not.

We have been taken through all the instances on which the lower appellate Court has relied and have referred to the evidence in support of them. Three of these, I think, do not help the appellants. In the case of Dwarka Das (No. 2 at p. 6 of the trial Court's judgment) it appears that there had been either a gift or the property had been forcibly appropriated by Tulsi. I can find no evidence in support of the instance of Rajji (No. 10). In the case of Raja Ram (No. 14 at p. 7 of the judgment) the property appears to have devolved by survivorship. There is however no reason for rejecting as either inadmissible or irrelevant the other instances accepted by the learned District Judge. The fact that the present appellants allowed themselves to be recorded as Rama Nand's successors without pointing out that Mt. Jhando was an heir seems to me to add considerable support to the plaintiffs' case. In my opinion the evidence in this case justified the Courts below in finding it established that the parties followed custom and that according to their custom the collaterals were entitled to succeed to Rama Nand's property. I would accordingly dismiss the appeal with costs.

Jai Lal, J. — I agree.

K.B./A.K.

Appeal dismissed.

A. I. R. 1937 Lahore 611

JAI LAL, J.

Mai Chand — Insolvent — Petitioner.

v.

Official Receiver, Ferozepore and another — Opposite Parties.

Civil Revn. Petn. No. 422 of 1936,
Decided on 7th December 1936, from
order of Addl. Dist. Judge, Ferozepore,
D/- 29th February 1936.

Provincial Insolvency Act (1920), S. 68—
Application under, is directed against action
of Receiver—Purchaser from Receiver is not
necessary party and his name need not be
mentioned at heading of application—S. 22,
Lim. Act, does not apply to such application.

The proceedings under S. 68, Provincial Insol-
vency Act, are more akin to an appeal than to a
suit and S. 22, Limitation Act, cannot apply to
them. It is not incumbent upon an applicant in
an application under S. 68 to name certain par-
ties as applicants and others as respondents
formally at the heading of the application. The
phraseology of S. 68 negatives such a necessity.
The application is directed against an action of
the Official Receiver and normally he is the only
necessary party to be heard against the applica-
tion. But the Court may hear other parties who
are interested, as for instance, a purchaser from
the Official Receiver. But it is not necessary that
the purchaser should be formally named as a
party at the heading of the application.

[P 611 C 2]

R. P. Khosla — for Petitioner.*Nihal Singh* — for Opposite Parties.

Order.—The petitioner was adjudicated
an insolvent and his house was sold by
the Official Receiver in whom his estate
vested. Within a week of the sale he
made an application to the Insolvency
Judge stating that his house had been
illegally sold by the Official Receiver to
one Chhog Mal. It is not necessary to
recite the grounds on which the sale was
alleged to be illegal. The proceedings
remained pending in the Court of the
Insolvency Judge for about a year when
an objection was raised, by the Official
Receiver apparently that the auction-
purchaser had not been made a party to
the application. The Judge thereupon
made the auction-purchaser a party, and
on this being done an objection was raised
that the application was barred by time,
on the ground that it must be deemed to
have been made on the day when the
auction-purchaser was impleaded as a
party. This objection has found favour
with in both the Courts below and the
application has been dismissed as barred
by time.

In my opinion the order dismissing
the application cannot be sustained.
According to S. 68, Provincial Insolvency
Act—and this application was expressly
made under S. 68—the insolvent or any
creditor or any other person aggrieved by
any act or decision of the Receiver, may
apply to the Court within 21 days from
the date of the act or decision complained
of and the Court may confirm, reverse or
modify the act or decision complained of,
and make such order as it may think fit.
The proceedings under this section are
more akin to an appeal than to a suit and
the provisions of S. 22, Lim. Act, by refer-
ence to which this application has been
dismissed, have no bearing on the question.
There is no law which requires that
certain parties should be formally men-
tioned as respondents in an application
under S. 68. It appears that the petitioner
was adjudicated insolvent on the appli-
cation of one of his creditors and the
application is headed "Bharaj, creditor
versus Mai Chand, the insolvent." In the
body of the application it was stated that
the Official Receiver had sold the property
to one Chhog Mal, another creditor. Full
information, therefore, was before the
Court and no law has been referred to
which makes it incumbent on an applica-
tion under S. 68, Provincial Insolvency Act,
to name certain parties as applicants and
others as respondents formally at the
heading of the application. The phraseo-
logy of S. 68 negatives such a necessity.
The application is directed against an
action of the Official Receiver and nor-
mally he is the only necessary party to
be heard against the application. But the
Court may hear other parties who are
interested, as for instance, a purchaser in
a case like this. But it is not, in my opi-
nion, necessary that the purchaser should
be formally named as a party at the
heading of the application. I accept this
petition, set aside the orders of the Courts
below and send the case back to the Insol-
vency Judge with directions to decide the
application on the merits. No order as to
costs.

K.B./A.L.

Petition accepted.

A. I. R. 1937 Lahore 612

ADDISON AND DIN MOHAMMAD, JJ.

Mt. Chand Kaur and another —

Defendants — Appellants.

v.

Bhagwan Singh and another —

Plaintiffs — Respondents.

First Appeal No. 265 of 1936, Decided on 1st December 1936, from decree of Sub-Judge, First Class, Ferozepore, D/. 18th March 1936.

(a) Custom (Punjab) — Succession — Sidhu Jats of Fazilka Tahsil, Ferozepur District — Sonless widow of pre-deceased son succeeds to property that her husband would have inherited — Unchastity of widow does not entail forfeiture.

Among Sidhu Jats of Fazilka Tahsil, District Ferozepur, sonless widows of predeceased sons are entitled to succeed to the property that their husbands would have inherited. Unchastity of the widow does not entail forfeiture of her right to succeed to such property. [P 612 O 2; P 613 O 1]

(b) Custom (Punjab) — Ferozepur District — Marriage — Ceremony is essential to marriage — Jat dying before muklawa — His brother taking muklawa — Karewa marriage is constituted.

Marriage cannot be presumed from mere cohabitation without the performance of any ceremony. It makes no difference whether the female is a widow or unmarried. If, however, among the Jats a man dies before the muklawa or bringing-home-of-the-bride ceremony, and his brother takes the muklawa, this is considered tantamount to a karewa marriage. [P 613 O 1]

Achhru Ram and Kartar Singh —

for Appellants.

Ram Lal Anand I — for Respondents.

Judgment.—The parties are Jat Sidhu Barar of village Sangewala in the Fazilka Tahsil of the Ferozepore District. Hira Singh died on 16th June 1932, whereupon the revenue authorities mutated his land in favour of his two sons Bhagwan Singh and Bishen Singh, the plaintiffs, as well as of Mt. Chand Kaur and Mt. Sham Kaur, widows of Prem Singh and Nand Singh, predeceased sons of Hira Singh, the defendants, in equal quarter shares. The plaintiffs then instituted this suit for a declaration that the defendants were not entitled to succeed as the widows of Prem Singh and Nand Singh, as after their deaths the first re-married Bhagwan Singh plaintiff and the second re-married Bishen Singh plaintiff and thus lost their right of inheritance. In para. 8 of the plaint it was further stated that even if it were held that the karewa of the defendants did not take place with the plaintiffs,

still they had no right of inheritance as they were of bad character and unchaste. The defendants denied their re-marriage and the following issues were struck:

1. Whether plaintiff 1 brought the muklawa of defendant 1 and plaintiff 2 that of defendant 2 by way of karewa after the death of their respective first husbands, who were brothers of the plaintiffs; 2. If issue 1 is proved, whether defendants still had the right to succeed to the estate of their father-in-law? 3. If issue 1 is not proved and it is proved that children were born to the defendants after their first husband's deaths, whether the necessary inference would be that each or either was a bad character and unchaste? 4. If issue 3 is proved, whether defendants still have a right to succeed to their father-in-law's estate? 5. On disproof of issues 1 and 3 whether the two defendants are not entitled to succeed Hira Singh in view of the fact that their husbands predeceased Hira Singh? The trial Judge held that the plaintiffs did bring the muklawas of the defendants after the death of their first husbands and that this amounted to a karewa marriage amongst these Jats (issue 1). As regards issue 2, he held that as they had re-married, they had forfeited their right to succeed as widows of their first husbands. The other issues were not decided. On issue 5 no evidence was led, but the answer to question No. 39 of the Customary law of Ferozepore District compiled at the revised settlement in 1914 lays down that:

The surviving sons and the grandsons as representing their deceased fathers inherit the property; the same applies to sonless widowed daughters-in-law and grand-daughters-in-law. Grandsons and widows succeed to the share that their deceased fathers or husbands would have inherited.

Under this answer many instances are given in the Customary Law. This means that sonless widows of predeceased sons do succeed and we so hold. As regards issues 3 and 4, the answer to question No. 47 is to the effect that:

As regards the question of unchastity, there seems to have sprung up a greater laxity. Most tribes now say that unchastity does not affect the widow's rights. The following groups, however, say that unchastity entails forfeiture—among Sikh Jats, Dhaliwals of Moga and Muktsar, Siddhus in Ferozepore, Gills and miscellaneous Jats in Moga and Sandhus and Khosas in Muktsar, and among other tribes Bodlas, Nipals and Obishtis in Fazilka, and in Ferozepore Pathans, Arains and Moghals.

Sidhu Jats are not amongst the exceptions recorded in Tahsil Fazilka. In the absence of any other evidence worthy of consideration, it follows that it must be held that unchastity of widows does not entail forfeiture. As regards issue 2, it is correct that if the widows re-married their deceased husbands' brothers, they would not be entitled to succeed. This leaves issue 1. In the discussion of it the trial Judge, when mentioning the evidence of the plaintiffs' witnesses at first, does not seem to have been favourably impressed with it (*see* discussion at the foot of pp. 43-44 of the paper book). He then went on to remark that the defendants refused to be medically examined by a lady doctor to establish that they had not given birth to children: but the fact that they did give birth to children has no bearing on the issue. He then remarked that neither party had produced any documentary evidence on this issue but that as regards defendant 2, Mt. Sham Kaur, the plaintiffs had produced seven witnesses, while the defendants had only produced two witnesses who gave direct evidence that Mt. Sham Kaur was not re-married by Bishen Singh. As regards Mt. Chand Kaur he remarked that the only witnesses, besides D. W. 1, who expressly stated that her muklawas were not taken by Bhagwan Singh, were defendants' witnesses 9 and 10, and he considered them unreliable. On the other hand, six witnesses of the plaintiffs had stated that they were present when Bhagwan Singh took her muklawas. In the circumstances he held that the plaintiff did take the muklawas of the defendants. The answer to question No. 26 of the Customary law is to the effect that:

Marriage cannot be presumed from mere cohabitation without the performance of any ceremony. It makes no difference whether the female is a widow or unmarried. If however among the Jats a man dies before the muklawas or bringing home-of-the-bride ceremony, and his brother takes the muklawas, this is considered tantamount to a karewa marriage.

No instances have been proved in this case; but a statement of the Customary law standing alone must be accepted in the absence of evidence. If therefore the two plaintiffs took the muklawas of the two defendants after their first husbands died, it must be held that there were karewa marriages between the plaintiffs and the defendants. Certain copies of Birth and Death Registers were put in

evidence, but we agree with the trial Judge that they establish nothing. We are far from being impressed however with the plaintiffs' evidence that they took the muklawas of the two defendants after their first husbands died. That evidence is most unconvincing. In fact, this is apparent from the plaint itself where an alternative claim was set up, namely, that if the karewa marriages were not established, still the widows had forfeited their rights of inheritance by their unchastity. Bhagwan Singh, plaintiff 1, as P. W. 13, stated that he was only 10 or 11 years old when he brought Mt. Chand Kaur home as his bride, whereas she was then 25 or 26 years old. This in itself seems impossible. He added that Mt. Chand Kaur was unchaste from the beginning and that he knew that she was unchaste before he took the 'barat' from her village to his. This is another remarkable circumstance. Similarly, Bishen Singh said that he was only 13 years old when he brought home Mt. Sham Kaur as his bride. Witness 1, Indar Singh, who is a lambardar has stated that his muklawas took place, but he could give no other instance of a muklawas of this nature. He could not say what other marriages he joined. Witness 3 for the plaintiffs is only a kamin. Witness 7 is a purohit but his evidence also does not appear to be reliable. Witnesses 11 and 12 of the plaintiffs belong to other villages.

On the other hand the witnesses examined on behalf of the defendants, some of whom come from Burj, the village of Mt. Chand Kaur, have stated that her muklawas were not taken by Bhagwan Singh. On the contrary the first husband Prem Singh took her muklawas and only died some two years after that. Mt. Sham Kaur comes from village Channun, and witnesses from that village have deposed that she was married to Nand Singh who took her muklawas. If this is so, then her muklawas could not be taken by Bishen Singh. In our opinion, there is no reason to disbelieve the statements of the defendants' witnesses while it would be easy for the plaintiffs to get a number of witnesses to allege that they took the muklawas of the two defendants after the deaths of their first husbands. Had this been done and these defendants been living as the wives of the plaintiffs, their names would never have been entered in the revenue papers as succeeding along with the plain-

tiffs as the widows of the husbands whom they undoubtedly were first married to. Nor would it have been necessary for the plaintiffs to set up an alternative case in their plaints that, even if the karewa marriages were not established, still the widows were not entitled to succeed by reason of their unchastity. On the record we have no hesitation in holding that it has not been established that the two plaintiffs took the muklawas of the two defendants. On the other hand it is quite clear that they did not do so. This disposes of the appeal which we accept and dismiss the suit with costs throughout.

K.B./A.L.

*Appeal allowed.***A. I. R. 1937 Lahore 614**

TEK CHAND, J.

Ghulam Muhammad — Plaintiff —
Appellant.

v.

Mt. Bakhtawaran — Defendant —
Respondent.

Second Appeal No. 120 of 1937, Decided on 20th April 1937, from decree of Dist. Judge, Campbellpur, D/- 30th November 1936.

Res judicata — Fraud — Application by defendant to set aside *ex parte* decree against him on ground of fraud in serving him—Application dismissed and so too appeal—Suit by such defendant on same ground for declaring *ex parte* decree as not binding on him—Such suit is not maintainable on principle of *res judicata*.

The defendant in a suit against him applied for setting aside the *ex parte* decree obtained against him on the ground of fraud in the service of summons on him in such suit. The application as well as the appeal against it were dismissed. The defendant again brought a suit on the same ground :

Held : that such question could not be raised again in the subsequent suit as it was barred by *res judicata* and the suit as brought was not therefore maintainable : 29 Cal 395 (P C), *Disting.*; 29 All 212; 29 All 608 and A I R 1924 Pat 238, *Rel. on.* [P 615 C 1]

Madan Lal — for Appellant.

Shamair Chand — for Respondent.

Judgment. — This second appeal arises out of a suit instituted by Ghulam Muhammad, plaintiff-appellant, against Mt. Bakhtawaran, defendant-respondent, for a declaration to the effect that the *ex parte* decree obtained on 15th August 1933 by the defendant against him, for cancellation of her marriage, from the Court of the Subordinate Judge, Pindigheb, had

been obtained by fraud and was inoperative and not binding on him. The suit was decreed by the trial Court, but on appeal has been dismissed by the District Judge. The relevant facts are as follows: On 24th April 1933, Mt. Bakhtawaran brought a suit in the Court of the Subordinate Judge, Pindigheb, against her husband Ghulam Muhammad for dissolution of marriage, on the ground that the defendant was impotent. An *ex parte* decree was passed in the suit on 15th August 1933 dissolving the marriage. On 24th January 1935 Ghulam Muhammad filed an application under O. 9, R. 13, Civil P. C., for having the *ex parte* decree set aside alleging that it had been obtained against him by fraud, in that there had been no proper service on him nor had he any knowledge of the decree until a few days before the presentation of the application when his property was attached in execution of the decree for costs. The Subordinate Judge dismissed the application on 21st March 1935, holding that there had been due service of the process against Ghulam Muhammad before the *ex parte* decree was passed, and consequently the application which had been made seventeen months after the decree, was time-barred.

Ghulam Muhammad went in appeal to the District Judge, who upheld the order of the Subordinate Judge dismissing the application. He also found that the defendant was duly served and that his application to have the *ex parte* decree set aside was time-barred. The order dismissing the appeal is dated 23rd November 1935. On 31st January 1936 Ghulam Muhammad instituted the present suit alleging that the *ex parte* decree had been obtained against him by fraud in the service of the process, and that it be declared that it was not binding on him. The learned District Judge has held that the question as to whether any fraud had been committed in effecting service in the original suit on the plaintiff was *res judicata* by reason of the previous decision in the application under O. 9, R. 13, Civil P. C., and that the present suit was not maintainable on the same grounds.

Before me it has been contended on behalf of the plaintiff-appellant that the decision of the Courts below is wrong and in this connection reliance has been placed upon a decision of their Lordships of the

Privy Council in 29 Cal 395.¹ That case, however, is clearly distinguishable. There a suit had been instituted to set aside an ex parte decree and a sale in execution of such decree as illegal, fraudulent, and collusive, the allegations made in the plaint being an attack not on the regularity or sufficiency of the service of summons or the proceedings, but on the whole suit in which the ex parte decree was obtained as being a fraud from beginning to end. It was held that the suit was maintainable notwithstanding that the plaintiff had been unsuccessful in applications under S. 108 and S. 311 of the Code of 1882 to set aside the ex parte decree and the sale in execution, the question in the suit as a whole being such as could not be determined on applications under those sections.

A reference to the plaint in the present case, however, clearly shows that the only ground on which the ex parte decree is sought to be set aside is that there was fraud in the service of the process on the present plaintiff in the previous suit. No other ground of fraud, apart from the service of the process, has been alleged. This question has already been gone into and decided by two Courts adversely to the plaintiff upon applications under O. 9, R. 13, Civil P. C., and it cannot be agitated again in the suit. In this connection reference may be made to 29 All 212,² 29 All 608³ and 2 Pat 833,⁴ where it was held that where in a suit to set aside a decree upon the ground of fraud, the sole fraud alleged was with respect to service of summons on the defendant in the former suit, a fresh suit on the same ground was not maintainable. I hold, therefore, that the plaintiff's suit has been rightly dismissed. The appeal fails and is dismissed with costs.

W.D./A.L.

Appeal dismissed.

1. Khagendra Nath Mahata v. Pran Nath Roy, (1902) 29 Cal 395=29 I A 99=6 O W N 473=8 Sar 266 (P C).

2. 'Puran Chand v. Sheo Dat Rai, (1907) 29 All 212=4 A L J 51=1907 A W N 31.

3. Nidar Mal v. Naunak Husain, (1907) 29 All 608=1907 A W N 191=4 A L J 668.

4. Ramrup Ghoshain v. Mahabir Shah, A I R 1924 Pat 238=74 I O 825=2 Pat 833=5 P L T 66.

A. I. R. 1937 Lahore 615

ADDISON AND ABDUL RASHID, JJ.

afterwards

SKEMP, J.

Jani and another — Defendants —
Appellants.

v.

Abdul Karim, Plaintiff and others,
Defendants — Respondents.

Letters Patent Appeal No. 37 of 1936,
Decided on 5th May 1936, from order of
Skemp, J., D/- 3rd February 1936, in
Second Appeal No. 1693 of 1935.

(a) Civil P. C. (1908), O. 22, Rr. 4 and 5—
Applicability—Defendant dying after passing
of preliminary decree—O. 22, Rr. 4 and 5
do not apply.

Order 22, Rules 4 and 5, Civil P. C., do not
apply to a case where the defendant dies after the
passing of a preliminary decree as the rights of
the parties are already determined by the passing
of the preliminary decree: *A I R 1937 Lah 164*
and *A I R 1924 P C 198, Foll.* [P 616 C 1]

(b) Civil P. C. (1908), O. 22, R. 10 and O. 43,
R. 1 (1)—Applicability—Death of defendant
after passing of preliminary decree—Plaintiff
and others applying for being appointed as
legal representatives of deceased defendant—
Plaintiff appointed as legal representative—
Applications of other persons dismissed as
time barred—Appeal by such persons—O. 22,
R. 10 held applied to case as interest in prop-
erty devolved on plaintiff between passing
of preliminary decree and final decree—
Order, held, appealable under O. 43, R. 1 (1).

The plaintiff brought a suit for possession by
partition of $\frac{3}{4}$ th share in a house left by his
deceased uncle. One of the defendants died after
the passing of the preliminary decree; certain per-
sons including the plaintiff applied for being
appointed as legal representatives of the deceased.
The application of the plaintiff was accepted
while those of others were dismissed as time
barred. Those persons therefore filed an appeal
against the dismissal of their applications:

Held: that the acceptance of the plaintiff as
the legal representative of the deceased, resulted
in the devolution of an interest in the property on
the plaintiff during the pendency of the proceed-
ings between the passing of the preliminary
decree and the passing of the final decree. O. 22,
R. 10, Civil P. C., was therefore applicable to the
case and the order dismissing their application
was appealable under O. 43, R. 1 (1). [P 616 C 1, 2]

Chuni Lal Vohra and Kahan Chand—
for Appellants.

Hukam Chand Bhasin and S. M. Sadiq
— for Respondent (Plaintiff).

Abdul Rashid, J. — The material facts
of this case for the purposes of this appeal
may be shortly stated. One Abdul Karim
brought a suit for possession by partition
of a $\frac{3}{4}$ th share in certain house property
situate at Lahore left by his deceased

uncle Ali-ud-Din. He also sought a declaration that he was entitled to the same share in the agricultural land of Ali-ud-Din. The contesting defendants were Mt. Hayat Begam and Mt. Wazir Begam widows of Ali-ud-Din. On 21st July 1933, Abdul Karim was granted a preliminary decree for possession by partition of a $\frac{2}{3}$ th share in the house property, and a declaration for a $\frac{2}{3}$ th share in the landed property. Mt. Wazir Begam died on 22nd April 1934, and (1) Abdul Karim plaintiff, (2) Mt. Hayat Begam; (3) Feroze Din and others, and (4) Jani and others, applied to be made her legal representatives. The learned Subordinate Judge appointed Abdul Karim as the legal representative of Mt. Wazir Begam. The claims of the others were rejected as barred by time. Against this decision Jani and others preferred an appeal to this Court. This appeal was heard by a learned single Judge on 3rd February 1936. At the hearing a preliminary objection was taken on behalf of Abdul Karim respondent to the effect that the order of the learned Subordinate Judge was not appealable. This preliminary objection was upheld by the learned Judge and the appeal was dismissed with costs. Against this decision Jani and others have preferred the present appeal under Cl. 10, Letters Patent.

As mentioned above, the preliminary decree in this case was passed on 21st July 1933. Mt. Wazir Begam died on 22nd April 1934. The rights of the parties had, therefore, been determined by the passing of the preliminary decree before the death of Mt. Wazir Begam. The provisions of O. 22, Rr. 4 and 5, have, therefore, no applicability to the facts of the present case. By means of the preliminary decree Abdul Karim was declared owner of $\frac{2}{3}$ th of the property belonging to the deceased Ali-ud-Din. By means of the final decree Abdul Karim has been given possession of $\frac{2}{3}$ th of the house in his personal capacity and of $\frac{1}{3}$ th of the house in the capacity of a legal representative of Mt. Wazir Begam. The acceptance of Abdul Karim as the legal representative of Mt. Wazir Begam has resulted in the devolution of an interest in property on Abdul Karim during the pendency of the proceedings between the passing of the preliminary decree and the passing of the final decree. This devolution brings the case within the purview of O. 22, R. 10, Civil P. C. Under O. 43, R. 1 (i), Civil P. C. an order

under O. 22, R. 10 is appealable. In these circumstances Jani and others were competent to prefer an appeal to this Court against the decision of the learned Subordinate Judge rejecting their applications to be made the legal representatives of Mt. Wazir Begam. We are, therefore, of the opinion that the preliminary objection preferred on behalf of Abdul Karim before the learned Single Judge was unsustainable. For the reasons given above, we accept this appeal, set aside the order of the learned Single Judge dated 3rd February 1936, and remit the case to him for decision on the merits. The costs will abide the result.

[On remission of case for decision on merits the following judgment was delivered (27th January 1937)]

Skemp, J.—This is an appeal against an order appointing one Abdul Karim as legal representative of Mt. Wazir Begum. Abdul Karim had sued for possession by partition of $\frac{2}{3}$ th of certain house property left by his deceased uncle Ali-ud-Din and for a declaration that he was entitled to the same share in the agricultural land of Ali-ud-Din. The contesting defendants were Ali-ud-Din's widows, Mt. Hayat Begum and Mt. Wazir Begum. Abdul Karim obtained a preliminary decree. Subsequently Mt. Wazir Begum died and four sets of persons applied to be made her legal representatives in the suit for partition. The senior Subordinate Judge decided in favour of Abdul Karim. The other applicants accepted this decision except Jani and Makha, who are related to Wazir Begum on the maternal side. The senior Subordinate Judge found that their application was barred by time because it had been made more than 90 days after the death of Wazir Begum. They appealed and I held that no appeal lay. This order was set aside by a Letters Patent Bench which remitted the case to me for decision on the merits. Since the decision of the learned Subordinate Judge, a Bench of this Court has held that Rr. 3 and 4 of O. 22, Civil P. C., have no applicability to a case where the plaintiff in a mortgage suit dies after securing a preliminary decree, but before the passing of the final decree. This judgment is published in the December number of the Indian Law Reports, Lahore series, 1936, as 17 Lah 817.¹ The judgment follows

1. Hari Chand v. Dina Nath, A I R 1937 Lah 164=17 Lah 817=39 P L R 168.

4 Pat 61² which dealt with a preliminary partition decree; and in 17 Lah 817,¹ the learned Judges said:

There is no distinction in principle between a decree such as the one in 4 Pat 61² and a preliminary decree for sale in a mortgage suit.

Therefore the application of Jani and Makha was not barred by time. I, therefore, accept this appeal, set aside the order of the learned senior Subordinate Judge and direct him to pass another order as to who shall be recorded as the legal representative of Wazir Begum, after considering the claim made by Jani and Makha. Costs to abide the event.

K.B./A.L.

Appeal accepted.

2. Lachmi Narain v. Bal Makund, A I R 1924 P C 198=81 I C 747=4 Pat 61=51 I A 321 (P C).

A. I. R. 1937 Lahore 617

ABDUL RASHID, J.

Mohammad Aslam Khan — Convict —
Petitioner.

v.

Emperor.

Criminal Revn. Petn. No. 1275 of 1936, Decided on 6th November 1936, from order of Sess. Judge, Jhelum, D/- 31st August 1936.

Penal Code (1860), S. 498—Applicability—Accused enticing away complainant's wife and providing shelter to her—Providing such shelter by accused is inducement to complainant's wife to withhold herself from her husband—Accused is liable under S. 498.

Depriving the husband of his proper control over his wife for the purpose of illicit intercourse is the gist of the offence under S. 498, Penal Code, just as it is of the offence of taking away a wife under the same section, and a detention occasioning such deprivation may be brought about simply by the influence of allurements and blandishments. [P 618 C 1]

Where the accused entices away the wife of the complainant and provides her with shelter in another town, such providing of shelter by the accused for the wife of the complainant is an inducement to her to withhold herself from her husband. Such conduct on the part of the accused would be sufficient to bring him within the purview of S. 498, Penal Code: 4 M H C R 20, Rel. on; A I R 1933 Bom 489, Ref.

[P 618 C 1]

Nand Lal — for Petitioner.

Malik Barkat Ali — for Complainant.

Order. — The petitioner Mohammad Aslam Khan was sentenced to one year's rigorous imprisonment and a fine of Rs. 200, under the provisions of S. 498, Penal Code, by Mr. Mohammad Afzal

Khan, Magistrate, First Class, Jhelum. His appeal having been dismissed by the learned Sessions Judge, he has preferred a petition for revision to this Court. Briefly stated the case for the prosecution is that Mt. Fuqraj Begum, the wife of Risaldar Lal Khan, was enticed away by the petitioner on the night of 17th November in the absence of her husband. On his return he found her missing. He thought that his wife had gone to her parents. He, therefore, did not make a report at the Police Station. Later on he learnt that his wife had been taken away by Mohammad Aslam Khan. He made great efforts to recover his wife, sending deputations to the petitioner. The petitioner promised to return Mt. Fuqraj Begum, but as he did not carry out his undertaking, a complaint was filed by Risaldar Lal Khan.

The evidence with respect to the enticement by the petitioner and four others is not of a very reliable character. The learned Sessions Judge did not rely on this evidence, and acquitted four out of the five accused persons who had been convicted by the trial Court. The learned Judge mainly relied on the evidence of Lorasap Khan and Mir Muhammad Khan who had seen the petitioner living with Mt. Fuqraj Begum in a room in a Nanbai's shop at Lyallpur. I agree with the learned Sessions Judge that it has been established that Mt. Fuqraj Begum was living with the petitioner in a Nanbai's shop at Lyallpur. Mt. Fuqraj Begum had been carrying on an illicit intrigue with the petitioner for a long time before she left her husband's house. It was contended by the learned counsel for the petitioner that in view of this consideration it cannot be held that the petitioner was detaining her. Reference was made in this connexion to 58 Bom 88.¹ In that case during the absence of the husband his wife was taken away by her brother, and was married by natra marriage to the accused. While the wife was staying with the accused without any sort of compulsion or restraint, the complainant accompanied by two persons went to the house of the accused and found his wife there. On seeing them the accused came out with a dharia and threatened the complainant and his companions, who then returned to their village. On

1. Emperor v. Mahiji Fula, A I R 1933 Bom 489 =1933 Cr O 1593=147 I C 43=35 Cr L J 376 =58 Bom 88=35 Bom L R 1048.

these facts the accused was prosecuted for an offence under S. 498, Penal Code. It was held that the conduct of the accused amounted to an exclusion or obstruction of the husband, but that it did not amount to a detaining of the wife and, therefore, the accused was not guilty of an offence under S. 498, Penal Code. The following observations were made by Broomfield, J.:

The word 'detains' means by derivation and according to the ordinary use of language 'keep back'. But there may be various ways of keeping back. It need not necessarily be by physical force. It may be by persuasion or by allurements and blandishments. But the use of the word does require that there should be something in the nature of control or influence which can properly be described as a keeping back of the woman.

On behalf of the respondent reference was made to 4 M H C R 20,² 36 P W R 1913³ and A I R 1934 Sind 72.⁴ It was laid down in 4 M H C R 20² that the words of the section "conceals or detains," may, and were intended to be, applied to the enticing or inducing a wife to withhold or conceal herself from her husband and assisting her to do so as well as to physical restraint or prevention of her will or action. Depriving the husband of his proper control over his wife for the purpose of illicit intercourse is the gist of the offence just as it is of the offence of taking away a wife under the same section, and a detention occasioning such deprivation may be brought about simply by the influence of allurements and blandishments. In my opinion it is established in the present case that Mt. Fuqraj Begum was being provided with shelter in Lyallpur by the petitioner, and his providing a shelter for her was an inducement to her to withhold herself from her husband. This conduct on his part would be sufficient to bring him within the purview of S. 498, Penal Code.

In view of all the circumstances of the case I am of the opinion that the petitioner is entitled to a reduction of sentence. Mt. Fuqraj Begam was carrying on an illicit intrigue with him for a number of years, and it did not require a great deal of persuasion on the part of Mohammad Aslam Khan to induce Mt.

Fuqraj Begum to leave her home. In the circumstances a sentence of six months' rigorous imprisonment and a fine of Rs. 200 would fully meet the ends of justice. I, therefore, accept this petition for revision to the extent of reducing the sentence to six months' rigorous imprisonment. The sentence of fine imposed by the trial Court is maintained.

W.D./A.L.

Sentence reduced.

A. I. R. 1937 Lahore 618

SKEMP, J.

Harbans Singh—Creditor—Petitioner.
v.

Kahla -Singh, Insolvent and others,
Receivers — Opposite Parties.

Civil Revn. Petn. No. 628 of 1936,
Decided on 1st February 1937, from order
of Dist. Judge, Ludhiana, D/- 7th May
1936.

Provincial Insolvency Act (1920), Ss. 6 (b) and 7 — Scope — Debtor committing act of insolvency under S. 6 (b) — Court can adjudge such debtor insolvent — It has no jurisdiction to decide whether such debtor has sufficient property to pay his creditors.

Where the debtor transfers his property or any part thereof with the intent to defeat or delay his creditors, the Court can adjudge him insolvent if it finds that he has committed an act of insolvency. But the Court has no jurisdiction to decide whether such debtor owns sufficient property to pay his creditors. In determining whether such debtor should be adjudged insolvent or not, such decision is beside the mark. [P 619 O 1]

Qabul Chand for M. L. Puri —

for Petitioner.

Jhanda Singh — for Opposite Party

(Insolvent).

Order. — The insolvency Judge of Ludhiana adjudged Kahla Singh insolvent on the petition of his creditor, Harbans Singh to whom Kahla Singh owed a large amount (Rs. 1,500 principal and Rs. 255 costs) on account of a decree. The insolvency Court found that Kahla Singh had committed an act of insolvency in that on 1st June 1933, less than three months before the petition of Harbans Singh, Kahla Singh had sold mortgagee rights for a considerable sum to his real brother, Puran Singh. The trial Judge found that Kahla Singh did this mala fide in order to defeat the rights of Harbans Singh. In view of this finding he held that it was unnecessary that he should decide the second issue whether Kahla Singh owned sufficient property to pay his debts. Kahla

2. *In re Sundara Das Tevan*, (1868) 4 M H O R 20=1 Weir 571.

3. *Bansi Lal v. Emperor*, (1913) 36 P W R 1913 =21 I O 467=14 Or L J 595=319 P L R 1913.

4. *Abdul Kayum v. Emperor*, A I R 1934 Sind 72=1934 Cr O 625=151 I O 175=35 Or L J 1254=28 S L R 140.

Singh appealed, and the District Judge upheld the finding on the first issue, namely, that Kahla Singh acted as above in order to defeat and delay his creditors. But he accepted the appeal and set aside the order of adjudication on a finding that Kahla Singh was able to pay his debts. This finding was irrelevant. Under S. 7, Provincial Insolvency Act, a debtor who commits an act of insolvency may be adjudged insolvent. Under S. 6 (b) it is an act of insolvency if the debtor makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors. Therefore when the District Judge found that Kahla Singh had committed an act of insolvency, he had no jurisdiction to decide whether Kahla Singh owned sufficient property to pay his creditors. It was entirely beside the mark in determining that he ought to be adjudged or not.

I accept this revision, set aside the order of the learned District Judge and restore that of the insolvency Judge. The respondent is to pay the petitioner's costs throughout.

W.D./A.L.

Revision allowed.

*** A. I. R. 1937 Lahore 619**

DIN MOHAMMAD, J.

Ghulam Qadir — Convict — Appellant.
v.

Emperor.

Criminal Appeal No. 749 of 1936, Decided on 18th September 1936, from order of First Class, Magistrate, Sialkot, D/- 8th June 1936.

* Penal Code (1860), S. 307 — Scope — S. 307 applies even if no injury is caused — Intention precedes act and is to be proved independently of it — When intention is proved nature of act is immaterial.

Section 307, Penal Code, may apply even if no hurt is caused. The causing of hurt is merely an aggravating circumstance and it cannot, therefore, be reasonably argued that unless an injury sufficient in the ordinary course of nature to cause death is inflicted on the victim, the intention contemplated by S. 307 cannot be presumed. Under this section the intention precedes the act and is to be proved independently of the act, and not merely gathered from the consequences that ensue. All that is necessary to be established is the intention with which the act is done and if once that intention is established, the nature of the act will be immaterial: 15 Bom L R 991 and A I R 1935 Nag 177, Dissent. [P 620 C 1]

S. M. Iftikhar Ali — for Appellant.

Nazir Hussain — for the Crown.

Judgment.—Ghulam Qadir has been convicted under S. 307, I. P. C., and sentenced to five years' rigorous imprisonment. The case for the prosecution is that he was in love with one Mt. Barkat Bibi whom the trial Magistrate has described as young and attractive, and that after her marriage with Allah Rakha, their relations became strained. Ghulam Qadir was bent upon having her at any cost and the woman did not agree. On the day of the occurrence she was on a temporary visit to her parents' house when Ghulam Qadir went there armed with a toka and inflicted with it terrible wounds on her neck and jaw. Mt. Barkat Bibi has stated that, on two occasions before during her visit there, the accused had met her and had threatened to murder her if she did not agree to run away with him. Counsel for the appellant has, on the authority in 21 I C 881¹ and 155 I C 1014,² contended that the act of Ghulam Qadir does not fall under S. 307, I. P. C., inasmuch as none of the injuries inflicted by him was sufficient in the ordinary course of nature to cause death. With all respect to the learned Judges who have delivered those judgments, I am disposed to think that the construction placed by them upon S. 307, I. P. C., is erroneous. To bring the case within the purview of S. 307, I. P. C., it is not necessary that the injury in itself may necessarily be fatal. The material portion of the section reads as follows:

Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished; and, if hurt is caused to any person by such act, the offender shall be liable

To this section are appended four illustrations which throw a great deal of light on the intention of the Legislature in enacting this provision of law. The language of the section makes it clear that even if mere hurt is caused by an act which is done with such intention or knowledge and under such circumstances that if by that act death is caused, the offender will be guilty of murder, S. 307, I. P. C., will apply. We cannot read into the words of the section the condition laid down by the judgments cited above, as the scope of the section will then be

1. *Martin v. Emperor*, (1913) 15 Bom L R 991 = 21 I C 881 = 14 Cr L J 641.

2. *Emperor v. Balli*, A I R 1935 Nag 177 = 1935 Cr C 1028 = 155 I C 1014 = 36 Cr L J 854.

unjustifiably narrowed down. S. 307 may apply even if no hurt is caused. The causing of hurt is merely an aggravating circumstance and it cannot, therefore, be reasonably argued that unless an injury sufficient in the ordinary course of nature to cause death is inflicted on the victim, the intention contemplated by S. 307, I. P. C., cannot be presumed. Under this section the intention precedes the act and is to be proved independently of the act, and not merely gathered from the consequences that ensue. All that is necessary to be established is the intention with which the act is done and if once that intention is established, the nature of the act will be immaterial. I have no hesitation in holding, therefore, that the appellant has been rightly convicted. Counsel has further urged that the sentence passed on the appellant is excessive. In this also I do not agree with him. Two of the injuries were inflicted on the neck of Mt. Barkat Bibi and the third on her jaw and this evidently shows that the attack on her was not only murderous but most brutal. I therefore dismiss this appeal and confirm the sentence.

S.C./D.S.

Appeal dismissed.

* A. I. R. 1937 Lahore 620

COLDSTREAM AND DIN MOHAMMAD, JJ.

Allah Ditta — Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 609 of 1936, Decided on 27th August 1936, from order of Sess. Judge, Sheikhpura, D/- 24th March 1936.

* Evidence Act (1872), S. 27—Scope—Custody under S. 27 need not be formal arrest—Mere suspect not formally charged with offence or arrested under Criminal P. C.—Presence of such person with police under some restraint amounts to custody under S. 27—Statement of such person in such circumstances leading to discovery of any matters is admissible under S. 27.

In order that a statement under S. 27, Evidence Act, be admissible the maker of the statement should be in the custody of the police but that custody need not be a formal arrest. In the case of mere suspects however who have not been formally charged with any offence or arrested under any section of the Criminal Procedure Code, their presence with the police under some restraint amounts to 'custody' which is contemplated by S. 27 of the Act. If a statement made by a person in such circumstances leads to the discovery of any matter it is admissible in evidence under S. 27 : *Case law discussed.* [P 623 C 2]

V. N. Sethi — for the Crown.

Din Mohammad, J.—Allah Ditta was tried before the Sessions Judge of Lyallpur, for the murder of his servant Fazal and sentenced to transportation for life. He has appealed through jail and the Local Government has presented a petition for the imposition of the sentence of death on him. The facts of this case are very peculiar. The story for the prosecution is that the appellant was inimical to one Wadhawa Singh and that he brought about the death of his servant Fazal merely with a view to fasten the guilt on his enemy. The occurrence was reported to the police by the appellant himself on the 26th November at 6 A. M. He was then accompanied by the lambardar and chaukidar of his village. He stated there that he originally belonged to a village in the District of Gujranwala but shifted to Bedadpur village seven or eight years before and took the land of Mohammad Hussain lambardar for cultivation. Three occurrences had taken place at his well during the two years prior to this murder. On the first occasion his four cattle were stolen, on the second occasion a bullock of his was stolen and on the third nothing was stolen as he happened to awake at the time when the theft was being committed. On all these occasions Wadhawa Singh was suspected. Later Wadhawa Singh was challaned under S. 110, Criminal P. C., and he appeared as a witness against him in spite of the fact that Wadhawa Singh had asked him to desist. Wadhawa Singh threatened to harm him and he reported the fact to the local zaildar, sofedposh and other village notables.

So far as the actual affair is concerned, the appellant stated that he was sleeping at his well along with his servant Nabi Bakhsh and had bolted the door of the haveli from inside. One Sohni came and opened the door from outside and when he left, the door was shut but the appellant forgot to bolt it. Nabi Bakhsh spread his bed under a pipal tree at a place where the compound wall was not very high. About midnight while he was half awake he heard the barking of the dog and on getting up he noticed four persons standing on the boundary of a sinji field near the wall where his servant was sleeping. On this he ran to the village and awakened the sofedposh, lambardar, chowkidar and other persons and informed them of what he had seen. They all accompanied him to the spot and on entering the haveli

they found Nabi Bakhsh lying murdered. A search was made but no clue was found. The appellant wound up his report by saying that he suspected that Wadhawa Singh, lambardar of Sidham, had either committed the murder himself or had got it committed by somebody else under the impression that it was he who was sleeping there and not his servant. It may be remarked here that the name of the deceased was not Nabi Baksh but Fazal. The police took the investigation into hand and it appears that they did not believe the story as related above from the very start. The appellant had on 22nd October 1935 and on 6th November 1935 submitted two applications to the Superintendent of Police, Sheikhpura, against Wadhawa Singh, Barkat Shah, Allah Bakhsh, Hussain and Dulla asking for protection against these persons on the ground that they were inimically disposed towards him and that he seriously apprehended that either he or his servant would be murdered by them or that he would be implicated in some false case. Taking their clue from these applications the police sent for these persons but did not take any further action against them. On the 28th it is alleged that the appellant pointed out a place in his cattle pen from which a bloodstained toka was unearthed and another place on the roof of his shed from which a bloodstained chadar of khadar was taken possession of. After having made these recoveries, the police came to the conclusion that the murder of Fazal had been committed by the appellant himself and not by any outsider and that he had manoeuvred the whole affair with a view falsely to implicate his enemies.

The post mortem examination was performed by Dr. Narain Das who found as many as 13 incised wounds on the body of Fazal, most of which were located on or near the head. His vertebral column was cut and so were the large blood vessels of the left side of the neck. The appellant consistently denied the allegations made against him and adhered to the report that he had originally made. The Sessions Judge has based the conviction of the appellant on the following grounds: 1. The discovery of the bloodstained toka and the chadar at the instance of the appellant. 2. The previous mention of the death of his servant in the two petitions submitted to the Superintendent of Police. 3. The failure of the appellant to raise an alarm

in the haveli itself and his studious attempt to invoke the help of his co-villagers in a manner which involved delay. 4. The absence of any other person at the well on the fateful night. 5. The absence of footprints of the alleged trespassers and the absence of any mark of trampling in the sinji field, and 6. The futility of this murder at the hands of thieves when no theft at all was attempted.

I may say at once that I am not at all impressed by reasons Nos. 2 to 6. Even if all these circumstances were present, they would be equally consistent with the appellant's innocence as with his guilt. Taking the petitions first. It is not denied that Wadhawa Singh and others were proceeded against under S. 110, Criminal P. C., nor is it disputed that the appellant had appeared as a witness against them. It is also not denied that thefts had been committed at the appellant's well. The submission of these petitions to the Superintendent of Police therefore will not raise any presumption of guilt against him. A man may feel genuinely apprehensive of his enemies and may seek protection from the police against their machinations and if a person conducts himself in this manner it cannot be argued that he betrays any guilty conscience. Similarly, the failure of the accused to raise a hue and cry in the haveli itself will not justify any inference of guilt against him. Every person has his own method of doing things and it is conceivable that the appellant having been terrified by the very sight of four strangers outside his haveli may not have considered it safe to make any noise there and may have tried to save himself by slipping away unnoticed. There is nothing on the record to show that there were any persons in the neighbourhood whom his cries could attract and this may further explain his keeping quiet at the moment.

The absence of any other person at the well may as well have been utilized by the offenders as by the appellant himself. There is some indication on the record to show that some efforts were made by the party of Wadhawa Singh to assure themselves of the absence of other persons at the well and the fact of the appellant being alone with his servant will not therefore advance the case for the prosecution any further. The absence of the offenders' tracks at the place where they were stated to have been standing at the

time when the appellant saw them is also immaterial. It was mentioned at the very first instance by the appellant that a large number of persons had accompanied him from the village and had even conducted a search to find out who the offenders were and nobody would have expected any tracks of the culprits on the borders of the sinji field in these circumstances. They must have been obliterated even if they were there, and the absence of these tracks therefore does not affect the case one way or the other. The last ground stated by the Sessions Judge also does not appeal to me to be sound. The offenders may not have intended to commit any theft at all and it is quite possible that their object may have been to commit the murder of the appellant himself and that they committed the murder of the servant under the mistaken notion that he was the appellant. In the body of the judgment the Sessions Judge has referred to one other matter which he considered very improbable if Fazal had been murdered by strangers. He has remarked as follows:

I however attach great importance to the fact that there were no cuts on the bedding or on the charpoy. This would certainly show that the assailants were not outsiders and that some one who had time enough to control the victim had killed him by holding him down to a particular point on the charpoy.

I have considered this matter and am not disposed to agree with the Sessions Judge. The argument employed by the Sessions Judge would rather help the appellant than harm him. It is difficult for one man to control his victim in the manner in which he is alleged to have done and the very fact that the injuries found on the body of the deceased indicated that he had been injured when he had been fully overpowered points to the conclusion that his assailants were more than one. There only remains to be considered now whether the evidence of the recovery of the bloodstained toka and chadar at the instance of the appellant is sufficient to justify the inference of his guilt. Counsel for the defence has attacked this evidence on three grounds: (a) That this evidence is legally inadmissible. (b) That it is self-contradictory, and (c) that it is unreliable.

Counsel contends that the statement attributed to the appellant is said to have been made at a time when he was not in the custody of the police and that therefore it cannot be admitted under S. 27,

Evidence Act. The only other section that applies to a statement made to an investigating officer is S. 162, Criminal P. O., and as it bars the use of such statement for any purpose, the information alleged to have been supplied by the appellant leading to the discovery of the toka and the chadar cannot be legally admitted. He has relied among other authorities on 6 All 509,¹ 59 Cal 1040² and 7 Pat 411.³ In 6 All 509¹ nothing has been said which relates to the facts of the present case. In 59 Cal 1040,² it was held by a Division Bench of the Calcutta High Court that an information not received from an accused person in the custody of a police officer or received from an accused person not in the custody of a police officer even if it leads to the discovery of a fact relating to the crime is inadmissible in evidence under S. 27, Evidence Act. In the judgment delivered by Sir George Rankin it was even suggested that the law should be amended as it led to absurd results. In 7 Pat 411³ a husband who had fatally assaulted his wife immediately went to the police station and stated among other things that he went into his room and finding his wife sitting there, wounded her. The question arose whether this statement was admissible against him. It was held by a Division Bench of the Patna High Court that as the informant had not, up to the time of making the statement set out above, been accused of an offence, he was not at that time a person accused of an offence within the meaning of S. 27, Evidence Act, and hence his statement was not admissible under that section. It may be remarked here that in 12 Pat 241⁴ this decision was considered and although the point at issue before us was not at issue there, the learned Judges appear to have remarked that if a person makes a statement to a police officer as such he submits to the custody of the officer within the meaning of S. 46 (1), Criminal P. O., and is then in the custody of a police officer as contemplated by S. 27, Evidence Act.

1. Queen-Empress v. Babulal, (1884) 6 All 509 (F B).

2. Durlaw Namasudra v. Emperor, A I R 1932 Cal 297=1932 Or O 266=138 I O 116=33 Or L J 546=59 Cal 1040=36 O W N 373.

3. Deonandan Dusadh v. Emperor, A I R 1928 Pat 491=111 I O 118=29 Or L J 790=7 Pat 411=9 P L T 533.

4. Santoki Beldar v. Emperor, A I R 1933 Pat 149=1933 Or O 404=142 I O 474=34 Or L J 349=12 Pat 241=14 P L T 82 (S B).

As against this counsel for the Crown has relied on 7 Lah 84,⁵ 54 Cal 237,⁶ 15 Lah 310,⁷ 49 Cal 167⁸ and A I R 1933 Cal 148.⁹ In 7 Lah 84⁵, a Bench of this Court presided over by Sir Shadi Lal, late C.J. and Sir James Addison, J. held that S. 27 did not apply to the statement of an accused person and that in its application it was confined to those persons only who were examined as witnesses by the investigating officer. This view was adopted by the Calcutta High Court in 54 Cal 237.⁶ In 15 Lah 310⁷ it was held that, in order to make statements admissible in evidence under S. 27, Evidence Act, it was not necessary that the accused should be under a formal arrest and that as soon as an accused person or a suspect came into the hands of a police officer, he was no longer at liberty and was therefore in custody within the meaning of S. 27, Evidence Act. In A I R 1933 Cal 148⁹, where a police officer interviewed an accused person and walked with him to the place where the accused pointed out the spot where an incriminating article might be found, although the accused had not been arrested by that time, it was held that he was in police custody within the meaning of S. 27, Evidence Act. In 49 Cal 167⁸ it was held that the submission of a person to the custody of a police officer within the terms of S. 46 (1), Criminal P. C., is "custody" within the meaning of S. 27, Evidence Act.

Counsel further contended that even if the statement could not be used as a confession it could be used as an admission as laid down in A I R 1932 Lah 488.¹⁰ That case related to an oral confession made to a Magistrate which was held admissible under S. 26, Evidence Act, and is therefore not relevant to the present case.

From the judgments referred to above, the following principles can be deduced : (a) that in order that a statement under S. 27, Evidence Act, be admissible the maker of the statement should be in the custody of the police but that custody need not be a formal arrest ; (b) in the case of mere suspects who have not been formally charged with any offence or arrested under any section of the Criminal Procedure Code, their presence with the police under some restraint amounts to "custody" which is contemplated by S. 27, Evidence Act ; and (c) that if a statement made by a person in the above circumstances leads to the discovery of any matter, it is admissible. I am in respectful agreement with these principles. Besides, with all respect, I may say that some of the judgments relied on by counsel for the defence do not appear to have taken into consideration other provisions of the Evidence Act under which a statement followed by a discovery not covered by S. 27, Evidence Act, may be admissible. Even if a mere statement be ruled out of consideration on the ground that a person was not in the custody of the police, the act of his pointing out a place from which a certain incriminating article is discovered or the act of his himself producing an incriminating article can in my view be proved under various other sections of the Evidence Act.

In the light of the principles enunciated above, the statement before us satisfies all the requirements of law but I need not expatiate on this point any further as in this case I hold, agreeing with the counsel for the defence, that the evidence of recovery is not of such a nature as to be a safe basis for the conviction of the appellant. In the first place, the prosecution witnesses are not agreed as to the exact place from which the bloodstained toka was recovered. In the list of recovery made at the time, the place is described as a cattle pen. In the statement of Bahawal Bakhsh Sofedposh the toka is said to have been recovered from a kotha to the south of the well. The Sub-Inspector however states that the toka was recovered from the south of the eastern corner of a Kur marked "P" on the plan which appears to be situated towards the north of the well. This discrepancy might not have been material but for the fact that the southern kotha has no door frame and that even if the toka was recovered from this kotha it

5. Rannun v. Emperor, A I R 1926 Lah 88=94 I C 901=27 Cr L J 709=7 Lah 84=27 P L R 583.

6. Azimaddi v. Emperor, A I R 1927 Cal 17=99 I C 227=28 Cr L J 99=54 Cal 237=44 C L J 253.

7. Mt. Aishan Bibi v. Emperor, A I R 1934 Lah 150=1934 Cr C 330=152 I C 206=31 Cr L J 14=37 P L R 67=15 Lah 310.

8. Superintendent and Legal Remembrancer of Legal Affairs, Bengal v. Lalit Mohan, A I R 1922 Cal 342=62 I C 578=22 Cr L J 562=49 Cal 167=25 C W N 788.

9. Sudam Chandra v. Emperor, A I R 1933 Cal 148=1933 Cr C 225=144 I C 74=34 Cr L J 675.

10. Sucha Singh v. Emperor, A I R 1932 Lah 488=1932 Cr C 626=142 I C 699=34 P L R 405.

will not conclusively establish the guilt of the appellant as the place being accessible, anybody could plant the toka there. The place from which the bloodstained chaddar is said to have been recovered is admittedly on the roof of a shed and that fact therefore would detract from the value of this recovery. These discoveries are said to have been made on the 28th and they lose much of their value in view of the fact that as is evident from the inquest report the investigating agency had from the very start suspected the story of the appellant and conducted the investigation on those lines.

There are other circumstances also on the record which tend to show that the possibility of the truth of the report made by the appellant was greater than that of its falsehood. The prosecution themselves have produced Kikka and Kasim Ali two wayfarers (P. Ws. 11 and 12) who have stated that they were anxious to pass their night at the appellant's well but he insisted on their spending the night at his house. Barkat Shah has stated that these two witnesses belong to his village and that he has known them since his childhood. Taking into consideration the fact that this Barkat Shah was one of those persons whom the appellant had described as his enemies in the petitions submitted to the Superintendent of Police, the visit of Barkat Shah's friends on the fateful night at the well and their anxiety to spend the night at the well leads one to infer that they had gone there at the instance of those persons who had planned to commit an offence at the well and who wanted to be sure that none but their friends should be there. It is noteworthy that the police took no steps to ascertain the guilt of those persons whom the appellant had suspected and were satisfied of their innocence merely on their asserting it and let them off without making any inquiry whatsoever into the matter. In view of all these circumstances, I am driven to the conclusion that the case against the appellant is not free from doubt. I would therefore give him the benefit of this doubt and acquit him. The petition of the Local Government for enhancement of the appellant's sentence would stand automatically dismissed.

Coldstream, J.—I agree.

W.D./A.L.

Appeal allowed.

A. I. R. 1937 Lahore 624

ABDUL RASHID, J.

Ram Rakha — Convict — Petitioner.
v.

Emperor.

Criminal Revn. No. 1546 of 1936, Decided on 15th January 1937, from order of Sess. Judge, Rawalpindi, D/- 21st September 1936.

Penal Code (1860), S. 211—Scope—'False charge'—False petition to Superintendent of Police for protection from oppression of head-constable does not amount to false charge.

For an allegation to amount to a false charge as contemplated under S. 211, Penal Code, it must be made with the intention and object of setting the criminal law in motion. The charge must be embodied either in a complaint to the Magistrate or in a report of cognizable offence to a Police Officer. A false petition to the Superintendent of Police praying for protection from oppression of a head-constable which may be effected by some departmental action, does not amount to such a false charge: *A I R 1932 Cal 511; A I R 1932 Lah 246; A I R 1917 All 223* and *A I R 1923 Oudh 4, Rel. on.* [P 625 O 2]

B. A. Cooper and Ajit Ram — for
Petitioner.

A. G. Maurice for Government Advocate
— for the Crown.

Nand Lal Ahuja — for Complainant
(Lajpat Rai).

Order.—The petitioner, Ram Rakha Mal, was convicted under S. 211, I. P. C., by Mr. Nathu Ram, Magistrate, First Class, Rawalpindi, by his order dated 13th August 1936, and was sentenced to imprisonment for one day and a fine of Rs. 200. His appeal having been dismissed by the learned Sessions Judge, he has preferred a petition for revision to this Court. The learned Sessions Judge has also sent up the case to this Court, under S. 438, Criminal P. C., with a recommendation that the sentence awarded to Ram Rakha Mal may be enhanced to six months' rigorous imprisonment and a fine of Rs. 200. Briefly stated, the case for the prosecution is that Ram Rakha Mal petitioner, sent three complaints in identical terms against Lajpat Rai, head-constable, to the Deputy Inspector-General of Police, Rawalpindi, Inspector-General of Police, Punjab, and the Superintendent of Police, Rawalpindi District. The allegations in these complaints were that the petitioner and Lajpat Rai were enemies owing to previous litigation, and the petitioner had instituted a criminal complaint against the relations of Lajpat Rai, which

was pending in the Court of the Bench of Honorary Magistrates at Gujar Khan, that on 4th April 1936, when the case came up for hearing Lajpat Rai met the petitioner in Court and told him to withdraw the case he had launched against his relatives or else he would get him murdered by some Pathans at Hazro. The concluding paragraph of the complaint is as follows:

It is requested that as the said Lajpat Rai is serving the police near his home and as he is trying to spoil a cognizable offence and is intending to get me murdered, action may kindly be taken to protect the case and my life as well as property, for which act of kindness I shall ever pray for your long life and prosperity.

A departmental inquiry was started by the police on these complaints and the complaints were found to be false. After the conclusion of the departmental inquiry Lajpat Rai presented a complaint under S. 211, I. P. C., which resulted in the conviction of the petitioner. After going through the evidence on the record I agree with the finding of the learned Sessions Judge that these complaints were in fact sent by the petitioner to the Deputy Inspector-General of Police, Rawalpindi, Inspector-General of Police, Punjab and the Superintendent of Police, Rawalpindi District. I am also of the opinion that the contents of these complaints were false.

The sole question for consideration therefore is whether the present case falls within the purview of S. 211, I. P. C. It was contended by the learned counsel for the petitioner that the petitioner did not institute or cause to be instituted any criminal proceedings against Lajpat Rai, head-constable. It was further urged that the sending of the complaints in question to the Police Officers concerned did not amount to falsely charging Lajpat Rai with having committed an offence within the meaning of S. 211, I. P. C., as the false charge of an offence should be made to a Court or an officer having jurisdiction to investigate. The offence of criminal intimidation as defined in S. 503, I. P. C., is a non-cognizable offence. The Superintendent of Police, Rawalpindi, or the other Police Officers concerned could not therefore order investigation with regard to an offence under Ss. 503/506, I. P. C., on the complaints sent to them by the petitioner. Reference was made in this connexion to a Division Bench ruling of the 1937 L/79 & 80

Calcutta High Court reported in 59 Cal 334,¹ where it was held that :

For an allegation to amount to a false charge, as contemplated under S. 211, I. P. C., it must be made with the intention and object of setting the criminal law in motion. A false petition to the Superintendent of Police praying for the protection of the petitioners from the oppression of a Sub-Inspector, which may be effected by some departmental action, does not amount to such a false charge.

In the reported case allegations of extortion and bribery were made against a Police Sub-Inspector, and the Calcutta High Court held that as these offences were non-cognizable, the false charge of bribery and extortion that was made to the Superintendent of Police did not amount to a false charge as contemplated in S. 211, I. P. C. It was observed in 13 Lah 568² that:

The word 'charge' 'as used in S. 211, Penal Code, implies that the allegation or accusation of an offence against another should be made to a person, or tribunal, competent to take action against the persons complained against, and the test is whether the person making the charge intended to set the criminal law in motion against the person charged.

In 39 All 715³ it was held that:

In order to constitute an offence defined by S. 211, I. P. C., the 'charge' therein alluded to must be made to an officer or to a Court who has power to investigate and send it for trial, and it must be an accusation made with the intention to set the law in motion.

In 23 Cr L J 641⁴ it was laid down that:

The words 'falsely charges' in S. 211, Penal Code, must be restricted to a charge made to some person in authority, that is to say, to some person who is in a position to get the offender punished. The charge must be embodied either in a complaint to a Magistrate or in a report of a cognizable offence to a Police Officer.

In the present case the complaints sent by the petitioner to the Police Officers did not amount to a report of a cognizable offence. The complaints were not sent to any Magistrate who could take action under S. 506, I. P. C. The prayer in the complaints of the petitioner seems to show that the object of the complaints was to get Lajpat Rai, head-constable, transferred from Rawalpindi so that he may

1. Abdul Hakim Khan v. Emperor, A I R 1932 Cal 511=1932 Cr O 440=138 I C 551=33 Cr L J 631=59 Cal 334.
2. Bhawani Sahai v. Emperor, A I R 1932 Lah 246=1932 Cr O 258=137 I C 157=33 Cr L J 409=13 Lah 568=33 P L R 174.
3. Mathura Prasad v. Emperor, A I R 1917 All 223=42 I C 761=18 Cr L J 1017=39 All 715 15 A L J 767.
4. Gaya Barhai v. Emperor, A I R 1923 Oudh 4 =69 I C 81=23 Cr L J 641=26 O C 44.

not be able to spoil a cognizable case pending in Gujar Khan. In view of the authorities quoted above, I am of the opinion that the present case does not fall within the purview of S. 211, I. P. C. The next question for consideration is whether the conviction of the petitioner could be altered to one under S. 182, I. P. C. S. 182, I. P. C., is one of the sections mentioned in S. 195 (1) (a), Criminal P. C., and according to that section no cognizance of an offence under S. 182 can be taken except on the complaint in writing of the public servant before whom the false information is given or some other public servant to whom he is subordinate. In the present case none of the Police Officers to whom the complaint was addressed by the petitioner has taken the trouble of presenting a complaint against him as required by S. 195, Criminal P. C. For the reasons given above, I accept this petition for revision and acquit the petitioner. The fine, if already paid, shall be refunded.

S.C./D.S.

*Revision allowed.***A. I. R. 1937 Lahore 626****TEK CHAND AND ABDUL RASHID, JJ.**

Roshan Lal and others — Plaintiffs—
Appellants.

v.

Samar Nath, Contesting Defendant and
others, Non-contesting Defendants —
Respondents.

First Appeal No. 337 of 1936, Decided on 10th June 1937, from decree of Sub-Judge, First Class, Amritsar, D/- 22nd June 1936.

(a) Evidence Act (1872), S. 114 — Adoption ceremonies—Presumption — Person enjoying status of adopted son for nearly half century and treated as such all his life—Presumption in absence of anything contrary is that all necessary ceremonies were duly and regularly performed at time of adoption.

When a person has for nearly half a century enjoyed the status of an adopted son and has been treated as such all his life and at this distance of time it is not possible to get witnesses who were actually present at the time and could depose to the performance of the ceremony, in such circumstances in the absence of anything to indicate the contrary, it must be presumed that all the necessary ceremonies were duly and regularly performed at the time of his adoption : 27 All 271 (P C); A I R 1923 Cal 18 and A I R 1921 Cal 647, Rel. on. [P 628 O 1]

(b) Custom (Punjab)—Adoption—Eligibility — Daughter's son — Among high caste non-agricultural Hindus, resident in towns such

as khatri of Amritsar, daughter's son can be validly adopted — Such adoption has full effect and adopted son severs his connexion with natural family and becomes male descendant of adoptive father.

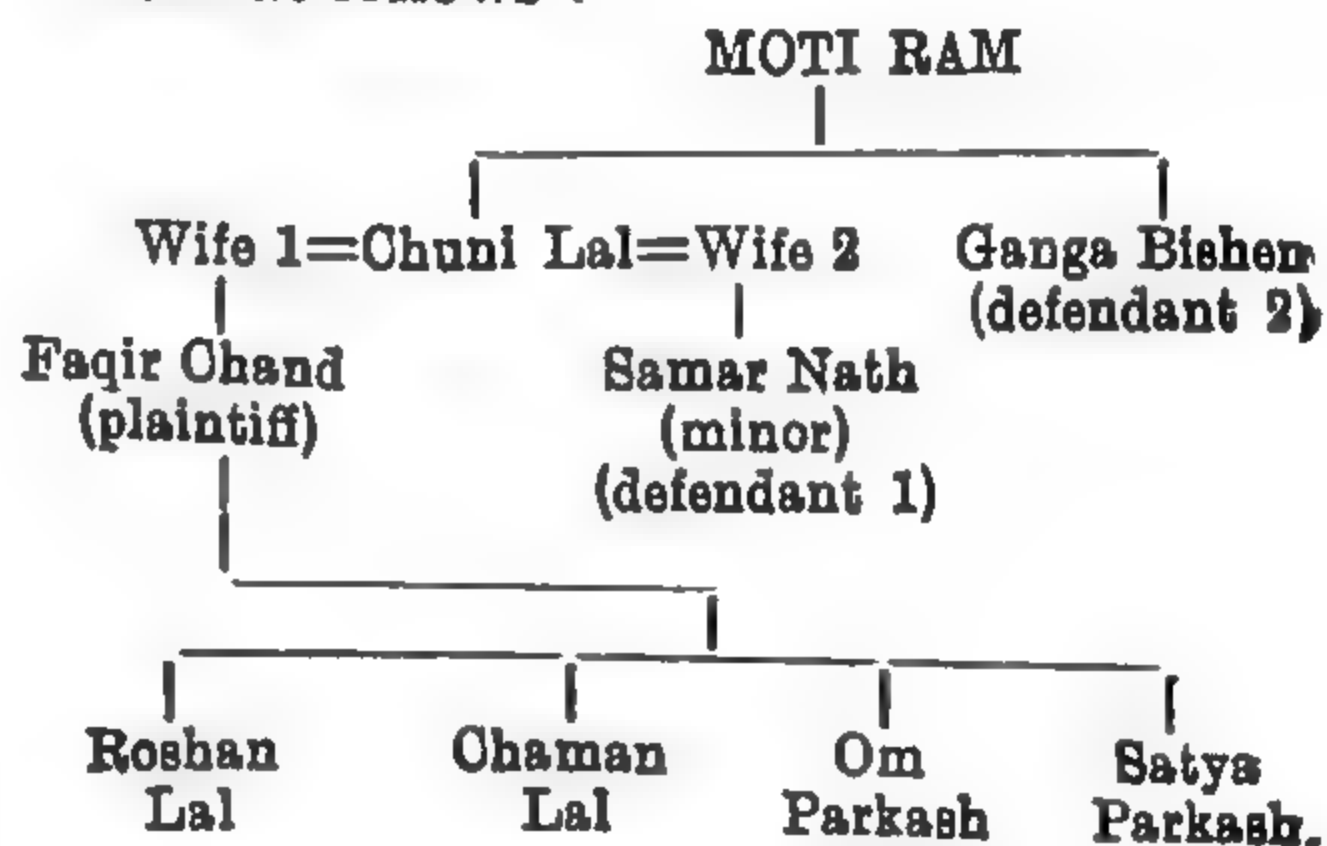
Among high caste non-agricultural Hindus, resident in towns in the Punjab such as Khatri of Amritsar the strict rule of the Hindu law of Mitakshara that a daughter's son cannot be adopted has been varied and a daughter's son can be validly adopted : 93 P R 1909 (P C), Rel. on; Case law referred. [P 628 O 1, 2]

Such an adoption has the full effect of a formal adoption under Hindu law and the adopted son severs his connexion with his natural family and becomes the male lineal descendant of the adoptive father : A I R 1931 Lah 546, Foll. [P 628 O 2]

Achhru Ram and Inder Dev Dua — for Appellants.

Shamair Chand, H. S. Khorana and L. C. Mehra — for Respondent No. 1.

Tek Chand, J.—The parties to this litigation are Khatri of Amritsar and are related as follows :



It is common ground between the parties that Chuni Lal and Ganga Bishen separated in 1928. Chuni Lal died in 1930, leaving considerable moveable and immoveable property, which is the subject of this litigation. In June 1932, Faqir Chand instituted the present suit for partition of these properties against Samar Nath (defendant 1). The other defendants were impleaded pro forma, as they were co-sharers in one of the houses, in which Chuni Lal was a part owner. In the plaint it was alleged that on Chuni Lal's death, the property in dispute devolved on his sons, plaintiff and defendant 1, and since then they had been in joint possession. It was also stated that, on 10th March 1929, Chuni Lal had executed a will (Ex. P-1), by which he had devised his entire property to plaintiff and defendant 1 in equal shares. In the will Chuni Lal had admitted that he owed a sum of Rs. 3,000 to Faqir Chand (plaintiff), and directed that if Chuni Lal failed to repay it in his lifetime, Faqir Chand would be entitled

to receive one-half of the amount, i. e., Rs. 1,500 from Samar Nath. It was stated that the plaintiff did not want to keep the properties joint any longer, and accordingly he sued for partition.

The suit was resisted by Samar Nath, who denied that Faqir Chand (plaintiff) was a co-owner with him in the properties in dispute. He averred that Faqir Chand had been adopted by his maternal grandfather, Narain Das, in 1888, when he was completely severed from his natural family and, therefore, he had no right to succeed to Chuni Lal. The due execution of the will (Ex. P-1) by Chuni Lal was denied, and it was pleaded that the properties being ancestral of Chuni Lal, he had no power to devise them by will. It was also denied that Chuni Lal owed to Faqir Chand Rs. 3,000 or any other sum. Soon after the institution of the suit, Faqir Chand died, and in his place were substituted his sons, who are the appellants before us. The trial Judge framed several issues, of which those material for the purposes of this appeal are the following : (2) Whether Faqir Chand was adopted by his maternal grandfather Narain Das, and hence he has got no connexion in the property in suit left by Chuni Lal ? (4) Whether Chuni Lal made a will according to which Faqir Chand is entitled to get one-half share in the property left by Chuni Lal ? (9) Whether Chuni Lal, deceased, had authority to make the will in question ? (10) Whether Chuni Lal was in his full senses and was of disposing mind at the time of the execution of the will ? (11) If issues 4, 9 and 10 are proved in favour of the plaintiff, whether the will in dispute was written under undue influence ? (14) Whether Rs. 3,000 mentioned in the will, were not borrowed by Chuni Lal, and whether the plaintiff is not entitled to recover half of this amount ?

The learned Judge found that Faqir Chand had been adopted by Narain Das, to whose family he had been transplanted and, therefore, he had no right to succeed to his natural father. He found that the execution of the will (Ex. P-1) by Chuni Lal had been proved, but that "some sort of influence was exercised on him" at the time, and, in any case, the will was invalid as the property was ancestral in the hands of the testator in which Samar Nath was a coparcener. He also decided issue 14 against the plaintiff, and, in the result,

dismissed the suit with costs. Faqir Chand's sons have appealed.

The first question to be decided is whether Faqir Chand was, in fact, adopted by his maternal grandfather Narain Das, and if so whether on his adoption he ceased to be a member of his natural father's family and lost his right to succeed to him. As already stated, the adoption is alleged to have taken place 45 years before suit, i. e., some time about 1888, and at this distance of time it is not possible to get direct evidence of the factum of adoption. The oral evidence produced by the parties, is vague and mostly hearsay. There is however ample circumstantial evidence, including the admissions of Chuni Lal and Faqir Chand himself, which conclusively prove that he had been adopted by Narain Das. The only child of Narain Das was the mother of Faqir Chand, who had married Chuni Lal and died soon after the birth of Faqir Chand. It is admitted that at the age of two, Faqir Chand went over to live with Narain Das and was brought up and educated by him. His marriage was performed by Narain Das in his house in Katra Parja. Faqir Chand's four sons who are the appellants before us were all born in Narain Das's house, and they have continuously lived there up to the present day. On Narain Das's death, Faqir Chand succeeded to his property as his son. In the Municipal Registers, the owner of the house which he got from Narain Das, is described as "Faqir Chand, son of Narain Das Khatri". On the will, Ex. P-1, executed by Chuni Lal on 10th March 1929, which was produced and relied upon by Faqir Chand himself, his signatures appear as an attesting witness, and there he described himself as 'son of Lala Chuni Lal', "the aforesaid testator, adopted son of Narain Das, caste khatri, resident of Amritsar, Katra Parja, legatee". In the body of the will, Chuni Lal is recorded as having stated that "Faqir Chand had been adopted by his maternal grandfather in his childhood", though this was qualified by the further statement that :

This adoption is not such as might have severed all the connections of the said Faqir Chand with me. Notwithstanding this adoption the said Faqir Chand is my son as before and is entitled to my heritage as a son.

It is quite clear from these facts and admissions that Faqir Chand had, in fact, been adopted by Narain Das, when he was

a child. Mr. Achhru Ram, however, strenuously argued that none of the defendant's witnesses had stated that the essential ceremony of "giving and taking" was performed at the time of adoption and in the absence of proof of this ceremony the adoption cannot be regarded as having been validly made. But, as pointed out already, the adoption took place 45 years ago, and at this distance of time it is not possible to get witnesses who were actually present at the time and could depose to the performance of the ceremony. In such circumstances, in the absence of anything to indicate the contrary, it must be presumed that all the requisite ceremonies were duly performed. As held in 27 All 271¹ at p. 290, A I R 1923 Cal 18² at p. 21 and 67 I C 31³ at p. 34, when a person has for nearly half a century enjoyed the status of an adopted son, and has been treated as such all his life, it must be assumed that all the necessary ceremonies were duly and regularly performed at the time of his adoption. No facts have been brought out which might displace this presumption. The learned counsel next urged that under the Hindu law of the Mitakshara School, a daughter's son cannot be legally adopted and, therefore, the adoption, even if it took place in fact and with all due ceremonies, was invalid. It is noteworthy that the validity of the adoption was not challenged in the Court below and, therefore, the appellants are not entitled to raise this question for the first time in appeal. It is no doubt true that under the Hindu law of the Mitakshara School, as administered in the British Indian Courts, a daughter's son cannot be adopted, but as observed by their Lordships of the Privy Council in 93 P R 1909⁴ at p. 467 :

This general rule may be varied by custom and often is so varied in the province from which this appeal comes (Punjab).

There are numerous cases in which it has been held that among high caste non-agricultural Hindus, resident in towns,

strict Hindu law has been so varied, and a daughter's son can be validly adopted. It is not necessary to discuss all these cases here ; reference may however be made to three reported cases of khattris of Amritsar, to which tribe and city the parties to this litigation belong : 64 P R 1883,⁵ 2 Lah 69⁶ and A I R 1933 Lah 1050.⁷ I must, therefore, hold that this contention also is without force. Lastly, Mr. Achhru Ram urged that, assuming that the adoption of a daughter's son is valid among non-agricultural high caste Hindus, of Amritsar in particular, and the Punjab in general, such an adoption has not the effect of severing the adoptee from his natural family and transplanting him into the family of the adoptor. This contention again was not raised in the Court below in this form, and there is no evidence whatever on the record to suggest that a daughter's son, who is validly adopted by his maternal grandfather among the khattris or other Hindus of Amritsar or any other place in the Punjab, has a status different from that which a son adopted in the Dattaka form possesses under Hindu law. This identical question was raised in 13 Lah 126⁸ and was examined at great length by Jai Lal, J. at pp. 138 to 142 of the report. The learned Judge after an elaborate examination of the previous rulings bearing on the point, held that such an adoption has the full effect of a formal adoption under Hindu law and the adopted son severs his connection with his natural family and becomes the male lineal descendant of the adoptive father. This, if I may say with all respect, lays down the law correctly, and I have no hesitation in following it. Mr. Achhru Ram referred us to a Single Bench decision of the Punjab Chief Court in 53 P W R 1908,⁹ but as explained in 13 Lah 126⁸ at p. 139, that case was decided on strict Hindu law; and the observations made therein must be confined to its peculiar facts. The same is true of 93 I C 956,¹⁰ where Campbell, J.

1. Lal Achal Ram v. Raja Kazim Hussain Khan, (1905) 27 All 271=32 I A 113=8 O C 155=8 Sar 772 (P O).

2. Kailas Chandra Nag v. Bijay Chandra Nag, A I R 1923 Cal 18=72 I O 680=36 C L J 434.

3. Jagannath Marwari v. Chandni Bibi, A I R 1921 Cal 647=67 I O 31=26 O W N 65=34 O L J 432.

4. Rup Narain v. Mt. Gopal Devi, (1909) 93 P R 1909=36 Cal 780=3 I O 382=36 I A 103 (P O).

5. Atma Singh v. Jatta Singh, (1883) 64 P R 1883.

6. Parmanand v. Shiv Charan Das, AIR 1921 Lah 147=59 I O 256=2 Lah 69=21 P L R 1921.

7. Shiv Dev v. Dwarka Das, A I R 1933 Lah 1050=147 I O 499.

8. Baldeo Sahai v. Ram Chander, A I R 1931 Lah 546=132 I O 481=13 Lah 126=32 P L R 482.

9. Baljnath v. Shamboo Nath, (1908) 53 P W R 1908=113 P L R 1908.

10. Mela Ram v. Malik Ram, A I R 1927 Lah 154=93 I O 956.

sitting in Single Bench, followed without discussion 53 P W R 1908.⁹ It was conceded by Mr. Achhru Ram that where among high caste Hindus a daughter's son is allowed to be adopted, he becomes a co-parcener in his adoptive father's family. If this is so, he cannot obviously retain his status as a co-parcener in his natural family; for, as was admitted by counsel, a person cannot, at one and the same time, be a member of two different co-parcenaries.

For all these reasons, I hold that the learned Subordinate Judge came to a correct conclusion in holding that Faqir Chand having been adopted by Narain Das had no right to succeed to the property of Chuni Lal. In the plaint the plaintiff had based his claim, in the alternative, on the will, Ex. P-1, executed by Chuni Lal. The execution of this will has been duly proved and it is no longer contended that the testator did not have a disposing mind at the time. It was urged, however, that it had been executed under undue influence, exercised by Faqir Chand on Chuni Lal. The learned Subordinate Judge has given a very halting finding on this point. He did not find definitely that undue influence was exercised, but observed that "some sort of influence was put forth on Chuni Lal and the will is not free from doubts". Mr. Shamair Chand for the plaintiff-respondents frankly conceded that there was no evidence on the record to warrant this conclusion. The will is a registered document and Chuni Lal lived for more than two years after its execution. It is not suggested that during this period he continued to be under the influence of Faqir Chand. Indeed, it is admitted that for all these years he lived amicably with his junior wife, the mother of Samar Nath, defendant, and yet he did not repudiate the will. It must, therefore, be held that the will had been executed by Chuni Lal of his free will and accord. There is, however, ample evidence on the record that the property was ancestral in the hands of Chuni Lal, and Samar Nath, on his birth, had acquired an interest in it. The property thus belonged to a joint family, consisting of Chuni Lal and Samar Nath, and consequently the former could not devise it by will. Mr. Achhru Ram conceded that on the finding that Faqir Chand had been severed from his natural family and that the property had been inherited by Chuni Lal from his father, he had no power to bequeath it. Faqir

Chand, therefore, did not acquire any right to the property in dispute by the aforesaid will.

The will, however, can clearly be relied upon by the appellants in proof of the allegation that the sum of Rs. 3,000 had been borrowed by Chuni Lal from Faqir Chand, and that he owed it to the latter at the time of the execution of the will. The admission in the will shifted the onus on the contesting defendant to prove that this amount was not due, and admittedly he has produced no evidence to discharge it. There is also no proof that the whole or any part of this amount had been repaid by Chuni Lal in his lifetime. The plaintiffs are, therefore, entitled to recover the whole of this amount from the estate of Chuni Lal, to which Samar Nath has succeeded. No doubt, in the plaint the plaintiff had claimed only one-half of this amount and issue 14 was also framed on that basis; but this was on the assumption that Faqir Chand was entitled to one-half of the property of Chuni Lal. It has, however, been found that Faqir Chand had no share in Chuni Lal's property the whole of which has devolved on Samar Nath. The plaintiffs are, therefore, entitled to recover the whole of Chuni Lal's debt from defendant 1. For the foregoing reasons I would accept this appeal in part, and grant the plaintiffs-appellants a decree for Rs. 3,000 against Samar Nath defendant-respondent 1; but would dismiss their claim for partition of the properties in suit. As none of the parties has succeeded in full, I would leave them to bear their own costs in both Courts. The plaintiffs-appellants shall not be entitled to execute the decree for Rs. 3,000, until and unless they have paid court-fee on this amount both in the lower Court and in this Court.

Abdul Rashid, J.—I agree.

S.C./D.S. *Appeal partly allowed.*

A. I. R. 1937 Lahore 629

BHIDE, J.

Amar Chand — Creditor — Appellant.

v.

Nawab Din, Insolvent and *another* — Respondents.

Second Appeal No. 52 of 1936, Decided on 6th January 1937, from order of Dist. Judge, Sialkot, D/- 29th May 1936.

Punjab Relief of Indebtedness Act (7 of 1934), Ss. 6, 5—Insolvency proceedings—Section 6 does not refer to civil proceedings other than suits—It is doubtful if S. 5 applies to insolvency proceedings — S. 4, Usurious Loans Act, confers jurisdiction on Insolvency Court to exercise power under S. 3 — Insolvency Court can reduce interest on sufficient cause.

Section 6, Punjab Relief of Indebtedness Act, does not refer to civil proceedings other than suits and there is room for doubt if the amendments made in S. 5 would apply to insolvency proceedings at all; but whether they would or would not, even the provisions of S. 4, Usurious Loans Act, as they stood before Act 7 of 1934 came into force, did confer jurisdiction on the Insolvency Court to exercise powers conferred by S. 3 of the Act on a Court in the trial of a suit. The Insolvency Court is, therefore, entitled to reduce the interest if it finds sufficient justification for doing so on the merits of the case.

[P 630 C 2]

M. C. Sud — for Appellant.

Mohammad Monir for *Bashir Ahmad*
— for Respondents.

Judgment.—In the proceedings relating to the insolvency of one Nawab Din, a question was raised as to the amount of interest which could be allowed to a secured creditor named Amar Chand. The Insolvency Judge decided that in view of the provisions of S. 5 of Act 7 of 1934, Amar Chand was not entitled to claim interest at a rate exceeding Rs. 12 per per cent. per annum. He accordingly held that the amount claimable by Amar Chand was Rs. 1,418 only. From this decision an appeal was preferred to the District Judge who held that S. 5 of Act 7 of 1934 applied to suits only and not to insolvency proceedings. He, therefore, accepted the appeal and remanded the case for re-decision. An application for review was then presented to the learned District Judge on the ground that he had overlooked the provisions of S. 4, Usurious Loans Act of 1928. He accepted this petition on the ground that there had been an error of law apparent on the face of the record and holding that the Insolvency Judge had jurisdiction to reduce the interest under S. 4, Usurious Loans Act, set aside his own order and affirmed that of the Insolvency Judge. From this decision a second appeal has been preferred.

The learned counsel for the appellant contended that the learned Insolvency Judge had no jurisdiction to reduce the interest claimable by Amar Chand as Amar Chand was a secured creditor and had not surrendered or valued his security

as required by S. 47, Provincial Insolvency Act. This contention does not appear to me to have force because this objection was not taken either in the insolvency Court or in appeal before the learned District Judge. The learned District Judge has distinctly noted in his last order that no other points except those discussed by him were raised before him. In the circumstances, it must, I think, be held that Amar Chand was prepared to surrender his security and claim the whole amount due to him along with the other creditors out of the assets of the insolvent.

The order of the learned District Judge, however, does not appear to me to be sustainable in law on another ground. The learned District Judge has remarked that according to S. 4, Usurious Loans Act, Amar Chand was not entitled to interest at a rate higher than 12 per cent. per annum. But the provisions of S. 4 are discretionary and neither the insolvency Judge nor the learned District Judge has examined the question of interest to be allowed to Amar Chand, on merits. I also note that S. 6 of Act 7 of 1934 provides that the amendments made in S. 5 shall apply to all suits pending on or instituted after the commencement of this Act. This section does not refer to civil proceedings other than suits and there is room for doubt in the circumstances if the amendments made in S. 5 would apply to insolvency proceedings at all; but whether they would or would not, even the provisions of S. 4, Usurious Loans Act, as they stood before Act 7 of 1934 came into force, did confer jurisdiction on the insolvency Court to exercise powers conferred by S. 3 of the Act on a Court in the trial of a suit. The insolvency Court was, therefore, entitled to reduce the interest if it found sufficient justification for doing so on the merits of the case. I accept the appeal and setting aside the order of the Courts below, remand the case for re-decision of the amount due to Amar Chand after an examination of the circumstances, of his debt in the light of the provisions of Ss. 3 and 4, Usurious Loans Act. Costs to follow final decision. Parties are directed to appear before the Insolvency Judge on 25th January 1937.

K.B./A.L.

Case remanded.

A. I. R. 1937 Lahore 631

TEK CHAND, J.

Lal Singh — Insolvent — Appellant.

v.

Dhanu Mal-Jai Lal and others —

Creditors — Respondents.

First Appeal No. 231 of 1936, Decided on 6th January 1937, from order of Addl. Dist. Judge, Ferozepore, D/- 15th April 1936.

Civil P. C. (1908), S. 151—Insolvency Court has inherent power to set aside ex parte order obtained by fraud.

A Court whether acting in its ordinary jurisdiction or under its special jurisdiction in insolvency, has got inherent power to set aside an ex parte order obtained by fraud or misrepresentation or to rectify a mistake inadvertently made.

[P 631 C 2; P 632 C 2]

Sardar Sahib Sardar Jhanda Singh —
for Appellant.

J. L. Kapur and Yashpal Gandhi —
for Respondents.

Judgment.—On 24th December 1934, Lal Singh, appellant, applied to be adjudicated insolvent, alleging that he was unable to pay his debts as his liabilities amounted to over Rs. 30,000 and his assets were Rs. 680 only. The application was admitted and notices issued to the creditors. In the meantime, an interim receiver was appointed to take charge of his property. Most of the creditors admitted the allegation of the debtor that he was unable to pay his debts and did not oppose his prayer to be adjudicated insolvent. The proceedings, however, dragged on for a considerable time, and the final hearing of the case was fixed for 12th February 1936. Before the date of hearing, on 4th January 1936, Lal Singh made an application to the insolvency Judge praying for the withdrawal of the petition for adjudication as insolvent. Notice of the application was ordered to issue to the creditors for 29th January 1936. Though there was a pleader appearing for the creditors he was not informed, but notices were sent for service on the creditors in the ordinary way. Personal service was, however, not effected and the process server reported that he had affixed the notices on the doors of the houses of the creditors. On 29th January 1936, the application for withdrawal came up for hearing before the Court. None of the respondents (creditors) was present and the Court granted the application for the withdrawal of the original petition. On

12th February 1936, which was the date originally fixed for the hearing of the case, the creditors appeared and made an application objecting to the withdrawal, alleging that the order had been passed without notice to them, that the report of the process server was false, that notices had not been affixed on their open doors and that their counsel had not been informed. The learned Additional District Judge made an enquiry into the matter, and finding that the order withdrawing the original petition had been obtained from him on incorrect information, and that the creditors had not been duly served, he set aside his previous order and restored the original petition of the debtor to be adjudicated as insolvent. He then proceeded to decide the case on the merits and, finding that the debtor owed more than Rs. 500 and was unable to pay his debts, passed an order adjudicating him an insolvent.

The debtor has appealed and it has been contended on his behalf that once the Court had passed an order permitting the withdrawal of the original petition for his adjudication as insolvent, he had no jurisdiction to restore the petition and proceed to decide it on the merits. After hearing counsel I find no force in this contention. It is obvious that the order of withdrawal was passed by the Judge on incorrect information. Under S. 14, Provincial Insolvency Act, a petition for adjudication, whether presented by a debtor or a creditor, cannot be withdrawn without the leave of the Court. It is well settled that leave will not be granted without notice to all the parties concerned. The proper procedure was to serve the pleader who had been appearing on behalf of the creditors. This, however, was not done. Notices were issued for personal service but this was not effected. Substituted service in this case was obviously defective, if not carried out fraudulently. The learned Additional District Judge has observed that he would not have permitted the withdrawal of the petition, if he had the faintest idea that the creditors were opposed to it. His order was passed under a misapprehension, and when the true facts were brought to his notice, he at once set aside the ex parte order. A Court whether acting in its ordinary jurisdiction or under its special jurisdiction in insolvency, has got inherent power to set aside an ex parte order obtained by fraud or misrepresenta-

tion or to rectify a mistake inadvertently made, and this was rightly done by the learned Additional District Judge in this case. On the restoration of the application, there can be no question as to the order to be passed in the case. The debtor himself moved the Court and showed that his indebtedness was over Rs. 500 and that he was unable to pay his debts. I hold therefore that he has been rightly adjudicated as insolvent. The appeal fails and is dismissed with costs.

P.R./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 632

YOUNG, C. J. AND MONROE, J.

Bachna Singh and another—Appellants.

v.

Emperor.

Criminal Appeal No. 1213 of 1936, Decided on 26th November 1936, from order of Sess. Judge, Ferozepore, D/- 17th October 1936.

Penal Code (1860), S. 302 — Intention—Presumption—Persons armed with spears, not using sharp end but killing with blows on all parts of body with lathi end of spears—Intention to kill or knowledge of likelihood of death is presumed.

Where people armed with spears refrain from using the sharp end but beat to pulp a man by beating him with lathi part of the spear on all parts of the body, the inevitable inference is that they intended to kill or knew that such a beating is likely to cause death. [P 633 C 1]

*Mahtab Singh — for Appellants.**Sleem — for the Crown.*

Young, C. J.—Bachna and Balu, together with two others, are alleged to have murdered a Brahman named Plast Ram. Bachna and Balu were tried by the learned Sessions Judge of Ferozepore and sentenced to death. The other two were not known and were not before the Court. This murder took place in the early morning of 19th June 1936. Plast Ram, his brother Paras Ram, and a siri of theirs, named Ali Bakhsh, proceeded to their field carrying manure from the village. They started just before sunrise and had taken one load of manure to the field and emptied it and were returning when, it is alleged, the two accused and the two others attacked them from a graveyard. Bachna and Balu were armed with spears, that is lathis with attachable spear heads. They prodded Plast Ram with spears while he was sitting in the cart. He then jumped out

and ran away. They pursued him and caught him in a very short space and then proceeded to give him a most merciless beating. They were careful after the prodding in the cart however to use their spears as lathis.

The evidence consists of that of four eye-witnesses, Paras Ram and Ali Bakhsh, who were in the cart with Plast Ram, and two other villagers, Sandhura and Giddar, who were also engaged in manuring their fields that morning and who say that they saw the whole occurrence. The general criticism of counsel in this Court is that these witnesses were not at the scene of the occurrence. That Dalip Singh, the zaildar, is an enemy of Bachna because, counsel alleges, Bachna beat Dalip Singh, and that Dalip Singh and Jowala, another enemy, have concocted this whole story and produced these witnesses. We may say at once that there is no foundation for this allegation against the zaildar. There is no proof on the record that Bachna ever beat the zaildar. In any event Paras Ram and Ali Bakhsh both would probably be with Plast Ram engaged in manuring their fields. We see no reason to doubt that Paras Ram and Ali Bakhsh were with Plast Ram in the cart. Cause has been proved for Sandhura and Giddar to give false evidence in this case against Bachna and Balu. We are satisfied therefore with the evidence of all the four eyewitnesses. Counsel has made a great point that the spear wounds are only four out of more than forty injuries, but it is perfectly clear to us what happened. Paras Ram, who was certainly in the cart, and who says himself that he was injured and this is corroborated by the medical evidence—says that Bachna and Balu gave spear thrusts while Plast Ram was still in the cart. Those were the only thrusts, in our opinion, which were made by the sharp ends of the spears. The medical evidence shows that Plast Ram received punctured wounds in the legs. He was obviously speared in that fashion in order to get him out of the cart. Once he was out of the cart the rest of the injuries were given with the lathi part of the spears.

Counsel also alleges that this murder took place in the dark and that therefore no one knew who were the murderers. We see no reason to doubt the evidence that it was just about sunrise, which is the time when normally in the hot weather in

June villagers would be engaged in their agricultural pursuits. Lastly counsel has argued that this is not a case of murder under S. 302. He has reproduced to us the argument, which we unfortunately frequently hear in this Court and which we never accept, that where men armed with weapons like spears refrain from using the sharp end but beat to pulp the victim with the lathi end, they cannot be found guilty of murder. This type of beating is used in this province merely to give occasion for this kind of argument. Where people, as in this case, kill a man by beating him on all parts of the body with weapons like lathis, the inevitable inference is that they intend to kill or know that such a beating is likely to cause death. We therefore agree with the conviction of these two accused. There is clearly no reason to interfere with the sentences which we confirm.

S.C/D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 633

TEK CHAND, J.

Jhandu Mal and others — Plaintiffs —
Appellants.

v.

Rulia Ram — Defendant — Respondent.

Second Appeal No. 864 of 1936, Decided on 10th December 1936, from decree of Addl. Dist. Judge, Ambala, D/- 15th April 1936.

Partnership Act (1932), S. 69—Suit for dissolution of partnership—Reliefs implied in prayer for dissolution of partnership—Court has power to pass preliminary decree for accounts.

A prayer for "dissolution of partnership" through Court is a compendious mode of asking a fourfold relief: (a) a declaration that the partnership stands dissolved from a certain date, (b) a declaration as to who the partners are and what are their proportionate shares; (c) a prayer that accounts be taken and the assets and liabilities of the partnership as on the date of dissolution be determined, and (d) a final decree be passed. These prayers are implicit in the prayer for dissolution made in a 'suit for dissolution of partnership'.

[P 634 C 1]

Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit. In a suit for dissolution of partnership, the

Court has the power to pass a preliminary decree directing inter alia that accounts be taken.

[P 634 C 1]

Bishen Narain for *M. L. Puri* —

for Appellants.

Shamair Chand — for Respondent.

Judgment.—The appellant firm Jhandu Mal-Bhag Mal, instituted a suit for "dissolution of partnership and rendition of accounts" against Rulia Ram-Jai Lal, sons of Jawahra, alleging that the plaintiff firm had entered into a partnership with the defendants for purchase and sale of gur in which the share of the plaintiff firm was one-half and that of the two defendants one-half. Jai Lal, defendant, denied that he was a partner. Rulia Ram admitted himself to be a partner with the plaintiff to the extent of one-half, but pleaded that the suit, in so far as it prayed that accounts of the partnership be taken, was not maintainable in view of S. 69, Partnership Act, as the partnership had not been registered. The trial Judge found that Jai Lal had not been proved to be a partner and dismissed the suit against him. He overruled the plea taken by Rulia Ram and granted the plaintiff a preliminary decree dissolving the partnership and declaring that the plaintiff firm and Rulia Ram were partners, each having a half share, and directing that accounts be taken. Rulia Ram appealed to the District Judge who upheld so much of the decree as declared that the partnership stood dissolved from the date of the institution of the suit and that the shares of the plaintiff and Rulia Ram were equal. He however held that the prayer for rendition of accounts could not be granted in this suit in view of the provisions of S. 69, and set aside this part of the preliminary decree. Sub-s. (3) of S. 69 provides inter alia that the provisions of sub-ss. (1) and (2) shall not affect

the enforcement of any right to sue for the dissolution of a firm, or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm.

The learned District Judge has held that a suit for accounts of an unregistered firm can lie only if the firm had been dissolved *ante litem* and that if the firm was undissolved at the date of suit, the only relief that could be granted in the suit was dissolution of the firm simpliciter and nothing more. It seems to me that the learned Judge has put too narrow an interpretation on the phrase "to sue for the dissolu-

tion of a firm". A prayer for "dissolution of partnership" through Court is a compendious mode of asking a fourfold relief: (a) a declaration that the partnership stands dissolved from a certain date, (b) a declaration as to who the partners are and what are their proportionate shares; (c) a prayer that accounts be taken and the assets and liabilities of the partnership as on the date of dissolution be determined, and (d) a final decree be passed. It is obvious that a decree for dissolution simpliciter will not yield any tangible results. In order to be of some practical use to the partners, it must be followed by certain consequential reliefs, leading up to a final decree. These prayers are implicit in the prayer for dissolution made in a "suit for dissolution of partnership", and I have no doubt that it is in this sense that this expression is used in S. 69. It could not have been the intention of the Legislature, as appears to have been supposed by the learned District Judge, that after the Court has passed a decree for dissolution and the partnership has been declared dissolved on a certain date, a fresh suit for accounts will have to be brought. R. 15 of O. 20, Civil P. C., makes the position quite clear. It is laid down there, that:

Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Courts, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

It is obvious that in a suit for dissolution of partnership, the Court has the power to pass a preliminary decree directing inter alia that accounts be taken. It seems to have been argued before the Courts below that if a suit for accounts is brought subsequently it will be barred under O. 2, R. 2. Mr. Shamair Chand for the respondent frankly conceded that this contention is without force, as ex hypothesi, the two suits will not be based on the same cause of action. I accept the appeal, set aside the decree of the learned District Judge and restore that of the Court of first instance. The appellant firm will get its costs from Rulia Ram, respondent, in all Courts.

P.R./D.S.

Appeal accepted.

A. I. R. 1937 Lahore 634

MONROE, J.

Lal Chand — Petitioner.

v.

Vir Singh and others —

Opposite Parties.

Civil Revn. No. 392 of 1936, Decided on 27th January 1937, from order of Addl. Dist. Judge, Amritsar, D/- 20th April 1936.

Provincial Insolvency Act (1920), S. 51—Mustajri of debtor's land completed before admission of his insolvency petition must be held good — Receiver and not debtor can apply to set aside such Mustajri.

The Mustajri of debtor's land which is completed before the admission of the insolvency petition of such debtor must be held good. The Receiver is the guardian of the insolvent's assets. Therefore the debtor cannot apply to set aside such Mustajri on general principles and under S. 51, Provincial Insolvency Act. It is the Receiver alone who can do so. [P 634 C 2]

A. G. Maurice and Mohd. Amin —

for Petitioner.

T. D. Khanna — for Opposite Parties.

Order.—The learned Additional District Judge has in insolvency proceedings set aside a Mustajri sanctioned in favour of the appellant in execution proceedings on 30th May 1934. The insolvency petition was presented on 30th April 1934 and admitted on 12th June 1934. The learned Judge has considered only one point in the case, whether the debtor who was the applicant, has a locus standi; deciding that he had such, he allowed the application without considering whether there was a case for setting aside the Mustajri at all. In my opinion, it is clear that the Mustajri must be held good, having been completed before the admission of the petition: see S. 51, Provincial Insolvency Act. I also hold that the learned Judge was wrong in holding that the debtor was entitled to bring such an application as this. Both on general principles, and in view of the words of S. 51, it seems to me that the debtor cannot do so: the Receiver is the guardian of the assets, not the debtor. I allow this petition and restore the order of the trial Judge. The respondent will pay costs in all Courts. Rs. 15 deposited in this Court as costs of adjournment will be repaid to the appellant as part of the costs payable to him under this order.

W.D./A.L.

Petition allowed.

A. I. R. 1937 Lahore 635**COLDSTREAM AND JAI LAL, JJ.***Prabh Dial* — Plaintiff — Appellant.
v.*Madho Ram*—Defendant—Respondent.

Appeal No. 447 of 1930, Decided on 11th March 1935, from order of Dist. Judge, Ambala, D/- 17th December 1929.

Custom (Punjab)—Succession—Daughter—Baniyas of Ambala District—Daughter is excluded by collaterals.

In the Ambala District among the Baniyas the daughters are excluded from inheritance by the collaterals in respect of ancestral and self-acquired property. [P 636 C 1]

Qabul Chand for Shamair Chand and Shamair Chand — for Appellant.*N. C. Pandit* — for Respondent.

Jai Lal, J. — This second appeal has come up to this Court on a certificate granted by the District Judge of Ambala, under S. 41, Punjab Courts Act, that there is a question regarding the existence of a custom involved, viz., whether among the baniyas of Ambala District collaterals succeed to the property of a deceased person in the presence of his daughter's son. The determination of this question depends upon whether a daughter is excluded by collaterals or not. It is conceded that under the Hindu Law, which ordinarily governs the parties in the matter of succession, a daughter would succeed in preference to the collaterals to the property of her deceased father whether ancestral or self-acquired. But it is claimed that in the Ambala District there is a special custom whereby a daughter is excluded from succession to ancestral and self-acquired property of the deceased by collaterals. The dispute arose in this way : One Salig Ram died leaving a widow, Mt. Raji and a daughter, Mt. Durgi, who had a son, Madho Ram. On 4th January 1921, Mt. Raji executed a deed whereby she declared that she had adopted Madho Ram as her son, thus conferring upon him the right to inherit the property of Salig Ram as an adopted son. The appellants, Prabh Dayal and Banwari Das, who are the collaterals of Salig Ram, instituted a suit for a declaration that the alleged adoption was invalid. Mt. Raji and Madho Ram were impleaded as defendants. These defendants contested the suit on the grounds : (1) that according to the special custom the adoption was valid and (2) that, in any case, the plaintiffs

had no locus standi to sue, as under the Hindu Law Madho Ram being the daughter's son was entitled to inherit the property after his mother Mt. Durgi. The question, therefore, arose whether Mt. Durgi herself was entitled to inherit the property of her father, Salig Ram. The trial Judge answered this question in the negative and decreed the plaintiff's suit, holding at the same time, that the adoption was invalid under the Hindu Law. On appeal the District Judge held that the adoption was invalid under the Hindu Law and also that the plaintiffs had failed to prove that according to the special custom governing the Baniyas of Ambala District generally, the collaterals excluded the daughters from succession to the estate of a deceased Hindu proprietor. He, therefore, dismissed the suit, but granted the plaintiffs a certificate as described above.

It is conceded before us that if we found that the custom propounded by the appellants has been proved, then the suit must be decreed and that if in the matter of succession of the daughters the Hindu law is to be followed, then the plaintiffs have no locus standi to sue. In support of the custom relied upon by the appellants some oral evidence was given. This oral evidence, however, merely consists of statements of some witnesses that there is a 'custom among the Baniyas of the Ambala District generally whereby daughters are excluded from inheritance by the collaterals. 'Only two instances in support of this evidence have been given. This evidence by itself would not have been sufficient to discharge the burden which undoubtedly was on the plaintiffs, but in addition to the plaintiffs' evidence at least three witnesses produced by the defendants have made definite statements in support of the custom relied upon by the plaintiffs. Two others also have made similar statements but their statements are open to criticism. Reliance also was placed upon a judgment of the District Judge of Ambala in which after considering the entire evidence produced—and the evidence was voluminous in that case—it was held that there was a custom in the Ambala District generally among the Baniyas such as is relied upon by the plaintiffs in this case. But the learned District Judge, who decided the present case, declined to rely upon that judgment because it was under appeal to this Court.

That case, however, has now been decided by us and we have confirmed the decision of the District Judge in Appeal No. 901 of 1928.¹ That judgment, therefore, now becomes an instance of an important judicial decision in favour of the appellants.

Having regard to the above circumstances, I would hold that the appellants before us have succeeded in establishing the custom which they relied upon, i. e., that in the Ambala District among the Banias the daughters are excluded from inheritance by the collaterals in respect of ancestral and self-acquired property. That being so, this appeal must be accepted, the judgment of the District Judge set aside and that of the trial Court restored with costs throughout. I would order accordingly.

Coldstream, J.—I agree.

S.C./D.S.

Appeal allowed.

1. Relu Mal v. Mukandi Lal, Reported in A I R 1937 Lah 609.

*** A. I. R. 1937 Lahore 636**

TEK CHAND AND ABDUL RASHID, JJ.

Mt. Basso and others — Plaintiffs
— Appellants.

v.

Harnam Singh and others —
Defendants — Respondents.

Letters Patent Appeal No. 26 of 1937, Decided on 6th May 1937, from decree of Jai Lal, J., D/- 24th November 1936.

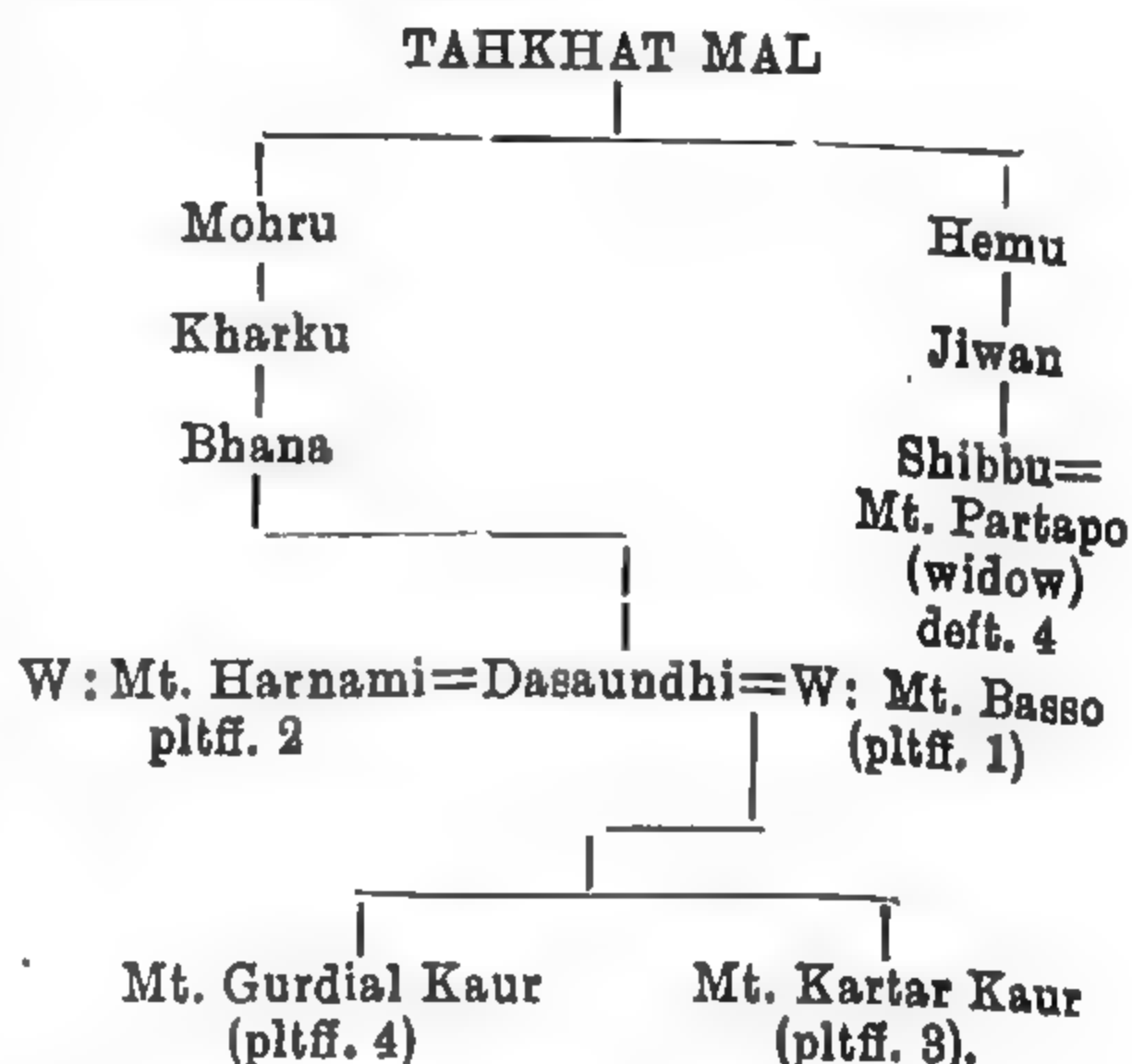
* Punjab Limitation (Custom) Act (1 of 1920), S. 8—Declaratory decree setting aside alienation obtained long before 1920 by male collateral of person governed by Customary law—Decree would not enure for benefit of his widow who, though entitled to succeed, is herself not entitled to challenge alienation.

Section 8, Punjab Limitation (Custom) Act, does not lay down any new rule but merely gives statutory recognition to the long settled rule of custom that the right to control an alienation is not co-extensive with the right to succeed and that a declaratory decree enures for the benefit of those persons only, who themselves have the right to control the alienor's alienations of ancestral property. A declaratory decree for setting aside alienations obtained long before 1920 by the male collateral of a person governed by Customary law would not enure for the benefit of his widow who though entitled to succeed, is herself not entitled to challenge the alienation: A I R 1934 Lah 725, Rel. on. [P 637 C 2]

Shamair Chand — for Appellants.

Achhru Ram — for Respondents.

Tek Chand, J.—The following pedigree table will be helpful in understanding the facts of this case:



On 24th May 1908, Shibbu who was in possession of a certain area of land which he had inherited from his great-grandfather Takhat Mal, alienated one half of it by way of gift to his sister's son Harnam Singh (defendant 1). Shortly afterwards Dasaundhi, who was a collateral of Shibbu in the 4th degree, instituted a suit for the usual declaration. This suit was decreed on 24th May 1909, it being declared that the gift was ineffectual against the reversionary rights of Dasaundhi. Some years later, Shibbu died childless, leaving a widow, Mt. Partapo, who succeeded on the usual widow's life estate, to one-half of the ancestral land, which Shibbu was in possession at the time of his death. The other half was in possession of the donee Harnam Singh, who was entitled to retain it till the death of Mt. Partapo. Mt. Partapo is still alive. Dasaundhi, the only male collateral of Shibbu recently died sonless, leaving two widows, Mt. Basso and Mt. Harnami (plaintiffs 1 and 2) and two daughters, Mt. Kartar Kaur and Mt. Gurdial Kaur (plaintiffs 3 and 4). On 2nd September 1928, Harnam Singh exchanged the land, which he had received in gift from Shibbu in 1908, with certain other land belonging to Gokal and Jowala (defendants 2 and 3). Thereupon Mt. Basso and Mt. Harnami, widows of Dasaundhi, and Mt. Kartar Kaur and Mt. Gurdial Kaur, his daughters, brought a suit for a declaration that this exchange shall not affect their rights after the death of Mt. Partapo alleging that the exchange had been made without necessity. The defendants pleaded, inter alia, that the plaintiffs had no locus standi to maintain

the suit. The trial Judge upheld the plea and dismissed the suit without going into the merits.

On appeal by the plaintiffs the District Judge agreed with the trial Court that the daughters of Dasaundhi had no right to sue and dismissed their appeal. He held, however, that the declaratory decree obtained by Dasaundhi in 1909 enured for the benefit of his widows, Mt. Basso and Mt. Harnami, and therefore they were competent to maintain the suit to have the exchange by Harnam Singh set aside. He accordingly accepted the appeal of these widows, and remanded the case to the trial Court for decision on the merits. Against this part of the decree, Harnam Singh lodged a second appeal in this Court, which was accepted by Jai Lal, J., sitting in Single Bench. The learned Judge held that the decree obtained by Dasaundhi in 1909 did not enure for the benefit of his widows. He therefore accepted their appeal and dismissed the suit of the widows also. He however granted a certificate to them for "appeal under Cl. 10, Letters Patent. It is common ground between the parties that according to the custom prevailing in the tribe, to which the parties belong: (a) A widow succeeds collaterally in her husband's family; and (b) a female, who is entitled to succeed to the property of a male, whether by collateral succession or as his heir, has got no right to impeach his alienations, even if made without necessity. It is, therefore, admitted by both counsel that the widows of Dasaundhi are entitled to succeed to the unalienated part of Shibbu's estate on the death of Mt. Partapo in the same way as Dasaundhi himself would have done, if he were alive when succession opens out. It is also admitted that if Dasaundhi had predeceased Shibbu his widows would have had no right to impeach an alienation of his ancestral land by Shibbu. In this case, however, Dasaundhi had survived Shibbu and had successfully sued to have an alienation by Shibbu of one-half of his land in favour of Harnam Singh declared invalid against his reversionary rights. But Dasaundhi died sonless long before succession would open out on the death of Shibbu's widow. The question is whether the declaratory decree which he had obtained in 1909 enures for the benefit of his widows.

In S. 8 of (Punjab) Act 1 of 1920 it is laid down that when any person obtains

a decree declaring that an alienation of ancestral immoveable property is not binding on him according to custom, the decree shall enure for the benefit of all persons entitled to impeach the alienation. But, as already stated, Mt. Harnami and Mt. Basso admittedly are not entitled to impeach the alienation of Shibbu. Therefore, they cannot have the benefit of the declaratory decree obtained by their husband, even though they would succeed to that portion of the property which he had not alienated in his lifetime. It is, however, contended that S. 8 of the Act does not apply, as in this case the declaratory decree had been obtained in 1908, long before the Act was passed. But, as pointed out in A I R 1934 Lah 725,¹ this section does not lay down any new rule so far as this matter is concerned. It merely gives statutory recognition to the long-settled rule of custom that the right to control an alienation is not co-extensive with the right to succeed and that a declaratory decree enures for the benefit of those persons only who themselves have the right to control the alienor's alienations of ancestral property. In the case cited, it was held by the Division Bench that a declaratory decree, obtained long before 1920 by the male collaterals of a person governed by customary law would not enure for the benefit of a female who, though entitled to succeed, is herself not entitled to challenge the alienation. The learned counsel for the appellant has not been able to cite any authority to the contrary. The conclusion reached by the learned Judge in Chambers is correct. I would, therefore, affirm his decree and dismiss this appeal, but in the peculiar circumstances of the case would leave the parties to bear their own costs throughout.

Abdul Rashid, J.—I agree.

T.M./D.S.

Appeal dismissed.

1. Milkha Singh v. Ram Kishan, A I R 1934 Lah 725=154 I C 988=37 P L R 353=16 Lah 237.

A. I. R. 1937 Lahore 637

ADDISON, J.

*Jhangi Ram Boda Ram — Creditor —
Petitioner.*

v.

*Collector, Dera Ghazi Khan and others
— Opposite Parties.*

Civil Revn. Petn. 250 of 1936, Decided on 9th February 1937, from order of Dist. Judge, Dera Ghazi Khan, D/. 8.1.1936.

Punjab Alienation of Land Act (13 of 1900), S. 21-A (2) and (3) — Order of Insolvency Court for sale of land of insolvent set aside by District Judge on motion of Deputy Commissioner under S. 21-A (2)— No revision by creditor lies against such order.

Where an order of an insolvency Court for sale of land of a Jat insolvent is set aside by the District Judge on the motion of the Deputy Commissioner under S. 21-A (2), Punjab Alienation of Land Act, a petition for revision by a creditor of the insolvent does not lie against such order. The order of the District Judge is final.

[P 638 C 1]

Sardar Narotam Singh for *S. L. Puri*
—for Petitioner.

Dewan Ram Lal—for Opposite Parties.

Order. — An insolvency Judge ordered the sale of the land of an insolvent. The caste of the insolvent was Khokhar. The Deputy Commissioner under the provisions of S. 21-A (2), Punjab Alienation of Land Act, moved the District Judge to set aside this order on the ground that Khokhars were members of an agricultural tribe, being a branch of the Jat tribe. The District Judge on the evidence before him came to the conclusion that the insolvent was a Jat and, therefore, a member of an agricultural tribe and he accordingly set aside the order of the Insolvency Court. Against this decision one of the creditors of the insolvent has preferred this petition for revision in this Court.

In my judgment the petition does not lie. According to S. 21-A (2) when the District Judge finds that the order is contrary to any of the provisions of the Punjab Alienation of Land Act, he shall alter it so as to make it consistent with that Act. Under S. 21-A (3) when such appellate Court passes an order, rejecting the application of the Deputy Commissioner, he may, within two months, apply to the High Court for revision of that order, but no provision is made for a similar revision being preferred by anyone else except the Deputy Commissioner. This being so, the order of the District Judge is final, and I dismiss this petition but make no order as to costs here.

V.B.B./A.L.

Petition dismissed.

A. I. R. 1937 Lahore 638

SKEMP, J.

Govind Ram — Appellant.

v.

Gurbax Singh — Respondent.

First Appeal No. 239 of 1936, Decided on 11th January 1937, from order of Senior Sub-Judge, Ferozepur, D/. 13th March 1936.

Custom (Punjab) — Ferozepur District — Ancestral land in hands of sons of deceased judgment-debtor cannot be attached in execution of simple money decree.

The Customary law in the Ferozepur District is the same as in most other districts and the ancestral land in the hands of the sons of the deceased judgment-debtor cannot be attached by a Court in executing a simple money decree, the debt not having been made a charge on the property : A I R 1937 Lah 148 (F B), *Rel. on.*

[P 638 C 2]

Indar Dev for *Achhru Ram* and *Achhru Ram* — for Appellant.

Prem Nath Bhardwaj and *Ram Lal Anand I* — for Respondent.

Judgment.—In execution of a decree for a large amount against the estate of Kesar Singh, Jat, ancestral land in the hands of his minor sons was attached. The minors raised an objection that the ancestral land was not liable for the payment of their father's debts. This objection was accepted by the learned Senior Subordinate Judge. The decree-holder appealed and one ground of the appeal is that in the Ferozepur District there is a special custom whereby ancestral property in the hands of sons is liable for the debts of their father. The hearing was adjourned at the request of Mr. Achhru Ram as the same question was before a Full Bench which has now given a judgment just reported in 39 P L R 16.¹ This lays down that the Customary law in the Ferozepur District is the same as in most other districts and that ancestral land in the hands of the sons of the deceased judgment-debtor cannot be attached by a Court in executing a simple money decree, the debt not having been made a charge on the property. This would appear to dispose of the appeal but it is also urged that in the present case the matter is *res judicata* between the parties. It appears that at a previous application for execution of the same decree the decree-holder attached the houses which were held to be non-ancestral. An issue was framed that if the houses were ancestral could they be attached. It was decided by the learned Sub-Judge following certain rulings that in the Ferozepur District ancestral property could be attached. This of course is now clearly not good law.

The learned Senior Sub-Judge held that the finding was not *res judicata* and I agree with him because the issue in

1. *Ranjit Singh v. Maghi Mal*, A I R 1937 Lah 148=167 I O 725=99 P L R 16=I L R 1937 Lah 125 (F B).

question was not necessary for the decision of the dispute once the property had been held to be non-ancestral. S. 11, Civil P. C., has therefore no application. This appeal is dismissed with costs.

S.C./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 639

JAI LAL, J.

Bhagat Ram — Defendant — Appellant.
v.

Malkiat Singh and another, Plaintiffs
and *another*, Defendant — Respondents.

Second Appeal No. 749 of 1935, Decided on 27th November 1936, from decree of Addl. Dist. Judge, Ferozepore, D/- 10th January 1935.

Custom (Punjab)—Alienation—Necessity—*S* adjudged insolvent — Official Receiver mortgaging house belonging to *S* and his mother with *S*'s bona fide consent—No proof of undue influence or coercion—*S* and his family benefiting by mortgage — Sons of *S* cannot set aside mortgage including mother's share on ground that it was without consideration and without necessity.

When consent to an alienation is given by the father bona fide, it binds the sons. [P 639 C 2]

In insolvency proceedings the Official Receiver mortgaged a house belonging to *S*, the insolvent, and his mother. The sons of the insolvent brought a suit to set aside the entire mortgage on the ground that it was without necessity and consideration. It was proved that *S* gave his consent bona fide to the mortgage and no undue influence was exercised nor was consent given under coercion. *S* was benefited by this consent in the insolvency proceedings and to this extent his family including his sons was also benefited :

Held : that the entire mortgage including the mother's share was binding on the sons and the suit could not succeed. [P 639 C 2 ; P 640 C 1]

D. N. Aggarwal — for Appellant.

Mohammad Amin — for Respondents (Plaintiffs).

Judgment. — Santa Singh was adjudicated insolvent and his estate vested in the Official Receiver. He had half a share in a house, the other half being owned by his mother Mt. Bhago. There is no definite information on the record how Mt. Bhago became an owner of half the house, but it is suggested that after the death of Santa Singh's father, this lady married his brother and on his death inherited his half share in the house as his widow. In the insolvency proceedings of Santa Singh, the Official Receiver attempted to sell half of his share in the

house, but he found that if half the share is sold, very little price would be fetched and the family would suffer. He, therefore, suggested that if Mt. Bhago agreed to transfer her share in the house by way of mortgage, he, the Receiver, would also mortgage the other half of Santa Singh and thus raise a larger amount for payment to the creditors of Santa Singh and expedite his discharge in the insolvency proceedings. He put all these considerations before Mt. Bhago and she agreed to mortgage her half share in the house. Thus the whole house was mortgaged jointly by the Official Receiver and by Mt. Bhago and money raised by the mortgage was utilized by the Official Receiver in the insolvency proceedings.

The respondents, the sons of Santa Singh, instituted the suit out of which this second appeal arises, to set aside the entire mortgage, on the ground that it was without necessity and consideration. Their suit as regards the mortgage of Santa Singh's share in the house has been dismissed ; but it has been decreed with regard to the share of Mt. Bhago. The mortgagee has presented this second appeal. I should have mentioned that the mortgage of Mt. Bhago's share had taken place with the consent of Santa Singh, and as this question was not disposed of by the learned District Judge, Agha Haidar, J. on 10th October 1935, remanded an issue to the District Judge whether the mortgage of Mt. Bhago's share had taken place with the consent bona fide given of Santa Singh. The District Judge has reported that there is no force in the contention of the respondent that the consent was given under undue influence or coercion of the Official Receiver and has reported that it was bona fide given by Santa Singh. It has been held in this Court that when consent to an alienation is given by the father bona fide, it binds the sons. On the finding of the District Judge, therefore, the suit with regard to the mortgage of the share of Mt. Bhago also should be dismissed.

But it is contended that the report of the District Judge is not borne out by the evidence and further that it is invalid because it is based on the evidence recorded by the trial Judge and not by the District Judge himself as in the order of remand he was not permitted to send the case to the trial Judge to record evidence.

The District Judge, however, has noted that he remanded the case for record of evidence to the trial Judge with the consent of both parties. It is not, therefore, open to the respondent to raise this objection here. The whole of the evidence has been read before me by the parties and it is sufficient to say that I see no reason to differ from the conclusion of the District Judge that the consent of Santa Singh was given bona fide. Santa Singh has benefited by this consent in the insolvency proceedings and to this extent the family including his two sons, the plaintiffs in the case, have also been benefited. In my opinion, there is no reliable evidence to show that any undue influence was exercised by the Official Receiver or that the consent was given under coercion. On the finding of the District Judge, therefore, this appeal must be accepted and the plaintiff's suit dismissed in its entirety. I order accordingly. The respondent shall pay the costs of the appellant in this Court.

V.B.B./A.L.

*Appeal allowed.***A. I. R. 1937 Lahore 640**

TEK CHAND, J.

Alam Sher and others — Plaintiffs — Appellants.

v.

Mt. Sat Bharai and another — Defendants — Respondents.

Second Appeal No. 120 of 1936, Decided on 15th January 1937, from decree of Addl. Dist. Judge, Mianwali, D/. 5th November 1935.

Custom (Punjab)—Succession — Awans of Shahpur District—Daughter succeeds to non-ancestral property in preference to collaterals.

According to the custom prevailing among the Awans of Shahpur District, daughter succeeds to the non-ancestral property of a sonless proprietor in preference to collaterals. [P 640 O 2]

L. M. Datta for Mirza Jalal-ud-Din — for Appellants.

Achhru Ram, Bhagu Ram and Indar Dev — for Respondents.

Judgment.—On the death of Bhola, an Awan of Mauza Nahshehra, Tehsil Khsuhab, Shahpur District, the property in suit devolved on his widow Mt. Sat Bharai, defendant 1, on the usual widow's life tenure. Mt. Sat Bihari has since gifted the land to her daughter Mt. Jawahar Khatun, defendant 2, and the plaintiffs, who are the real brothers of Bhola, have

brought a suit for a declaration that the gift is void against them and shall not affect their reversionary rights after the death of Mt. Sat Bharai. They alleged that the property was ancestral qua them. In the alternative they pleaded that even if a portion of the property was found to be non-ancestral, by the custom prevailing in the tribe, they are the preferential heirs as against the married daughter of Bhola. The defendants denied the ancestral nature of the property, and pleaded that according to the custom, daughter of a sonless proprietor, whether she had married or not, succeeds to her father's self-acquired property in preference to collaterals. The trial Judge found that the property was partly ancestral and partly self-acquired of Bhola. As regards the former, he decreed the plaintiffs' suit, but he dismissed it as regards the self-acquired property holding that, according to the custom prevailing among the Awans of the Shahpur District, daughters succeeded to the non-ancestral property of a sonless proprietor in preference to collaterals.

Both sides appealed to the District Judge who upheld the finding of the trial Court as to the custom whereby daughters excluded collaterals in succession to non-ancestral property. He however found that some of the property which the trial Court had held to be ancestral was not proved to be so, and in the result, he modified the decree of the trial Court accordingly. On an application made by the plaintiffs the learned Judge, however, granted them a certificate for preferring a second appeal to this Court for determination of the question of custom involved. Before me, the learned counsel for the appellants stated that on the materials on the record he was unable to argue that the decision of the Courts below on the question of custom was wrong, and that he had nothing further to urge. He conceded that the presumption arising from the entry in the Riway-i-am had been amply rebutted by judicial instances such as 1 Lah 284,¹ 13 Lah 276,² 15 Lah 73³ and A I R 1936 Lah

1. Ghulam Muhammad v. Gauhar Bibi, A I R 1920 Lah 9=54 I O 419=1 Lah 284=10 P L R 1920.

2. Khan Beg v. Mt. Fateh Khatun, A I R 1932 Lah 157=136 I O 769=13 Lah 276=32 P L R 890.

3. Mt. Bbug Bhan v. Muhammad, A I R 1934 Lah 404=150 I O 786=36 P L R 449=15 Lah 73.

809.⁴ He did not therefore press the appeal. The appeal fails and is dismissed with costs.

S.C./D.S.

Appeal dismissed.

4. Ahmad v. Mohammad, A I R 1936 Lah 809=167 I C 135.

A. I. R. 1937 Lahore 641

TEK CHAND, J.

Mt. Rajan — Plaintiff — Appellant.

v.

Mt. Bano and others — Defendants — Respondents.

Second Appeal No. 765 of 1936, Decided on 8th January 1937, from decree of Addl. Dist. Judge, Mianwali, D/. 23rd May 1936.

Custom (Punjab) — Succession—Awans of Shahpur District — Married daughter is preferential heir to self-acquired property of her father as against collaterals of 5th degree.

Among Awans of Shahpur district a married daughter is a preferential heir to the self-acquired property of her father as against the collaterals of the 5th degree. The presumption arising from the entry in the Riwayat is rebutted by judicial instances. [P 641 C 2; P 642 C 1]

Indar Dev for Achhru Ram —

for Appellant.

Madan Lal for S. R. Sawhney —

for Respondents.

Judgment. — The land in dispute belonged to one Manga, an Awan of mauza Daiwal, Tahsil Khushab, Shahpur District. Manga died sonless leaving him surviving a widow, Mt. Bano, defendant 1, and a married daughter, Mt. Rajan, from a predeceased wife. On Manga's death, his land devolved on his widow Mt. Bano on the usual widow's life-estate. On 21st June 1934 Mt. Bano sold the land to Hayat and Baza, defendants 2 and 3, who were the collaterals of Manga in the 5th degree, for a nominal consideration of Rs. 1,000. Mt. Rajan, daughter of Manga, claiming to be the next heir to his property, has instituted the present suit for a declaration that the sale effected by her step-mother, Mt. Bano, was without consideration and necessity and was not binding on her after the death of the alienor. The vendees contested the suit alleging that the land was ancestral and that under custom the plaintiff was not an heir. They also pleaded that even if the land were held to be non-ancestral qua them, the plaintiff, as the daughter of the

last male holder, was not entitled to succeed in preference to the collaterals of the 5th degree. In that event also the suit was incompetent. Lastly they averred that the sale was for consideration and necessity and was binding on the plaintiff. The trial Judge found that the plaintiff had succeeded in proving that the land was non-ancestral qua the defendants and that under custom she had a preferential right to succeed to the non-ancestral property of her father as against his collaterals of the 5th degree, and that necessity had been established for Rs. 100 only. He accordingly granted the plaintiff a declaration that the alienation in question would not be binding on her reversionary rights after the death of Mt. Bano except to the extent of Rs. 100.

The defendants appealed to the District Judge who held that under custom a married daughter was not an heir to the property of an Awan of Shahpur District, irrespective of the fact whether it was ancestral or acquired. He however concurred with the finding of the lower Court that necessity had been established to the extent of Rs. 100 only. On his finding on issue 1 that the plaintiff was not an heir and therefore had no locus standi to sue, he accepted the defendants' appeal and dismissed the suit. He however granted a certificate to the plaintiff under section 41 (3), Punjab Courts Act, for a second appeal to this Court. In view of the Answers to Questions 16 and 17 of Wilson's General Code of Tribal Custom in the Shahpur District, the onus is on the plaintiff to prove that she is a preferential heir to the self-acquired property of her father as against the collaterals of the 5th degree. She urges that this onus has been discharged by five judicial instances in which daughters have been held, after enquiry, to be preferential heirs to non-ancestral property. These instances are 1 Lah 284,¹ 13 Lah 276,² 15 Lah 73,³ A I R 1936 Lah 809,⁴ and a decision of the Additional District Judge, Shahpur, at

1. Ghulam Muhammad v. Mt. Gauhar Bibi, A I R 1920 Lah 9=54 I C 419=1 Lah 284=10 P L R 1920.

2. Khan Beg v. Mt. Fateh Khatun, A I R 1932 Lah 157=135 I C 769=13 Lah 276=32 P L R 890.

3. Mt. Bhug Bhan v. Mohammad, A I R 1934 Lah 404=150 I C 786=15 Lah 73=36 P L R 449.

4. Ahmad v. Mohammad, A I R 1936 Lah 809=167 I C 135.

Mianwali, in Civil Appeal No. 102 of 1935 (Mt. Sat Bhirai, etc. v. Alam Sher, etc.) decided on 5th November 1935. The learned District Judge has considered these instances to be insufficient to discharge the onus in view of five mutations, copies of which have been produced by the defendants and a case decided by the Chief Court reported in 81 P R 1879.⁵ The mutations are Exs. D-11, D-15, D-16, D-17 and D-18 which show that daughters who had succeeded to their father's estates surrendered them in favour of the collaterals on marriage. In none of these cases however has it been shown that the property was non-ancestral qua the collaterals. In four of the mutations, Exs. D-15, D-16, D-17 and D-18, the collaterals were of the 3rd degree while in D-11 they were related in the 4th degree. None of these mutations therefore is relevant to the present case in which the property has been found to be non-ancestral. 81 P R 1879⁵ is a case in which the property had been definitely found to be ancestral. That case also is therefore irrelevant.

The learned counsel for the respondents was not able to cite any valid argument in support of the decision of the learned District Judge. In my opinion, the judicial instances cited by the plaintiff-appellant are sufficient to rebut the presumption arising from the entries in the Riwajiam. The plaintiff has therefore a clear locus standi to maintain the suit. It has been concurrently found by the lower Courts that necessity had been established to the extent of Rs. 100 only. This finding is one of fact and nothing has been urged against it on behalf of the respondents. The plaintiff is therefore entitled to the declaration that she will get possession of the land after the death of Mt. Bano on payment of Rs. 100. I accept the appeal, set aside the judgment and decree of the learned District Judge and restore that of the Court of first instance. The plaintiff will get her costs from the contesting defendants in all Courts.

T.M./D.S.

Appeal allowed.

⁵ Mt. Fana Bibi v. Khedayar, (1879) 81 P R 1879.

* A. I. R. 1937 Lahore 642

SKEMP, J.

*Shanti Parkash and another —*Plaintiffs — Appellants.
v.*Harnam Das and others —* Defendants
— Respondents.

Second Appeal No. 431 of 1936, Decided on 8th October 1936, from decree of Senior Sub-Judge, Jullundur, D/. 22nd January 1936.

* (a) Limitation Act (1908), Ss. 4 and 19—Scope—S. 4 does not apply to acknowledgment.

When the last day of limitation on which the period of limitation expires is a holiday, an acknowledgment made on the next day is not valid although a suit on that day would not have been barred, because S. 4 does not apply to acknowledgment : *Case law discussed.*

[P 643 C 1, P 644 C 1]

(b) Limitation Act (1908), S. 19—Distinction between 'acknowledgment' under S. 19, Lim. Act, and 'promise' under S. 25 (3), Contract Act—To create fresh starting point of limitation promise under S. 25 (3) may be made after expiration of period of limitation provided promise is express.

The distinction between an acknowledgment under S. 19, Lim. Act, and a "promise" within the meaning of S. 25 (3), Contract Act, is of great importance. Both, an acknowledgment and a promise are required to be in writing signed by the party or his agent authorised in that behalf and both have the effect of creating a fresh starting point of limitation. But while an acknowledgment under the Limitation Act is required to be made before the expiration of the period of limitation, a promise under S. 25 (3), Contract Act, to pay a debt may be made after the limitation period. After the period of limitation expires, nothing short of an express promise will provide a fresh period of limitation: 30 All 268; A I R 1930 All 467; A I R 1932 All 461; A I R 1928 Bom 319 and A I R 1929 Cal 444, *Rel. on.*

[P 644 C 1]

Wishnu Datta — for Appellants.*Achhru Ram —* for Respondents.

Judgment.—The plaintiffs sued on the basis of a bahi account dating back to 1922. The facts found are that, on 11th July 1922, Lachhman Das and his son Harnam Das executed a nawan for Rupees 450 for a cash advance. On 30th June 1925 they struck a balance for Rupees 571-8-0. On 1st July 1928 Lachhman Das alone struck a new balance of Rs. 725-8-0. On 14th June 1929 Lachhman Das made a payment of Rs. 50. On these facts the trial Court gave the plaintiffs a decree for Rs. 923 against the estate of the joint family of the defendants, but on appeal the learned Senior Subordinate Judge found that the suit was barred by limita-

tion, a point found in plaintiffs' favour in the lower Court. The point before him and again before me is that the acknowledgment of 1st July 1928 was not made within the period of three years required by law. The 30th June 1928 was admittedly a Bank holiday and the trial Court, following certain authorities, held that, by virtue of S. 4, Lim. Act, the suit was within time. The lower appellate Court held that S. 4 did not apply. This is the main point before me, but it is also argued that, even if the acknowledgment was out of time, it operates as a fresh promise to pay the debt within S. 25 (3), Contract Act. We must start from the principle that by S. 3, Lim. Act, every suit instituted after the period of limitation prescribed in the schedule must be dismissed. S. 19 (1), Lim. Act, runs as follows :

Where before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

In 26 Bom 782,¹ the leading case on the point, it was held that the suit was barred. Sir Lawrence Jenkins' reasoning was that :

Section 19, Lim. Act, requires that an acknowledgment should be given before the expiration of the period prescribed for the suit. That period is determined by Sch. 2 of the Act; and though in this case the right of suit may have been subsisting on 28th October 1897, in the sense that the suit could under the circumstances have been instituted on 29th October 1897, that was not because the period of limitation prescribed for the suit had not expired, but because notwithstanding the expiration of that period, there is a special right under the provisions of S. 5 (now S. 4) to institute the suit on the day on which the Court re-opened.

The correctness of this judgment was doubted by Beaman, J. of the same Court in a Single Bench decision, 15 Bom L R 348.² This judgment is the foundation of what I regard as heretical doctrine on the subject. The facts were similar and acknowledgment was given after the expiry of three years but while the plaintiff could still sue because the Courts were shut on the day when time expired. Beaman, J. held that :

1. Hemkore v. Masamali, (1902) 26 Bom 782= 4 Bom L R 608.

2. Visram v. Tabaji, (1913) 15 Bom L R 348= 19 I C 820.

The effect of Ss. 3 and 4, Lim. Act, upon the period prescribed in Sch. 1 seems to me clearly to extend those periods in the special circumstances contemplated by S. 4. Omitting the technical words, it comes to this : that where, say, a three years period ends within a Court vacation, the plaintiff may bring his suit not within three years but within three years and so much of the Court vacation as exceeds that period.

He went on to say that the reason probably was that in consideration of the acknowledgment the plaintiffs forbore to sue. This judgment has been followed in 49 All 726³ by Mukerjee, J. and in *C. R. No. 178 of 1936*⁴ decided by a Single Judge of this Court on 5th June 1936. These three rulings were quoted by the appellants' counsel before me. He also relied on 49 All 67,⁵ a Division Bench judgment of the Allahabad High Court, and 129 I C 125⁶, a judgment by Jai Lal, J. These two judgments may however be distinguished. They repose not on the interpretation of S. 4, Lim. Act, but on special legislation which extended limitation. The Allahabad ruling proceeds on S. 31, Limitation Act, which increased the period of limitation for mortgages from 12 to 60 years in certain territories including the United Provinces ; and 129 I C 125⁶ depends on S. 5, Punjab Act 3 of 1923, which temporarily gave a period of limitation longer than three years for money suits. Now, S. 4, Lim. Act, does not extend limitation. It states that where limitation expires when the Court is closed, a suit may be filed on the date that the Court re-opens. As far as suits are concerned the practical result is the same as if the section extended limitation, and hence it is often loosely said that the section extends limitation; but in terms it provides that in the circumstances specified, the suit may be lodged after the expiry of limitation. This was pointed out again by Rankin, C. J. in 55 Cal 1210.⁷ He said :

Section 4 is a provision to say that where the period of limitation prescribed expires on a day when the Court is closed, the suit may be insti-

3. Abdul Ghani v. B. Chiranji Lal, A I R 1927 All 577=102 I C 111=49 All 726=25 A L J 589.

4. Kishan Singh v. Sardar Ali, *Reported in* A I R 1937 Lah 162=164 I C 650=38 P L R 934.

5. Sheo Partap Singh v. Tajammul Husain, A I R 1927 All 114=98 I C 1005 = 49 All 67 =24 A L J 1039.

6. Buta Singh v. Bhan Singh, A I R 1930 Lah 978=129 I C 125.

7. Debendra Nath Roy v. Kartic Prasad Das, A I R 1929 Cal 68 = 114 I C 483 = 55 Cal 1210=32 C W N 359=47 C L J 12.

tuted on the day that the Court re-opens, that is to say, it may be instituted, notwithstanding that the period of limitation prescribed has expired.

He cut to ribbons the reasoning of Beaman, J. in 15 Bom L R 348³ and followed 26 Bom 782.¹ This judgment, 55 Cal 1210,⁷ does not appear to have been brought to the notice of the Single Judge who decided *C. R. No. 178 of 1936*.⁴ 26 Bom 782¹ was also followed in 52 Bom 521⁸ and 58 Cal 1148,⁹ both of which disapproved of 15 Bom L R 348.² I therefore think that the conclusion of the learned appellate Judge on this point was correct. As to the second point the acknowledgment is in the following terms :

Hisab yad dasht Lachhman Das wald Dhani Nath wa Harnam Das wald Lachhman Das Zat Khatri Khosla sakin Nur Mahal, ba sud ba hisab fi sadi 12 anna sainkra mahwar mugarrir kiya gya, aur bahaq Shanti Parkash balig wa Lachhmi Chand Ram Parshad nabalgan bawalayat Shanti Parkash tahrir kar diya. 1st July 1928. Mablig 725-8-0 baqaya hisab mandarja bala tahrir kiya gya hai. Tikat 4 anna ka lagaya gya.

Lachhman Das baqalm khud.

There is no express promise to pay : the promise is implied. Now, S. 25 (3), Contract Act, runs :

An agreement made without consideration is void unless it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

The learned authors of the Commentary on the Contract Act, Sir F. Pollock and Sir D. F. Mulla, say (Edn. 6, p. 203) :

The distinction between an acknowledgment under S. 19, Lim. Act, and a 'promise' within the meaning of the section is of great importance. Both an acknowledgment and a promise are required to be in writing signed by the party or his agent authorized in that behalf ; and both have the effect of creating a fresh starting point of limitation. But while an acknowledgment under the Limitation Act is required to be made before the expiration of the period of limitation, a promise under this section to pay a debt may be made after the limitation period. After the period of limitation expires, nothing short of an express promise will provide a fresh period of limitation.

This is supported by many authorities quoted by Mr. Achhru Ram on behalf of the respondents, e. g. 30 All 268,¹⁰ at

8. Maganlal Harjibhai v. Amichand Gulabji, A I R 1928 Bom 319=112 I O 24 = 52 Bom 521=30 Bom L R 793.

9. Anisuddin Ahmad v. Kalipada Roy, A I R 1931 Cal 785=134 I C 1132=58 Cal 1148=35 C W N 370.

10. Gobind Das v. Sarju Das, (1908) 30 All 268=5 A L J 274=1908 A W N 129.

p. 270, 52 All 480,¹¹ 54 All 506,¹² 52 Bom 521⁸ at p. 526, and 57 Cal 394.¹³ The appellants' learned counsel relied on the well-known Privy Council ruling 33 Cal 1047¹⁴ at p. 1059, but, as pointed out in that ruling, the acknowledgment was made within the period of limitation. This is also the case in 10 Lah 745¹⁵ and A I R 1929 Lah 591.¹⁶ The only other rulings relied on by the appellants were two old rulings of the Punjab Chief Court, 72 P R 1879¹⁷ and 102 P R 1905.¹⁸ There being no express promise, I must hold that S. 25 (3), Contract Act, does not apply and the appeal fails on both the points. As however the appellants have lost what is apparently a just claim by one day's limitation, I direct that the parties bear their own costs.

W.D./D.S.

Appeal dismissed.

11. Raj Narain v. Ram Sarup, A I R 1930 All 467=123 I O 820 = 52 All 480=1930 A L J 552.
12. Girdhari Lal v. Bishnu Chand, A I R 1932 All 461 = 140 I O 783 = 54 All 506 = 1932 A L J 279.
13. Sasi Kanta v. Sonaula Munshi, A I R 1929 Cal 444 = 121 I O 412 = 57 Cal 394 = 33 C W N 965.
14. Mani Ram v. Seth Rup Chand, (1906) 33 Cal 1047=33 I A 165=2 N L R 130 (P O).
15. Kahan Chand Dula Ram v. Daya Ram Amrit Lal, A I R 1929 Lah 263=115 I O 764 = 10 Lah 745=30 P L R 240.
16. Hannu Ram v. Jhanda Singh, A I R 1929 Lah 591=123 I O 90.
17. Ladhu Shah v. Fazl Dad, (1879) 72 P R 1879.
18. Mahbub Jan v. Nuruddin, (1905) 102 P R 1905.

A. I. R. 1937 Lahore 644

YOUNG, C. J. AND DIN MOHAMMAD, J.

Diwan Chand — Appellant.

v.

Gujranwala Sugar Mills Co., Ltd. — Respondent.

Letters Patent Appeal No. 21 of 1936, Decided on 7th December 1936, from judgment of Monroe, J., D/- 8th January 1936.

(a) Appeal — Letters Patent — Burden of proof—Single Judge deciding after full consideration that evidence on record is insufficient to prove plaintiff's allegations—Onus lies upon plaintiff to show that decision of Single Judge is legally erroneous.

Where a single Judge after full consideration of the evidence on record comes to a conclusion that the evidence is insufficient to substantiate the allegations made by the plaintiff and a Letters Patent appeal is filed from such decision, the onus lies heavily on the petitioner to show that the conclusion arrived at by the learned Judge is legally erroneous. [P 645 C 2]

(b) **Company—Contract to purchase shares—Secretary of company cannot make representation to induce persons to purchase shares—Person purchasing share due to fraudulent misrepresentation of secretary, not authorized or known to officer of company—Such person cannot sue company for damages for such misrepresentation.**

The secretary of a company has no general authority to make representations to induce persons to take shares in company: so that a person who is induced to take a share in a company by a fraudulent misrepresentation, not authorized by or known to the officers of the company entitled to make representations, of the secretary of a company, is not entitled to maintain an action against the company for the rescission of the contract, or for damages for such misrepresentation: *Newlands v. National Employer's Accident Association*, 54 L J Q B 428, Foll.

[P 649 C 1]

Jagan Nath Agarwal, Asa Ram Agarwal and S. M. Sikri — for Appellant.

M. L. Puri and Qabul Chand —
for Respondent.

Young, C. J.—This is an appeal from the order of Monroe, J. dated 8th January 1936, dismissing the petitioner appellant's application under S. 38, Companies Act, 1913, for rectification of the register of members of the Gujranwala Sugar Mills Co., Ltd. and removal of his name therefrom. The facts giving rise to this appeal are these. On 4th May 1933, the petitioner made an application to the Gujranwala Sugar Mills Co., Ltd. and was allotted 50 shares of the value of Rs. 1,000 each by the Allotment Sub-Committee and his name was duly entered in the register of members of the Company. On the same day he paid Rs. 5,000, Rs. 1,500 in cash and Rs. 3,500 per cheque, which under Art. 9 of the Articles of Association he was required to pay with his application. On 3rd July 1934, he submitted a petition to this Court praying that his name be omitted from the register of members of the company and that the company be called upon to refund the sum of Rs. 5,000 paid by him with his application together with interest at 12 per cent. per annum from the date of payment to the date of realization. He alleged that he had annexed certain conditions to the offer that he had made for the purchase of his shares and that as those conditions had not been carried out by the Company he was entitled to have the register rectified.

The Company resisted this application on the ground that the petitioner's application, dated 4th May 1933, was unconditional and so was the allotment made to

him. Issues arising from the pleadings of the parties were framed and findings given against the petitioner. The sole question that falls to be determined in this case is whether the petitioner has succeeded in establishing that any conditions were attached to the offer made by him on 4th May 1933. The petitioner relies on oral as well as documentary evidence in support of his contention and it becomes necessary, therefore, to see whether the evidence relied upon by the petitioner is sufficient to substantiate the allegations made by him. This evidence has already been fully examined by the learned Judge of this Court and considered to be insufficient for the purpose, and the onus, therefore, lies heavily on the petitioner to show that the conclusion arrived at by the learned Judge is legally erroneous.

The petitioner alleges that in the first week of April 1933, Mr. Labh Singh, Chairman, and Mr. Mukund Lal, Secretary of the Company, visited him at Gakhar and canvassed him to buy 50 shares of the company. He offered to purchase these shares on the following conditions: (1) that he would be made a life director in the Company; (2) that his firm would be given an equal share in the managing agency with Messrs. Singh & Co., and Narang Bros. & Co. Ltd.; (3) that more than 50 per cent. of the share money would not be called; and (4) that his firm would be given the sole agency for the sale of sugar manufactured by the company.

A rough calculation was made by Mr. Labh Singh on a loose sheet of paper, estimating, among other things, what amount by way of commission would fall due to his firm if the sole agency was made over to it. Both the Chairman and the Secretary agreed to the conditions proposed by him on which he asked them for a copy of the draft agreement of the company with the managing agents. These two officers of the company showed him a resolution by which they were empowered to settle the terms with the prospective members. Two or three days later, Mr. Mukund Lal saw him at Lahore and handed over to him a copy of the draft agreement with the managing agents and told him that if he agreed to the conditions contained in the said agreement he would also be given an equal share with Singh and Company, and Narang Brothers & Co. Ltd., with whom the agreement was being entered

into. On 14th April, Mr. Mukund Lal addressed a post-card to him, referring to the draft agreement in question. Thereupon he intimated to the company on 18th April 1933 that 50 shares be kept in reserve for him. On 20th April 1933 Mr. Mukund Lal sent him a reply to his letter mentioned above. Sometime after, he had an interview with Mr. Labh Singh, who informed him that he had settled everything else and that he had simply to ask Messrs. Narang Brothers & Co. Ltd. about the share to be allotted to him in the managing agency. On 4th May, he received a note by hand from Mr. Labh Singh asking him to see him and make a final settlement with him regarding the Sugar Mills. On this he went to Gujranwala where he was informed by Mr. Labh Singh that the company had accepted all the conditions proposed by him and that he should fill in an application form and pay Rs. 5,000 with his application as required by the rules. Allotment of 50 shares was made to him there and then and the requisite letter was issued. He was also furnished with a copy of the Articles of Association in which at that time Art. 90 relating to directors had been left blank. He was told that after his appointment as a life director his name would be duly shown in the Articles of Association along with the names of the other directors. He waited for a few days and wrote a letter to the Company on 2nd June 1933. Not receiving any reply to that letter from the company, he sent a reminder on 9th June which brought forth on 10th June a letter in reply from the Company assuring him of due fulfilment of all the promises that had been made to him. This letter was in the handwriting of and signed by Mr. Mukund Lal. On 23rd June he again received a letter assuring him that he would be made a director in place of Mr. Ram Singh, brother of Mr. Labh Singh. On 9th July, he received another letter bearing date 7th July from the company. He sent a reply to this letter on the same day. As his conditions had not been fulfilled, he served a notice on the Company on 29th January 1934 and later sent another notice on 31st March 1934. Sometime after, he was assured by Mr. Mukund Lal that he would arrange to transfer his shares without reserving any liability upon him.

This version of the petitioner has been entirely disbelieved by the learned Judge,

and sitting as an appellate Court we will not be justified in differing from him unless we are satisfied that there are strong reasons to adopt that course. We however find that there are not only no such reasons but that the reasoning employed by the learned Judge is most cogent and convincing. We are not at all prepared to believe that a business-man of the standing and position of the petitioner could have been put off by the Chairman or the Secretary of the Company in the manner in which he asks us to believe or would have been satisfied with vague assurances and indefinite promises as alleged by him.

There is no document on the record to show that any conditions were annexed to the offer made by the petitioner. He asks us to infer these conditions from the letters which were exchanged between him and Mr. Mukund Lal in the month of April 1933. We have read these letters very carefully and have come to the conclusion that instead of supporting his case these letters give the lie direct to his allegations, inasmuch as they clearly indicate that in the first instance no promises were made to him by the Company in the first week of April 1933 as alleged by him, and secondly, that the conditions set forth by the petitioner could not have been then under consideration at all. It is significant that the possibility of the petitioner's owning 50 shares was for the first time visualised on 18th April 1933 and if this were so, there could not have been any promises made to him in the first week of April 1933 on the basis of his owning 50 shares. It may also be mentioned that the letter of Mr. Mukund Lal bearing date 14th April 1933 assuring the petitioner that the managing agents would have to abide by the restrictions imposed by the Directors could not have been written to the petitioner, if the petitioner's having a share in the managing agency had been one of the baits placed in his way. The most important thing however that deserves consideration in this connexion is that while the petitioner in the story related by him does not refer to any event having taken place on 1st May 1933 and avers that he saw the Chairman for the first time on 4th May 1933, both his application for shares and his cheque for Rs. 3,500 in part payment of his application money bear date 1st May 1933. In his cross-examination an explanation was demanded from him on this matter and his statement

that he antedated his application and the cheque at the instance of Mr. Labh Singh is simply ridiculous.

The sheet-anchor of the petitioner is the letter, Ex. P. W. 1/M, dated 10th June which is admittedly in the handwriting of Mr. Mukund Lal. The account put forward by the petitioner is that this letter was sent to him in reply to his two letters dated 2nd June and 9th June respectively. The learned Judge has discussed these letters in his judgment and has come to the conclusion that even if it be believed that they were addressed to Mr. Mukund Lal, who had ceased to be the Secretary of the Company prior to that date and has denied having seen them, there is nothing in them to indicate that Mr. Labh Singh was a party to any arrangement made with the petitioner by Mr. Mukund Lal. It is even doubtful whether these letters were ever despatched to Mr. Mukund Lal. In his letter of 9th June the petitioner had unequivocally demanded from the company a definite assurance as to the fulfilment of the conditions set out above and in default had directed the company not to forward his name to the Registrar of Joint Stock Companies as a member of the Company and to treat his application as well as his application money as a deposit in trust. The subsequent conduct of the petitioner however shows that it was altogether inconsistent with the cut and dry position taken up by him on 9th June.

Adverting now to the letter of 10th June, we do not consider that even taken at its face value, it lends any support to the petitioner's case. The vague references made therein to the managing agency and the sole agency do not in any way fall in line with the petitioner's allegations. It is true that there is a reference in that letter to some promises made to the petitioner before his application for shares was put in and to the possibility of the petitioner's appointment as a Director of the Company as well as an assurance to the effect that more than 50 per cent. share money will not be called, but it is nowhere indicated in this letter that the company was in any way privy to the so-called promises made to him or that the nature of the promises made was exactly in accordance with the allegations now made by the petitioner or that the conditions alleged by him were annexed to the offer made by the petitioner. We are disposed to think that Mr. Mukund Lal who

was a friend of the petitioner had induced him to purchase shares in the Company and had raised his expectations in the matter of his appointment as a director, but we cannot infer from the correspondence alluded to above that the offer by the petitioner had been made subject to any conditions.

The petitioner has admitted that a regular notice of call was issued to him on 9th August 1933, and that he did not take any steps to repudiate his liability on the receipt of the said notice. This, in our opinion, could not be the conduct of a person who had written the letter of 9th June, and his inactivity on this occasion clearly indicates that the story of his having annexed any conditions to his original offer is far from truth. Another notice of call was issued in the month of January 1934, and it is only then that the petitioner served a notice on the company through a lawyer on the lines set forth in his letter of 9th June. The reason is not far to seek. The petitioner appears to have built some castles in the air and dreamt of fat dividends on his investment, but finding that even machinery had not been purchased up to the end of December 1933, and that there was no likelihood of his dreams being realized, he thought of wriggling out of his liability in some way or other and informed the Company for the first time in January 1934 that the allotment made to him was improper.

There is ample documentary evidence on the record to show that since 4th May 1933, the petitioner had been taking an active interest in the affairs of the Company. He had been canvassing for the sale of shares and participating in the administration of the company in several other ways. It is inconceivable that had he attached any conditions to his offer he would have conducted himself in this manner without securing a definite assurance from the Company in the shape of a resolution by the Board especially if he had written the letter of 9th June. The most important thing however to mention in this behalf is that the conditions relied upon by the petitioner were impossible of execution under the Articles of Association.

In the first instance, directorship could not co-exist with sole agency as this would have been a clear violation of Art. 102 of the Articles of Association. Moreover no director or other officer of the Company could have made any agreement with the

petitioner prejudicially affecting the interests of Narang Brothers & Co. Ltd. and Singh & Co. without their knowledge or consent. They had been appointed managing agents under Art. 112 of the Articles of Association, and it passes our comprehension that the Chairman would hand over a copy of the Articles of Association to the petitioner who, according to his own showing, was being kept in the dark as to the real situation in this matter. Narang Brothers & Co. Ltd. were well known in Lahore and the petitioner, who also belongs to Lahore, could have easily ascertained from them whether they would be willing to introduce the petitioner as an equal partner in the managing agency with themselves. We cannot believe that the petitioner was such a simpleton that he could be duped into believing that his conditions could be fulfilled by any Board of Directors.

The petitioner's own calculation shows that he stood to gain about Rs. 16,600 or at least Rs. 13,600 per annum if the conditions set out above were fulfilled. His earnings from the managing agency alone including commission on profits would have amounted to Rs. 6,000 per annum. His receipts from the sole agency would have been at least Rs. 4,000 and his dividend would have come up to Rs. 6,000 on Rs. 50,000 or to Rs. 3,000 on Rs. 25,000 per annum. His fee as director would have amounted to Rs. 600 per annum. Considering that the petitioner was prepared to pay Rs. 25,000 only in the first instance, it is inconceivable that any directorate would have or could have agreed to these terms. There is thus an inherent improbability in the allegations made by the petitioner.

Further, it has been reliably established that as early as 29th May 1933, it was resolved by the Board that only that person would be appointed as sole agent for the sale of sugar manufactured by the company who would own 40 shares or more in his own right and would underwrite or sell another 150 shares within a period of three months from the passing of the resolution. As no person came forward to qualify himself under this resolution, this condition was modified and a compulsory deposit of a fixed amount in cash was called for. On the altered condition, in September 1933, an agreement for the sale of sugar was entered into by the company with Lala Bhag Shah, a Municipi-

pal Commissioner and kursi nashin of Gujranwala, and it cannot be believed that the petitioner would not have come to know of it, seeing that he was taking a very keen interest in the affairs of the Company and was keeping himself in touch with it throughout the period that elapsed after the allotment of shares to him and his repudiation thereof. Lala Bhag Shah who appears to us to be a truthful person has stated that the petitioner had actually been negotiating with him for a share in the sole agency, and in these circumstances we cannot imagine that the petitioner was labouring under any misapprehension as to his position in the matter.

The petitioner has placed his reliance on several letters which, according to him, furnish intrinsic evidence that he was being treated as a responsible officer of the Company; for instance, letters dated 23rd June and 7th July 1933. In the former letter Mr. Mukund Lal had asked the petitioner to attend a meeting in which the question of the appointment of manager was to be considered, and in the latter Mr. Labh Singh had made a request to the petitioner to supervise the construction of the buildings and had given him authority to fix rates, etc. These letters no doubt convey that the petitioner was being treated as an important person in relation to the affairs of the Company, but even a liberal interpretation placed upon them would not support the case as put forward by the petitioner. It is noteworthy in this connexion that the petitioner produced a copy of a letter purporting to have been addressed by him on 9th July in reply to the letter dated 7th July mentioned above. Another letter bearing date 9th July 1933, and admittedly in the handwriting of the petitioner, was produced by the Company which dealt with quite a different matter from the one dealt with in the letter produced by the petitioner. Faced with this awkward situation, the petitioner offered an explanation which however does not ring true.

It may further be remarked that there is ample evidence on the record to show that the petitioner wanted to take certain contracts under the company and his own letters show that he was interested in the building contract as well as in the contract for the purchase of sugarcane. The role played by the petitioner in this respect is altogether inconsistent with the

position claimed by him. Moreover, even if any fraudulent misrepresentations were made to him by Mr. Mukund Lal as Secretary of the Company, we do not think that the Company would be bound by them. The petitioner has relied on a resolution of the Board delegating the powers of allotment to Messrs. Labh Singh and Mukund Lal under Article 9 of the Articles of Association, by which the Directors were empowered to authorize by a resolution any one or more from among themselves to sanction the allotment of shares. This authorization, however, could not empower the Directors so authorized to bind the company in contravention of the Articles of Association. The fact remains, therefore, that neither Mr. Labh Singh nor Mr. Mukund Lal could validly agree to any terms which were not contemplated by the Articles of Association or ran counter to them. Reference in this connexion may be made to (1885) 54 L J Q B 428.¹ It was held in that case by the Court of Appeal :

The Secretary of a company has no general authority to make representations to induce persons to take shares in a company: so that a person who is induced to take shares in a company by a fraudulent misrepresentation, not authorized by or known to the officers of the company entitled to make representations, of the Secretary of a company is not entitled to maintain an action against the company for the rescission of the contract, or for damages for such misrepresentation.

On these grounds we hold that the petitioner has failed to make out a case for himself and we accordingly affirm the order passed by Monroe, J. and dismiss this appeal with costs.

K.B./A.L.

Appeal dismissed.

1. Newlands v. National Employers Accident Association, (1885) 54 L J Q B 428=53 L T 242=49 J P 628.

A. I. R. 1937 Lahore 649

TEK CHAND, J.

Jawala Sahai — Defendant —
Petitioner.

v.

Firm Hari Ram-Balmokand —
Plaintiff — Opposite Party.

Civil Revn. No. 888 of 1936, Decided on 20th January 1937, from order of Dist. Judge, Amritsar, D/- 19th May 1936.

(a) Res judicata — Issue between parties whether barred by res judicata decided—
Decision is itself res judicata in subsequent suit.

A decision even if erroneous in a former suit that the issue between the parties was or was not barred by the plea of res judicata is in itself a decision which operates as res judicata in a subsequent suit: *A I R 1915 Cal 629*; *A I R 1930 Pat 585*; *A I R 1928 Cal 717* and *A I R 1933 Pat 104, Rel. on.* [P 651 C 2]

(b) Res judicata—Decision regarding jurisdiction—Decision is res judicata in subsequent suit.

A Court before whom a cause is brought has always jurisdiction to decide for itself whether it has jurisdiction to try the suit and its decision thereon is as much res judicata in a subsequent suit relating to the same subject matter as on any other point: *11 Bom 488*; *A I R 1926 Cal 1101* and *A I R 1933 Pat 104, Rel. on*; *A I R 1931 All 454, Disting.* [P 652 C 1]

Nand Lal — for Petitioner.

Daulat Ram — for Opposite Party.

Order.—This is an appeal against the decision of the District Judge, Amritsar, dated 19th May 1936, dismissing the defendant-appellant's appeal under S. 104, Cl. (1) (f), Civil P. C., against the order of a Subordinate Judge, Amritsar, fling an award given in a private arbitration. A preliminary objection is raised that no further appeal lies to this Court in view of the clear provisions of S. 104, Cl. (2). This objection is well founded and must succeed. Counsel for the appellant prays that the memorandum of appeal may be treated as a petition for revision and, in view of the peculiar circumstances of the case, the judgment of the Court below be set aside on the revision side. The relevant facts are as follows: The plaintiff firm Hari Ram Balmokand carry on business as Commission Agents at Amritsar. The defendant, Dr. Jawala Sahai, is a resident of Pind Dadan Khan in the Jhelum District. It appears that on various dates between 3rd December 1931 and 15th August 1932, the defendant placed orders with the plaintiff for the purchase and sale of wheat. The terms of the contracts were entered in certain parchis, some of which have been produced and are marked P. 7 to P. 9. One of these terms was that:

In case of any dispute arising between the parties the same shall be referred to two members of the Amritsar Sugar and Grain Merchants' Association, one to be appointed by either party. If any party failed to nominate an arbitrator within seven days of the date of request by the other the latter shall have the right to nominate both. The award of the arbitrator will be final and binding on the parties.

Disputes having arisen between the parties the plaintiff firm on 8th February 1933 wrote to the defendant intimating that they had appointed one Lala Lachh-

man Das as their arbitrator and calling upon the defendant to nominate his arbitrator within a week. The defendant declined to do so. Thereupon the plaintiff nominated Lala Nihal Chand as arbitrator for the defendant. These two persons entered on their duties on 18th February 1933 and served notice of the date of hearing on the parties. The defendant failed to appear before them. Accordingly the arbitrators gave an award ex parte on 7th March 1933, declaring that the sum of Rs. 1,053-1-9 was due by the defendant to the plaintiff on the transactions in dispute.

On 9th March 1933 the plaintiff filed an application under Sch. 2, Para. 20, Civil P. C., in the Court of a Subordinate Judge, Amritsar, for filing the award and passing a decree in accordance therewith. The application was registered as a suit and notice issued to the defendant Jawala Sahai. On the same day, i. e. 9th March 1933, Jawala Sahai instituted a suit against the plaintiff firm for rendition of accounts on foot of the transactions in dispute, in the Court of an Honorary Subordinate Judge at Pind Dadan Khan. In the plaint he made no reference to the proceedings before the arbitrators or the award given by them. In this suit a preliminary decree for rendition of accounts was passed ex parte against the present plaintiff on 29th June 1933. This was followed by a final decree, also passed ex parte on 27th July 1933, directing the Amritsar firm to pay Rs. 498-7-0 to Jawala Sahai. The firm applied to have the ex parte final decree set aside on the ground that they had not been duly served. This application was accepted and the ex parte final decree was set aside on 8th March 1934. Jawala Sahai appealed against this order to the Senior Subordinate Judge, Jhelum, but the appeal was dismissed on 20th July 1934. Accordingly the suit instituted by Jawala Sahai in the Court of the Subordinate Judge, Pind Dadan Khan, proceeded on the merits, and after a lengthy enquiry, the Subordinate Judge found that nothing was due by the Amritsar firm to Jawala Sahai, but that Jawala Sahai owed Rs. 183-11-6 to the firm. He accordingly passed a decree for Rs. 183-11-6 in favour of the firm against Jawala Sahai. From this decree both parties appealed to the District Judge, Jhelum, before whom it was contended on behalf of the firm that the suit

for rendition of accounts could not be entertained by the Pind Dadan Khan Court as the cause of action arose wholly at Amritsar and secondly because the suit was barred by reason of the award of the arbitrators who had been duly appointed under the terms of the contract. The learned District Judge overruled both these contentions holding that the plea as to want of jurisdiction could not be entertained in an appeal in view of S. 21, Civil P. C., and further that neither of these two objections could be considered at that stage as no steps had been taken by the firm to have the ex parte preliminary decree, passed by the Pind Dadan Khan Court, set aside in proceedings under O. 9, Civil P. C., or on appeal. On the merits he affirmed the conclusion of the trial Judge and dismissed both appeals on 27th January 1936.

In the meantime proceedings in the Amritsar Court on the application under Sch. 2, Para. 20, Civil P. C., which had been presented by firm Hari Ram-Balmokand for filing the award of the arbitrators, were stayed from time to time at the request of the plaintiff firm pending the decision of the litigation at Jhelum.

When after the disposal of the appeals by the District Judge, Jhelum, on 27th January 1936, the proceedings at Amritsar were revived, the defendant Jawala Sahai objected that the question of the liability of the defendant under the contracts in question was res judicata by reason of the preliminary decree passed by the Subordinate Judge, Pind Dadan Khan, on 29th June 1933. He also pleaded that the plaintiff was not competent to make a reference to arbitration under the terms of the contract and in any case the award was bad by reason of the misconduct of the arbitrators. At the time of arguments the objection as to the matter being res judicata was withdrawn by counsel for the defendant. On the other points the Subordinate Judge found against the defendant and ordered the award to be filed and in the result passed a decree for Rs. 1053-1-9 in favour of the firm in accordance with the award. From the order filing the award, Dr. Jawala Sahai appealed to the District Judge, Amritsar. Before him the plea of res judicata which had been abandoned in the Court below was raised again, and the order of the trial Court was also assailed on the ground that the reference and the award

were invalid. The learned District Judge found against the defendant on all points and dismissed his appeal.

In rejecting the plea of *res judicata* the learned District Judge has observed that there was nothing to show that the dispute which was the subject matter of the defendants' suit at Jhelum arose out of identical transactions which form the subject matter of the award. The learned counsel for the plaintiff-respondent has admitted before me that the learned District Judge was in error on this point. He frankly conceded that the litigation at Jhelum related to accounts of the identical transactions on which the award had been delivered by the arbitrators at Amritsar. The learned Judge further held that even if the transactions were identical, the award which is of an earlier date cannot be barred under S. 11 by the decree passed in the defendants' suit for the simple reason that the decree is of a subsequent date to the date of the award. This reasoning is obviously fallacious and is based on a misappreciation of the proper effect of the decree of the District Judge, Jhelum. In that case it was pleaded by the present plaintiff that the matter was *res judicata* by reason of the award which had been validly given by the arbitrators prior to the institution of the suit at Jhelum, but this plea was rejected by the District Judge, Jhelum, who ignored the award, went into the accounts and having determined the amount due thereon passed a decree for Rs. 183.11.6 in favour of the present plaintiff. That decision is now conclusive between the parties and I have no doubt that it is not open to plaintiff to get another decree for Rupees 1053.1.5 on the same transactions based on the earlier award. The learned counsel for the plaintiff-respondent has argued that a valid award, given in a private arbitration is a final adjudication of the dispute between them and is operative, even though neither party has sought to enforce it by a regular suit or by the summary procedure laid down in Sch. 2 of the Code: 33 Cal 881¹ at p. 887. He urges therefore that the award operated as a bar against the Jhelum Court going into the accounts of the same transactions. But, as already stated, this plea had been raised in the Jhelum Court and was heard

and finally decided against the present plaintiff. That decision therefore itself operates as *res judicata*. A very similar case will be found in 19 C W N 1280,² where it was held that where a decision between the parties was considered by the Court and declared not to be *res judicata*, the latter decision, even if erroneous in law, becomes conclusive between the parties and it is not open to any of them to plead in a later suit that the former decision still operated as *res judicata*. Similarly, in 9 Pat 674³ it was held that a decision in a former suit that the issue between the parties was or was not barred by the plea of *res judicata* is in itself a decision which operates as *res judicata* in a subsequent suits; *see also* 32 C W N 828⁴ and 12 Pat 117⁵ (at p. 119) which are to the same effect.

The learned counsel for the plaintiff-respondent contends however that the entire proceedings in the Jhelum Courts were without jurisdiction as a suit by a principal against a commission agent for accounts can only be instituted at the place where the commission agent resides or carries on business or where the contract was entered into (70 P R 1890,⁶ 53 I C 331⁷, 9 Lah 455,⁸ etc.) and therefore the former suit should have been instituted at Amritsar. He argues therefore that the decision in that suit being by a Court without jurisdiction cannot operate as *res judicata*. But as has been pointed out already, the plea of want of jurisdiction was also raised before the District Judge, Jhelum, and was decided against the present plaintiff. Obviously that decision was not void. Even if erroneous, it is binding on the parties; when set aside on appeal or other pro-

2. Mohendra Nath Biswas v. Shamsunnessa Khatun, A I R 1915 Cal 629=27 I C 954=21 C L J 157=19 C W N 1280.

3. Sanichar Mahton v. Dhakeshwar Prasad Narain Singh, A I R 1930 Pat 585=128 I C 337=11 P L T 765=9 Pat 674.

4. Ayetonnessa Bibi v. Amjed Ali, A I R 1928 Cal 717=115 I C 598=32 C W N 828=48 C L J 184.

5. Girwan Narayan v. Kamla Prasad, A I R 1933 Pat 104=142 I C 113=12 Pat 117=13 P L T 737.

6. Thakur Das v. Tulsi Das, (1890) 70 P R 1890 (F B).

7. Asa Ram Kalu Ram v. Bakshi Ram Kanhya Ram, A I R 1919 Lah 26=53 I A 331=1 Lah 203=51 P L R 1920.

8. Bhamboo Mal v. Ram Narain, A I R 1928 Lah 297=109 I C 28=9 Lah 455=29 P L R 406.

1. Bhajahari Saha v. Behari Lal, (1906) 33 Cal 881=4 C L J 162.

ceedings allowed by law, its correctness cannot be questioned in this suit. A Court before whom a cause is brought has always jurisdiction to decide for itself whether it has jurisdiction to try the suit and its decision thereon is as much *res judicata* in a subsequent suit relating to the same subject matter as on any other point: 11 Bom 488⁹ (at p. 490), A I R 1926 Cal 1101¹⁰ (at p. 1103) and 12 Pat 117.⁵ The learned counsel for the respondent referred to 53 All 560,¹¹ but the facts there were entirely different and in that case there had been no decision on the point of jurisdiction in a former suit. I hold therefore that the decree of the Jhelum Court is a bar to the proceedings at Amritsar and the decision of the lower appellate Court to the contrary is erroneous. As a last resort, the respondents' counsel urged that an erroneous decision of a point of law is not a good ground for revision and he cited certain well-known rulings in support of it. But in the present case the judgment of the learned District Judge is vitiated by erroneous assumptions and has led to the curious result that the plaintiff, after having obtained a decree for Rs. 183.11.6 after contest from the Jhelum Court, has been granted another decree for Rs. 1,053.1.5 on the same transactions. The result is all the more remarkable, as the plaintiff himself got the proceedings at Amritsar repeatedly stayed to await the result of the litigation at Jhelum.

I accept the petition for revision, set aside the judgment and decree of the learned District Judge, Amritsar, dated 19th May 1936, and dismiss the respondent's application under Sch. 2, Para. 20, Civil P. C. Having regard to all the circumstances, I leave the parties to bear their own costs throughout.

P.R./D.S.

Petition accepted.

9. Amritrav Krishna v. Balkrishna Ganesh, (1887) 11 Bom 488.
10. Ishan Chandra v. Moomraj Khan, A I R 1926 Cal 1101=97 I C 770=30 O W N 940=45 C L J 24.
11. Raghubir Saran v. Hori Lal, A I R 1931 All 454=131 I O 248=53 All 560=1931 ALJ 240.

A. I. R. 1937 Lahore 652

ABDUL RASHID, J.

Allah Bakhsh and another v. Emperor.

Criminal Misc. Appln. No. 328 of 1936, Decided on 12th January 1937, for transfer of appeal pending before Sess. Judge, Gurgaon, to some other Court.

Criminal P. C. (1898), S. 526—Grounds for transfer—Opinion formed—Appellate Court remanding case for re-trial holding that there was *prima facie* case against accused under some other section of Penal Code—On appeal to same appellate Court after conviction on remand, application by accused for transfer of appeal to another Court under S. 526 — Transfer, held, was justified in interests of justice.

The accused was convicted under S. 363, Penal Code. On appeal the appellate Court set aside the conviction and remanded the case to the trial Court for retrial holding that there was a *prima facie* case against the accused under S. 366 or S. 366-A, Penal Code. On a conviction after remand, the accused filed an appeal to the same appellate Court and also filed an application for transfer of the appeal to another Court :

Held : that in the interests of justice the transfer of appeal to another Court was justified under the circumstances of the case. [P 652 O 2]

Mohammad Amin — for Petitioners.

Order.—The petitioners Allah Bakhsh and Khacheru were convicted by S. Gurdial Singh, Magistrate, First Class, Gurgaon, on 18th January 1936, under S. 363, I. P. C., and were each sentenced to two years' rigorous imprisonment. They preferred an appeal in the Court of the learned Sessions Judge, Hissar, at Gurgaon. The learned Sessions Judge set aside the conviction, and remanded the case to the Magistrate on the ground that the accused persons ought to have been charged under S. 366 or 366-A, I. P. C. The petitioners were subsequently tried by Mr. Budhwar, Subdivisional Officer, and sentenced to three years' rigorous imprisonment each under S. 366-A, I. P. C., on 9th September 1936. Against their convictions and sentences the petitioners have preferred an appeal to the Sessions Judge, Hissar. The petitioners have also preferred an application to this Court under S. 526, Criminal P. C., praying that their appeal be transferred for disposal from the Court of the Sessions Judge, Hissar, to the Court of some other Sessions Judge. In his order, dated 25th February 1936, the learned Sessions Judge, Hissar, has held that there was a *prima facie* case against the petitioners under S. 366 or 366-A, I. P. C. In these circumstances it is expedient, in the interests of justice, that the appeal preferred by the petitioners be heard by some Court other than the Court of the Sessions Judge, Hissar. Notice of the application of transfer preferred by the petitioners to this Court was sent to the District Magistrate, Hissar. He sent it for report to the learned Sessions Judge.

The learned Sessions Judge is himself of the opinion that the appeal should be transferred. For the reasons given above I withdraw this appeal (*Allah Bakhsh and Khacheru v. The Crown*) from the Court of the Sessions Judge, Hissar, and transfer it to the Court of the Sessions Judge, Delhi, for disposal.

W.D./A.L. *Application allowed.*

* A. I. R. 1937 Lahore 653

TEK CHAND AND ABDUL RASHID, JJ.

Jati Khubi — Plaintiff — Appellant.

v.

Matu and another — Defendants — Respondents.

Letters Patent Appeal No. 27 of 1937, Decided on 18th May 1937, from decree of Jai Lal, J., D/- 3rd December 1936, reported in *A I R 1937 Lah 485*.

* Custom (Punjab) — Alienation — Reversioner — Right of reversioner to contest alienation is independent and individual — Omission by one reversioner to sue does not debar others from suing at all—Minor son of alienor and other major but distant collaterals living at time of alienation—No suit by such collaterals to challenge alienation within limitation—Suit by minor after limitation but within three years of his attaining majority is maintainable and not barred: 39 *P L R 127* = *A I R 1937 Lah 485*, *Reversed*.

The right of the reversioners to contest an alienation by the last male holder is not a joint and indivisible one and the omission by one reversioner to sue does not debar the others from suing at all. Each one of the reversioners has an independent and individual right to sue, though the decree obtained by one may enure for the benefit of all. Each collateral is entitled only to his share when he challenges an alienation by the last male holder. He is not entitled to a decree for his own share as well as for the shares of other reversioners who refuse to join him as plaintiffs. Inasmuch as the right to file a suit to set aside an alienation accrues to each reversioner separately, the question of limitation is to be decided with respect to the law governing the plaintiff in each case. [P 654 C 2; P 655 C 2]

Where therefore the minor son of the alienor and the collaterals in the fifth degree were in existence at the time of the alienation by the minor's father and the minor son was primarily entitled to challenge the alienation and no suit was brought by such collaterals within limitation to challenge the alienation and the minor son sued therefor after limitation, but within three years after attaining majority:

Held: that the suit was maintainable and not barred: 39 *P L R 127* = *A I R 1937 Lah 485*, *Reversed*; *A I R 1932 Lah 39*; *A I R 1933 Lah 866*; *A I R 1934 Lah 968* and *A I R 1934 Lah 908*, *Foll.*; *A I R 1933 Lah 524*, *Dissent.*;

A I R 1925 Lah 654 and *A I R 1919 Mad 911 (F B)*, *Disting.* [P 656 C 1]

Shamair Chand and Parkash Chandra — for Appellant.

Mukand Lal Puri and Qabul Chand — for Respondents.

Abdul Rashid, J.—On 26th February 1926, one Khubi mortgaged 50 bighas 7 biswas of agricultural land for a sum of Rs. 4,000 in favour of Matu. On 21st August 1930, Khubi again mortgaged another piece of land measuring 38 bighas in favour of Matu for a sum of Rs. 1,200. On 9th June 1933, Jati, minor son of Khubi, instituted the suit, out of which the present appeal has arisen, for the usual declaration that the mortgages effected by his father were null and void and shall not affect his reversionary rights after the death of the alienor, as the alienations were without consideration and necessity. It was pleaded by the contesting defendant, inter alia, that the suit of the plaintiff was barred by limitation so far as the mortgage dated 26th February 1926 was concerned. On 26th February 1926, the plaintiff was a minor. There were however several collaterals related to the last male holder in the fifth degree who were majors. The plaintiff was a minor at the time of the institution of the suit also.

The trial Court held that as the plaintiff was a minor and the alienations in question were effected during his minority, the suit of the plaintiff was not barred by limitation. It was also held that the alienations in question were without consideration and valid necessity. On these findings, the plaintiff was given the declaration prayed for. The contesting defendant preferred an appeal in the Court of the learned District Judge which was dismissed, all the findings of the trial Court being affirmed. Against this decision, Matu preferred an appeal to this Court which was heard by a learned Single Judge. [see *A I R 1937 Lah 485*]. The learned Judge held that the plaintiff's suit was barred by limitation with regard to the mortgage of 26th February 1926. He therefore accepted the appeal in part and set aside the decree of the District Judge with regard to the mortgage of 26th February. Against this decision Jati has preferred an appeal to this Court under Cl. 10, Letters Patent.

The judgment of the learned Single Judge is based on a Division Bench ruling

of this Court: *Gajindar Singh v. Balwant Kaur*.¹ The following observations from this judgment of Addison and Bhide, JJ. may be reproduced in extenso :

The proposition of law that a suit by a reversioner to challenge an alienation in cases of this type is a representative one is now well established and it follows almost as a corollary from this that if there is at the date of the alienation a reversioner who is competent to challenge it, but fails to do so within the period of limitation, the result is binding on the whole body of reversioners. The learned counsel for the appellants did not attempt to challenge these propositions but merely sought to distinguish the present case on the ground of the minority of the plaintiffs. But the minority of the plaintiffs cannot help them as the period of limitation began to run against the whole body of reversioners, some of them at any rate being majors when the alienations were effected. This was the view taken in A I R 1927 Mad 216² and seems to be in accord with the propositions laid down by the Full Bench of the Madras High Court in 41 Mad 659.³ The view taken by the Full Bench of the Madras High Court was followed by this Court in 6 Lah 405.⁴

Jai Lal, J. in his judgment under appeal observed that he was bound to follow this ruling though with great respect he was of the opinion that the observations of the learned Judges had laid down a much wider proposition than was justified by law. In *Gajindar Singh v. Balwant Kaur*¹ the learned Judges have relied on certain observations of their Lordships of the Privy Council in 38 Mad 406.⁵ It was held by their Lordships in that case that :

A suit to set aside an adoption is brought by the presumptive reversioner in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment, just as the relief sought for is for their common benefit. The contingent reversioner may be joined as plaintiff in the presumptive reversioner's suit, and, if so, it follows that on his death the "next presumable reversioner" is entitled to continue the suit begun by him.

This ruling does not deal with the question of limitation and does not support the view that, if there is at the time of the alienation a reversioner who is competent to challenge it but fails to do so within the period of limitation, the result is binding on the whole body of rever-

sioners including minors. The doctrine that a suit by a reversioner is a representative suit cannot, in my opinion, be pushed so far as to lay down that the right of the reversioners to contest an alienation by the last male holder is a joint and indivisible one and that the omission by one reversioner to sue debars the others from suing at all. Each one of the reversioners has an independent and individual right to sue though the decree obtained by one may enure for the benefit of all. Reliance has also been placed by the learned Judges in *Gajindar Singh v. Balwant Kaur*¹ on a Full Bench ruling of the Madras High Court reported in 41 Mad 659.³ It was held in the reported case that:

A suit by a reversioner to set aside an alienation by a Hindu widow is a representative suit on behalf of all her reversioners then existing or thereafter to be born, and all of them have but a single cause of action which arises on the date of the alienation. Hence if by failing to sue within 12 years allowed by Art. 125, Lim. Act, the existing reversioners become barred by limitation, reversioners thereafter born are equally barred.

This ruling appears to me to be clearly distinguishable. In this case the suit was by a minor who was born after the date of the alienation by the widow. In these circumstances the minority of the plaintiff could not extend the time because he was born after the cause of action had arisen, and could not take advantage of S. 6, Lim. Act. In 6 Lah 405⁴ also the plaintiff had been born after the date of the alienation. Out of the four cases relied upon in *Gajindar Singh v. Balwant Kaur*,¹ there is only one case, namely A I R 1927 Mad 216,² a single Bench ruling, which supports the view propounded in that ruling. It is well settled that the right of collaterals to succeed is not a single indivisible right so as to give each collateral a right of action for the whole estate. Each collateral is entitled only to his own share. In a suit for possession if one of the reversioners challenges an alienation by the last male holder, he can only succeed in gaining possession of his own share and he is not entitled to a decree for his own share as well as the shares of other reversioners who refuse to join him as plaintiffs. If the right of the reversioners was a joint and indivisible one, the failure of some of the reversioners to join as plaintiffs would not disentitle the reversioner who brings the suit from obtaining a decree for possession

1. A I R 1933 Lah 524=149 I O 696.

2. Neela Kantamier v. Chinnu Ammal, A I R 1927 Mad 216=99 I O 668=52 M L J 13.

3. Varamma v. Gopaladasayya, A I R 1919 Mad 911=46 I O 202=41 Mad 659=35 M L J 57 (F B).

4. Chirag Din v. Abdullah, A I R 1925 Lah 654=90 I O 1022=6 Lah 405=26 P L R 695.

5. Venkatanarayana Pillai v. Subbammal, A I R 1915 P O 124=29 I O 298=42 I A 125=38 Mad 406 (P C).

of the entire area covered by an alienation by the last male holder. Reference may be made in this connexion to para. 25 of Rattigan's Digest of Customary Law which runs in the following terms :

By virtue of the right of representation, whereby descendants in different degrees from a common ancestor succeed to the share which their immediate ancestor, if alive, would succeed to, and which presumably prevails amongst agriculturists, all collaterals heirs succeed together and not to the exclusion of each other, whether they were associated with or separated from the deceased. But the right of collaterals to succeed is not a single indivisible right so as to give each collateral a right of action for the whole estate. Each collateral is entitled only to his own share.

In A I R 1932 Lah 39,⁶ Shadi Lal, C. J. and Broadway, J. held that :

While it is true that a suit by one reversioner is for the benefit of the entire body of reversioners, and while it may be that a decision in such a suit would bind the entire body, it cannot be said that the omission by the presumptive reversioners to bring a suit to challenge an alienation must be regarded as depriving the other reversioners of their right to attack the transaction. The assent of the next reversioner would not bar a suit by the remoter reversioner. The suit of the remoter reversioner, if instituted, within three years of his attaining majority is, therefore, within time.

This ruling definitely lays down that each one of the reversioners has an independent and individual right to challenge the alienation though once the suit is brought, the decree obtained by one may enure for the benefit of all the reversioners. This case was followed by Tek Chand, J. in A I R 1933 Lah 866⁷ where it was held that :

The property being ancestral the present plaintiff had an independent right to contest the alienation, and as he was a minor at the time when the cause of action arose, he is certainly entitled to extension of time under S. 6, Lim. Act, the existence of the nearer reversioners (including his father) notwithstanding.

In A I R 1934 Lah 968⁸ it was held by Young, C. J. and Din Mohammad, J. that:

If a reversioner and his minor sons are alive at the date of an alleged adoption, they have separate rights both derived from the common ancestor to challenge the adoption. The right of the father being barred does not bar the right of the son if he be a minor. The son will have the advantage under the Limitation Act of adding the period of his minority to the limitation period. [*Headnote of A I R 1934 Lah 968*].

6. Wali Chand v. Punjab Singh, A I R 1932 Lah 39=132 I C 665.

7. Khushi Ram v. Nand Lal, A I R 1933 Lah 866=147 I C 399.

8. Hari Ram v. Sali, A I R 1934 Lah 968=154 I C 675.

In A I R 1934 Lah 908,⁹ it was held by Young, C. J. and Rangi Lal, J. that :

Under the Customary law every minor who was in existence at the time of the alienation which is being challenged by him, can bring a suit within three years of attaining majority. Therefore, where the plaintiffs are still minors, they have clearly ample time for bringing their suits and no objection on the ground of limitation can be taken to their suit.

The judgment of this Court does not show whether at the time of the alienation there were other reversioners than the minors in existence. The judgments of the lower Courts in that case, however, make it clear that at the time of the alienation several remoter reversioners were alive but omitted to bring an action within the period of limitation. It has been laid down in a large number of rulings of this Court that the mere assent of the next reversioner, or one of several reversioners of equal degree, to an alienation, will not debar other reversioners from suing to set aside the alienation by a limited owner. If one of the reversioners who has not consented to the alienation is entitled to bring a suit to obtain possession of his own share, then it must be held that the right to file a suit to set aside an alienation is an independent and individual right accruing to each of the reversioners separately and the question of limitation will be decided with respect to the law governing the plaintiff in each case. The suit of some of the reversioners may be barred by limitation while the suit of the other reversioners may be within time.

It has been mentioned already that the reversioners, who were majors at the time of the present alienation, were related to the alienor in the fifth degree. If they had instituted a suit immediately after the alienation, their suit would have been thrown out on the ground that it was a speculative suit, as the minor son of the alienor was alive at the time of the alienation and was primarily entitled to challenge the alienation on attaining majority. If the suit of the son is to be thrown out on the ground that limitation began to run against the distant reversioners and against him from the date of the alienation, it would amount to this: that neither the distant reversioners nor the minor son on attaining majority could challenge the alienation.

9. Sarwan Singh v. Mt. Basanti, A I R 1934 Lah 908=154 I C 603.

For the reasons given above, I dissent, with all respect, from the view propounded in *Gajindar Singh v. Balwant Kaur*¹ and agree respectfully with the view expressed in A I R 1932 Lah 39⁶ and various other rulings alluded to above. A number of rulings dealing with cases under Hindu law were also referred to by Mr. Shamair Chand in support of his contentions. It is unnecessary to deal with those rulings in detail as they do not seem to be of any great assistance in the determination of the question of law involved in this appeal. In the result I would accept this appeal, set aside the judgment and the decree of the learned Single Judge dated the 3rd December 1936, and restore that of the learned District Judge. I would order the parties to bear their own costs throughout.

Tek Chand, J.—I agree.

V.B.B./A.L.

Appeal allowed.

A. I. R. 1937 Lahore 656

SKEMP, J.

Devidas and others — Plaintiffs —
Appellants.

v.

Yaran Khan and others — Defendants
— Respondents.

Second Appeal No. 705 of 1936, Decided on 7th December 1936, from decree of Dist. Judge, Mianwali, D/- 12th May 1936.

Second Appeal — Question of fact— Issue whether plaintiff was in cultivating possession of suit land and whether he was dispossessed — Decision of lower Court involving interpretation of lease deed in favour of plaintiff executed by third parties and not by defendant, and of khasra girdawaris — Such documents are not foundation of title — Their interpretation cannot be questioned in second appeal.

Where in a case the issue was whether the plaintiff had been in cultivating possession of the suit land and whether he had been dispossessed by the defendant and the decision of the lower Court involved the discussion of a lease deed in favour of the plaintiff, executed not by the defendant, and of the khasra girdawaris, the documents in such case are not foundation of title but only evidence of title and the interpretation of these documents is a question of fact. Hence their interpretation cannot be questioned in second appeal: A I R 1930 P C 91, *Rel. on*; 34 All 579, *Disting.* [P 656 O 2]

Nand Lal — for Appellants.

V. N. Sethi — for Respondents.

Judgment. — The parties to this case are proprietors of village Dhibba in the Mianwali District. The plaintiffs sued the defendant (now represented by his

sons) for possession of part of three khasra Nos. 1340, 1349 and 1684 which were admittedly part of shamilat. The learned Subordinate Judge granted the plaintiffs a decree for possession which they sought. On appeal the learned District Judge upheld this decree in regard to khasra Nos. 1340 and 1349 but reversed it in regard to khasra No. 1684. The plaintiffs have come here in second appeal but are met by the contention that the findings of the learned District Judge are findings of fact. The issue was :

Whether the plaintiffs have been in cultivating possession of the suit land and whether they have been dispossessed by the defendants ?

Prima facie this is a pure question of fact. The decision of the District Judge involved the discussion of a lease deed in favour of the plaintiffs executed by tenants, third parties, and not by the defendants, and of the khasra girdawaris. These are not documents of title in the present case and his interpretation of these documents is therefore a question of fact. See the well-known ruling 11 Lah 199¹ at p. 207 :

Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights, but were really historical materials, have to be construed for the purpose of deciding the question.

The revenue records and khasra girdawaris in this case are not foundations of title but evidence of title. Dr. Nand Lal relied on an old Privy Council ruling, 34 All 579.² Apparently the head-note favours him but in that case I find at p. 584 :

From the judgment of the lower appellate Court it appears that it is founded on inferences of law drawn by the learned Subordinate Judge (the lower appellate Court) from certain documents and the wajib-ul-arz which were given in evidence.

Inferences of law no doubt can be questioned in second appeal, and the case is distinguishable. 74 I O 482³ cited as an authority for the proposition already quoted from 11 Lah 199¹ is also in point. This appeal is concluded by findings of fact and is rejected with costs.

P.R./D.S.

Appeal rejected.

1. Wall Mohammad v. Mohammad Bakhsh, A I R 1930 P C 91=122 I O 316=57 I A 86=11 Lah 199 (P O).
2. Fateh Chand v. Kishen Kunwar, (1912) 34 All 579=16 I O 67=39 I A 247 (P O).
3. Midnapore Zamindari Co., Ltd. v. Uma Charan Mandal, A I R 1923 P C 187=74 I O 482 (P O).

A. I. R. 1937 Lahore 657

DALIP SINGH AND SKEMP, JJ.

Mt. Kissi — Defendant — Appellant.

v.

Balwant Singh and another, Plaintiffs
and *others*, Defendants — Respondents.

First Appeal No. 327 of 1936, Decided on 20th April 1937, from decree of Asst. Collector, First Grade, Amritsar, D/. 17th May 1935.

Custom (Punjab)—Statement in *Riwaj-i-am* that childless widow gets equal share with son of another widow and is entitled to get that share separated — Onus to prove contrary is on person disputing correctness of statement.

Where there is a statement in the *Riwaj-i-am* that a childless widow of a man is entitled to an equal share with the son of another widow of that man and can get the share separated, the effect of the statement is that the onus of proving a custom to the contrary is on the person disputing the correctness of the statement: *A I R 1916 P C 129* and *A I R 1927 Lah 241, Rel. on.*
[P 657 C 2; P 658 C 1]

J. L. Kapur and Kartar Singh —
for Appellant.

Amolak Ram Kapur —
for Respondents.

Skemp, J.—The following circumstances have given rise to this first appeal. Tehl Singh, a Zaildar in the Amritsar district, had two wives, Mt. Har Kaur and Mt. Kissi. Mt. Kissi was a widow when Tehl Singh married her with a daughter by her previous husband. She bore Tehl Singh no children, but Mt. Har Kaur and Tehl Singh had two sons, Balwant Singh and Sant Singh. On the death of Tehl Singh in 1932 mutation of his property was made in favour of Balwant Singh and Sant Singh and Mt. Kissi in equal shares. This mutation was sanctioned on 6th April 1932. Mt. Kissi subsequently applied for partition of her share but her step-sons objected that she was not entitled to partition and by order dated 13th December 1934 they were referred to a civil suit. The Revenue Assistant himself tried the suit as a civil Court. He framed two issues; one as to Mt. Kissi's right of partition the onus being put on the plaintiffs; the other dealing with the question that she had a pension as widow of her first husband which the step-sons said was sufficient for her maintenance. The Revenue Assistant found issue 1 in favour of the plaintiffs and held that issue 2 did not arise. He decreed the plaintiffs' suit with

costs on 17th May 1935, and Mt. Kissi appealed.

We overruled a preliminary objection that the decree was barred by time. The suit was valued by the plaintiffs at Rupees 199-7-3 for purposes of jurisdiction and the appeal was lodged in the Court of the District Judge on 13th July 1935. The proceedings before the District Judge are not with the record, but he held that the appeal lay not to his Court but to the High Court and returned the appeal on 7th August 1936. It was presented in the High Court on 12th August 1936. We are of opinion that the plaintiffs and her legal advisers, misled by the value for purposes of jurisdiction placed on the suit by the plaintiffs, were obviously bona fide prosecuting their remedy in another Court and we condoned the delay. The Revenue Assistant held that the oral and documentary evidence of the plaintiffs reinforced by Para. 16 of Rattigan's Customary Law discharged the onus of the issue. We read through the oral evidence of the plaintiffs and are of opinion that for various reasons it is unreliable and that the case must be decided by the documentary evidence on the record. The Revenue Assistant referred to the *Riwaj-i-am* of District Amritsar; a copy of question and answer 128 were placed on his record. These are reproduced in the Amritsar Code of Tribal Custom. The question and answer are:

Q. 128. If the partition be made, can the widow claim a share? If so, what share, and on whom will it devolve after her death?

A. All tribes.—A widow having sons will get no share. A sonless widow can get the share separated to which she is entitled. On her death the share thus separated will devolve on the heirs of the deceased husband in accordance with the rules of inheritance.

He did not follow this, because the question does not deal with the case of a man leaving a widow but a son by another widow. In my opinion this case is covered by the words: "A sonless widow can get the share separated to which she is entitled." We have also been referred to question and answer 43 which run as far as relevant as follows:

Q. If a man dies leaving a widow or widows, a son or sons, a daughter or daughters, a brother or other relatives, upon whom will the inheritance devolve?

A. All tribes. — The son or sons or their male lineal descendants through males inherit in preference to all others. If a man has more than one wife but a son or sons by only one of them,

the childless widows are generally each for her life allotted a share equal to that of a son. The other widows and daughters only get maintenance.

This was not produced before the trial Court but we have allowed it to be referred to in appeal because after all it is a citation from a work published by authority for the guidance of the Courts in cases of this kind. Under the well-known rulings, 45 P R 1917¹ and 8 Lah 281,² the effect of these two questions and answers in the *Riwaj-i-am* is to place the onus of proving a custom to the contrary on the plaintiffs. The onus is not light as an assembly of men was stating the rights of women. To discharge the onus the plaintiffs have produced, besides the inconclusive oral evidence, documentary evidence as follows: Ex. P. A., a judgment dated 13th August 1920, by Mian Muhammad Aslam, Munsif First Class, dismissing a suit by a step-mother against her step-son for possession of half the land left by her deceased husband. This proceeded only on Para. 16 of Rattigan's Digest. Ex. P. B., a compromise in a partition case. A widow had applied for partition, of what share is not clear, but she agreed to take 45 kanals of land to be cultivated by the defendants who would pay Rs. 120 per annum as rent to be paid through the Zaildar. This compromise, it seems to me, favours the defendant.

The defendant produced Ex. D. A., an extract from the jamabandis, which shows that Mt. Indar Kaur, widow, and two sons of Sundar Singh were owners in equal shares. Ex. D. B. shows a partition between Mt. Bhagwan Kaur and her step-sons. This had apparently been compromised. As the step-sons got 4/5th and the step-mother 1/5th of 12 kanals 13 marlas and Mt. Bhagwan Kaur got the whole of 2 kanals 13 marlas, she got approximately her 1/3rd share. It seems to me that the instances produced by the plaintiffs are insufficient to discharge the onus cast by the terms of the Code of Tribal Custom. Rattigan's Customary Law owes its authority to different considerations, namely, to the wide knowledge and experience of the author. The Revenue Assistant overlooked the explanation to Para. 16:

1. Beg v. Allah Ditta, A I R 1916 P O 129=38 I C 854=44 I A 89=44 Cal 749=45 P R 1917 (P O).

2. Labh Singh v. Mt. Mango, A I R 1927 Lah 241=100 I C 924=8 Lah 281=29 P L R 586.

But in some cases where the hostility of the sons seems to render such a course advisable, a separate portion of the estate is allotted to the widow in lieu of maintenance.

The dispute before us was limited to the points whether Mt. Kissi had a right to be recorded as owner. It was conceded that if she had such a right she was entitled to partition. I would accept this appeal and dismiss the plaintiffs' suit. In the circumstances it is best that the parties should bear their own costs.

Dalip Singh, J.—I agree.

P.R./D.S.

Appeal accepted.

* A. I. R. 1937 Lahore 658

TEK CHAND AND ABDUL RASHID, JJ.

Dewan Chand—Defendant—Appellant.

v.

Pindi Dass, Plaintiff and others, Defendants—Respondents.

Second Appeal No. 1489 of 1936, Decided on 26th May 1937, from decree of Addl. Dist. Judge, Lyallpur, D/- 14th October 1936.

* Civil P. C. (1908), Ss. 47 and 145—Scope—Execution of decree against surety for default of judgment-debtor—Application by surety under O. 21, R. 2 about adjustment between decree-holder and judgment-debtor—Application dismissed on ground of limitation and not on merits—Declaratory suit by surety that decree is not executable against him in view of adjustment is maintainable—Suit is not barred by S. 47.

Where a decree is sought to be executed against a surety for non-appearance of the judgment-debtor and the surety makes an application under O. 21, R. 2, Civil P. C., to the executing Court that an adjustment had taken place between the decree-holder and the judgment-debtor and therefore he is discharged from the liability but the application is dismissed without going into merits on the ground of limitation, the surety can bring a suit for declaration that the decree cannot be executed against him in view of the adjustment; such suit is not barred by S. 47, Civil P. C., as a surety, unlike a judgment-debtor, is a party to the suit or execution proceedings only for the limited purpose of appeal in view of S. 145 of the Code: *A I R 1928 All 527, Disting.*; *A I R 1919 PC 50*; *A I R 1920 Mad 75*; *38 Cal 754* and *A I R 1926 Sind 105, Rel. on.* [P 659 C 2; P 660 C 2]

Ram Chand Manchanda—

for Appellant.

Partap Singh—for Respondent

(Plaintiff).

Abdul Rashid, J.—*Dewan Chand*, defendant 1, obtained a decree against *Arjan Singh*, defendant 2, and *Mohar Singh*, defendant 3, for Rs. 500 on 18th

January 1932. In execution of this decree Arjan Singh was arrested. Pindi Dass stood surety for the appearance of Arjan Singh. Arjan Singh did not appear in Court on one of the dates fixed for hearing in the execution proceedings, and the surety bond given by Pindi Dass was sought to be enforced against him by means of his arrest. Pindi Dass was arrested and committed to civil prison on 5th August 1932. While Pindi Dass was in jail, Arjan Singh and Mohar Singh entered into a compromise with the decree-holder whereby the decree was adjusted. This compromise took place on 30th August 1932. On that date Arjan Singh paid Rs. 55 in cash to the decree-holder and agreed to pay a sum of Rupees 200 in a month's time. Mohar Singh undertook the responsibility for the payment of Rs. 255 within a month. This settlement, however, was not certified in the execution Court under the provisions of O. 21, R. 2, Civil P. C. Between 1932 and 1934, execution was taken out twice by the decree-holder against Arjan Singh and Mohar Singh. He however did not succeed in realizing any amount from them.

At the end of 1934 the decree-holder sought to execute the decree against Pindi Dass, surety, and got his land attached. Thereupon Pindi Dass brought the suit which has given rise to the present appeal for a declaration that the decree could not be executed against him, as the settlement arrived at on 30th August 1932 had resulted in his complete discharge. The trial Court held that it had not been established that any settlement was arrived at between the decree-holder and the judgment-debtors. The Court was however of opinion that the surety was entitled to bring a regular suit to obtain the declaration asked for. On these findings the suit brought by Pindi Dass was dismissed. Against this decision Pindi Dass preferred an appeal in the Court of the Additional District Judge. The learned Additional District Judge held that a settlement had been arrived at on 30th August 1932 between the decree-holder and the judgment-debtors, and that in pursuance of that settlement a sum of Rs. 400 had been obtained by the decree-holder from Bhagat Singh, brother-in-law of Arjan Singh. The learned Additional District Judge further held that the surety could be treated as a party to the execu-

tion proceedings only for the limited purpose of appeal and that the present suit by the surety was therefore maintainable. On these findings Pindi Dass was granted the declaration prayed for.

The decree-holder preferred an appeal to this Court against the decision of the learned Additional District Judge which came up for hearing before a learned single Judge of this Court in the first instance. The learned Judge has referred the case to a Division Bench for disposal. The principal argument addressed by the learned counsel for the appellant was that by virtue of the combined operation of Ss. 145 and 47, Civil P. C., the surety became a party to the execution proceedings for all purposes, and that he could not maintain a separate suit for a declaration that the settlement arrived at between the decree-holder and the judgment-debtors had resulted in his complete discharge. It was urged that his only remedy was to file an appeal against the order of the Court refusing to recognize the adjustment, and that his failure to file an appeal against that order had made the order of the executing Court conclusive against him, and that such an order could not be challenged by means of a separate suit. It was on 23rd August 1934 that Pindi Dass had presented an application to the executing Court stating that a settlement had been arrived at between the decree-holder and the judgment-debtors on 30th August 1932, and that in pursuance of that settlement Rs. 400 had been realized by the decree-holder from Bhagat Singh, brother-in-law of Arjan Singh, judgment-debtor. He prayed that the Court may certify the adjustment and that execution may not be proceeded with against him. That application was disposed of by the executing Court on 3rd December 1934 by the following order :

Even if the allegations made by the judgment-debtor be correct, I cannot go into this question because under O. 21, R. 2, Civil P. C. the alleged adjustment was not certified within time. The judgment-debtor can take what legal steps are open to him.

It is clear from the above-mentioned order that the executing Court did not decide the question of the alleged settlement on the merits. The application of the surety was dismissed as having been made beyond time. The learned counsel for the appellant contended that a Division Bench ruling of the Allahabad High

Court reported in 51 All 346¹ was applicable to the facts of the present case. It was observed in the Allahabad ruling that:

Section 47, Civil P. C., does not bar the suit because that section does not in terms apply to a surety, inasmuch as he is not a party to the suit. The effect of S. 145 is that for purposes of appeal only he is deemed to be a party to the suit and not that S. 47 as a whole is applicable to him.

These observations do not help the appellant. It was, however, further laid down that :

When an order for execution is made against a surety under S. 145, his position becomes that of a judgment-debtor. The proceedings taken against him are in the nature of execution proceedings and it is implied that he may make any objections which a judgment-debtor might make, though the mode in which they are to be made has not been expressly provided. If he raises objections to the sale and the objections are dismissed and the sale confirmed, he is bound by the orders passed against him and is not entitled to re-agitate the same question by means of a separate suit. Such a suit is barred by the principle of *res judicata* and also by O. 21, R. 92 (3).

In my opinion the Allahabad ruling is clearly distinguishable. In that case the surety did not deny his liability to pay the money. Some immoveable property belonging to the surety had been sold and he preferred objections against the confirmation of the sale under O. 21, R. 90, Civil P. C. These objections were dismissed on the merits under O. 21, R. 92. It was therefore not open to the surety under the provisions of O. 21, R. 92 (3) to institute a suit to set aside the order made under that Rule. As observed already, in the present case, the application made by the surety in August 1934 was not decided on the merits nor is there any question in the present case of a suit being barred under O. 21, R. 92 (3), Civil P. C. It has been held in a large number of cases that S. 145, Civil P. C., makes the surety a party to the proceedings only for the purposes of appeal and that he does not become a party to the execution proceedings for all purposes. Reference may be made in this connexion to 42 All 158,² 43 Mad 325³ and 38 Cal 754.⁴ It was

held in A I R 1926 Sind 105⁵ that S. 145 in express terms provides that a surety shall be deemed to be a party to the suit within the meaning of S. 47 only for the purposes of appeal, and excludes by implication the inference that he is a party to the suit in proceedings before the original Court. It was also held that when the Court is moved to proceed against the surety under S. 145, Civil P. C., it does not purport to execute the decree itself in the real sense of that expression, but to enforce the bond in the manner provided for execution of decrees, and is not therefore the Court executing the decree within the express meaning of those words as used in O. 21, R. 2 (3), Civil P. C.

A suit by the judgment-debtor for a declaration that a decree obtained by the defendant against him had been satisfied, and consequently should not be executed, stands on an entirely different footing, and might be barred under S. 47, Civil P. C. The judgment-debtor is a party to the execution proceedings for all purposes, whereas the surety is a party to the execution proceedings for the purposes of appeal only by virtue of the provisions of S. 145, Civil P. C. The rulings which deal with declaratory suits instituted by the judgment-debtors are therefore inapplicable to the facts of the present case. It was for the decree-holder to satisfy the Court that the present suit was barred by the provisions of any law. In my opinion he has utterly failed to establish that this is so. I would therefore confirm the decision of the learned Additional District Judge and dismiss this appeal with costs.

Tek Chand, J.—I agree.

K.B./A.L.

Appeal dismissed.

5. Noor Mahomed v. Dhaniram, A I R 1926 Sind 105=96 I O 234=20 S L R 362.

A. I. R. 1937 Lahore 660

SKEMP, J.

Bachint Singh and another — Defendants — Appellants.

v.

Ganpat Rai and others, Plaintiffs and another, Defendant — Respondents.

Second Appeal No. 1112 of 1936, Decided on 4th February 1937, from decree of Senior Sub-Judge, Hoshiarpur, D/- 12th May 1936.

1. Ram Kishun v. Lalta Singh, A I R 1928 All 527=112 I C 534=51 All 346 = 26 A L J 1160.

2. Raj Raghubar Singh v. Jai Indra Bahadur Singh, A I R 1919 P O 55=55 I O 550=46 I A 228=42 All 158=22 O O 212 (P O).

3. Ramanathan Pillai v. Doraiswami Ayyangar, A I R 1920 Mad 75=55 I O 363=43 Mad 325 =38 M L J 65.

4. Srinivasa Prasad Singh v. Kesheo Prasad Singh, (1911) 38 Cal 754=9 I O 362=13 O L J 365=15 O W N 475.

(a) Limitation Act (1908 as amended by Act 1 of 1929), Art. 134-B — Mahant of Thakardwara mortgaging debutter property — New Mahant appointed after removal of previous Mahant — Suit for possession by subsequent Mahant brought within 12 years from date of removal of previous Mahant — Suit is within time under Art. 134-B.

A Mahant of Thakardwara mortgaged the debutter property. The Mahant was removed from his office and a new Mahant was appointed in his place. The successor brought a suit for possession of the mortgaged property within 12 years from the date when the previous Mahant was removed from his office:

Held: that the suit was within time under Art. 134-B, Limitation Act: *A I R 1933 P C 75, Rel. on.* [P 661 C 2]

(b) Civil P. C. (1908), S. 92 — Applicability — Successor Mahant bringing suit for possession of debutter property mortgaged by previous Mahant — S. 92(1) (b) is not applicable — Sanction under S. 92 is not necessary for such suit.

A Mahant who was newly appointed after the removal of the previous Mahant brought a suit for possession of the debutter property which was mortgaged by his predecessor. It was contended that the suit was incompetent as no sanction of the Collector was obtained under S. 92, Civil P.O.:

Held: that S. 92(1) (b) did not apply to such a case as Cl. (b) was applicable to suits relating to headings specified in Ols. (a) to (g) of the section only and sanction under S. 92 was not therefore necessary for such suit: *A I R 1926 P C 16, Rel. on.* [P 662 C 1]

(c) Hindu Law — Religious endowment — Alienation — Powers of Mahant — Mahant can alienate debutter property only in cases of unavoidable necessity — Mahant executing mortgage of debutter property to pay off earlier mortgages for which no necessity proved — Mortgage is void.

The power of a Mahant to alienate debutter property is, like the power of the manager for an infant heir, limited to cases of unavoidable necessity. [P 662 C 1]

Where therefore a Mahant executes a mortgage of debutter property to pay off previous mortgages, and no necessity is proved for such mortgages, the mortgage is void: *36 Cal 1003 (P C), Rel. on.* [P 662 C 1]

Dr. Nand Lal — for Appellants.

Shamsher Bahadur for M. L. Puri — for Respondents (Plaintiffs).

Judgment. — This second appeal has arisen from a suit whereby the plaintiffs, the committee of management of a thakardwara, were granted possession of property originally belonging to the thakardwara which had been alienated by the late Mahant Raghu Nath. Mahant Raghu Nath was removed on 12th August 1928 in execution of the decree whereby his removal was ordered and a Court committee was appointed for the management of the institution. The Court authorized

that committee to appoint a new Mahant to carry out the duties of a Mahant and manage the property under the supervision of the committee. The present plaintiffs are the successors of that committee. The defendant, a mortgagee for a large sum, took many pleas, all of which were found against him by both the trial and the appellate Judges. He has come here through Dr. Nand Lal in second appeal. Dr. Nand Lal has argued: (1) that the suit is not within time; (2) that the suit required the sanction of the Collector under S. 92, Civil P. C; and (3) that the alienations were for necessity. The mortgage in question was effected in 1921 and the greater part of the consideration was two previous mortgages effected in 1914 and 1920. The consideration for the mortgage of 1914 was in its turn the previous mortgages detailed in the judgments of the lower Courts. *Prima facie* Art. 134-B, Limitation Act, added by the Amending Act of 1929, would apply to the present litigation. As far as it is relevant it runs:

Suit by a manager of a Hindu . . . religious or charitable endowment to recover possession of immoveable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.

The time is twelve years from the death, resignation or removal of the transferor. If this Article applies, then the suit is within time. The appellate Court relied on Art. 144 and on a judgment of their Lordships of the Privy Council reported in 12 Pat 251.¹ Lord Russell of Killowen who delivered their Lordships' judgment said:

A Mahant has power (apart from any question of necessity) to create an interest in property appertaining to the math which will continue . . . during his tenure of office of Mahant of the math, with the result that adverse possession of the particular property will only commence when the Mahant who had disposed of it ceases to be Mahant by death or otherwise.

Their Lordships applied this principle equally to a permanent lease and to an absolute grant of the property, and I see no reason why the same principle should not extend to a mortgage. This judgment was delivered in a suit instituted in 1924 before the Limitation Act was amended. The result is the same whether that principle is applied or the Article of the

1. *Ram Charan Das v. Naurangi Lal*, *A I R 1933 P C 75=142 I C 214=12 Pat 251=60 I A 124 (P C)*.

Amending Act. The suit is within time. As to S. 92, Civil P. C., the Senior Subordinate Judge held that it did not apply because the suit was not for one of the objects specified in the section. Dr. Nand Lal relies on sub-s. (1), Cl. (h). His own learned edition of the Civil Procedure Code states that the section does not apply to suits to enforce private rights including a suit against the alienee for a declaration of the invalidity of the alienation made by the manager of trust property. The same principle would apply to a suit for possession. In 55 Cal 519² their Lordships of the Privy Council pointed out that :

Upon general principles of construction, the words as to 'further and other relief' in head (h) are used in connection with the specified heads and that the contrary construction would cut down substantive rights which existed before the enactment of 1908 and a Code regulating procedure should not be construed as having that effect in the absence of express words.

There are numerous cases in which Mahants have sued without sanction under S. 92 to recover property alienated by their predecessors, and here obviously the managing committee is in the position of a Mahant. In my opinion this argument is also unfounded. Finally Dr. Nand Lal urged that the alienation was for necessity in so far as it was an act of good management to pay off previous mortgages. It must be remembered that we are not here considering a case of a male proprietor but of a Mahant dealing with property attached to a religious institution. 36 Cal 1003³ says :

It is well settled law that the power of the Mahant to alienate debutter property is like the power of the Manager for an infant heir limited to cases of unavoidable necessity.

It was therefore for the alienee to prove necessity strictly, and the Senior Subordinate Judge who has gone through the evidence in detail has found that there is no evidence as to the necessity for any of these mortgages. The result is that this appeal must be dismissed with costs.

K.B./A.L.

Appeal dismissed.

2. Abdur Rahim v. Abu Mahomed Barkat Ali Shah, A I R 1928 P C 16=108 I C 361=55 Cal 519=55 I A 96 (P C).

3. Abhiram Goswami Mohant v. Shyama Charan Nandi, (1909) 36 Cal 1003=4 I C 449=36 I A 148 (P C).

A. I. R. 1937 Lahore 662

SKEMP, J.

Harbans Singh—Plaintiff—Petitioner.

v.

*Municipal Committee, Amritsar —
Defendant—Opposite Party.*

Civil Revn. Petn. No. 698 of 1936, Decided on 21st January 1937, from decree of Addl. Judge, Small Cause Court, Amritsar, D/- 15th July 1936.

Punjab Municipal Act (3 of 1911), S. 97—Plaintiff applying for water supply and agreeing that he will not allow any person except members of his family to take water from tap—Municipality charging plaintiff with water rate per family on finding that tenants were living in the house—Suit by plaintiff for refund of excess tax paid by him—Municipality held was entitled to limit water supply to one family under S. 97 (1)—Contract by plaintiff held was not contrary to statute and plaintiff was bound by it—Municipality held entitled to charge water rate per family.

The plaintiff applied for a connexion for water-supply to his house and specifically agreed in his application that he would not allow any person except the members of his family to draw water from his tap. Accordingly water connexion was supplied to the plaintiff. Subsequently the Municipal Committee found that there were three tenants living in the house and, therefore, charged the plaintiff with water for each family. The Municipality cut off the water supply to the plaintiff. The plaintiff therefore brought a suit for damages for cutting off water supply unreasonably and for refund of excess water-tax paid by him under protest :

Held : that the supply of water could be limited by the Municipality under S. 97 (1), Punjab Municipal Act, by limiting its use to one family in one house. [P 663 C 2]

Held further : that as the plaintiff had expressly agreed not to allow other persons than his family to take water from his tap, he was bound by the contract which was not in any way contrary to the terms of the statute and the Municipality was therefore entitled to charge water-rate per family : A I R 1923 Sind 1, Rel. on. [P 663 C 1, 2]

Iqbal Singh — for Petitioner.

*Shamair Chand and Sham Das —
for Opposite Party.*

Order.—This is a petition for revision of a judgment of the Additional Judge, Small Cause Court, Amritsar. The plaintiff, Sardar Harbans Singh Kalsi, sued the Municipal Committee of Amritsar for Rs. 111, Rs. 60 damages for cutting off his water supply unreasonably and Rs. 51 for refund of excess water charges paid under protest. The facts are that the plaintiff's father Sardar Kesar Singh Kalsi has a large house in Amritsar which was

formerly supplied by three different water connexions with separate numbers for "domestic purposes". These were closed and a ferrule or small pipe connecting with the main opened in their place at the request of Sardar Harbans Singh Kalsi. Subsequently it was discovered by the Committee that not only was the family of Sardar Harbans Singh living in the house but there were sub-tenants; according to the finding of the Subordinate Judge there were three different tenants. The Committee pleaded that as there were three different tenants, they were entitled to charge water rate separately for each family.

The point of dispute between the parties is whether this contention is well founded. If the Committee's plea is well founded, then they were justified in cutting off the water and charging the additional water rate the amount of which is not in dispute. If it is not justified then there is force in the plaintiff's suit. The Subordinate Judge found that the Committee were justified in charging separately per family and dismissed the suit. The plaintiff has come to the High Court in revision through Sardar Iqbal Singh, who claims that the charge is not in accordance with the Punjab Municipal Act or the bye-laws framed thereunder. The Committee rely on a printed form of application filled up and signed by Sardar Harbans Singh when he requested to have water laid on to his premises. The application contains a number of clauses; the material clause for our purpose runs:

I also agree to use water only for domestic purposes and will only take water in one house from one connexion and will not have tap or taps outside of the house or shop which would be open to the public, and will also not allow any person, except the members of my own family, to draw water from my tap or taps.

Prima facie, this clause in the plaintiff's application governs the matter and he is bound by the terms of the contract into which he entered. Sardar Iqbal Singh, however, urges that the clause that the applicant will not allow any person except the members of his own family to draw water from his tap or taps is not in accordance with the Municipal Act. S. 97, Municipal Act, runs:

(1) The Committee may, on application by the owner of any building, arrange for supplying water from the nearest main to the same for domestic purposes in such quantities as it deems reasonable, and may at any time limit the

amount of water to be so supplied whenever it considers it necessary.

(2) No additional charge shall be payable in respect of such supply, in any municipality in which a water-tax is levied, but for water supplied in excess of the quantity to which such supply is under sub-s. (1) limited, and in other municipalities for all water supplied under this section payment shall be made at such rate as may be fixed by the committee with the approval of the Local Government.

Sardar Iqbal Singh argues that under the second part of sub-s. (2) payment can only be made at rates fixed by the Committee with the approval of the Local Government, and he relies on a notification not placed on the record in the lower Court but which I have accepted as it is a public notification which simply states that the Amritsar Municipality will charge for 1/4 inch ferrule Re. 1 per mensem. The connexion to the plaintiff's house was by 1/4 inch ferrule. Neither the notification nor the Amritsar bye-laws say anything about separate charges per family. Mr. Shamair Chand for the Committee relies on sub-s. 1 which makes it voluntary for the Committee to supply water for domestic purposes to any premises in such quantities as it deems reasonable, and may at any time limit the amount of water to be so supplied whenever it considers it necessary.

He urges that one way of limiting the water to be supplied is by limiting it to one family in one house. With this argument I agree. The plaintiff applied for the connexion and signed the terms with his eyes open, and I cannot see anything in the contract which is contrary to the terms of the statute. In A I R 1923 Sind 1¹, a Division Bench of the Judicial Commissioners' Court under the corresponding section of the Bombay District Municipal Act held that:

A Municipality will supply water to private persons on certain terms and this clearly makes an offer to such private persons to supply them with water on the terms laid down.

I dismiss this petition for revision with costs.

K.B./A.L.

Petition dismissed.

1. Committee of Management of Hyderabad v. Ramchand Lownkiram, A I R 1923 Sind 1—87 I C 258—16 S L R 98.

A. I. R. 1937 Lahore 664

ADDISON AND DIN MOHAMMAD, JJ.

Jamadar Sultan — Plaintiff —

Appellant.

v.

Khushia and another — Defendants —
Respondents.

R. S. Appeal No. 932 of 1936, Decided on 20th January 1937, from order of District Judge, Gujrat, D/. 12th May 1936.

Punjab Tenancy Act (16 of 1887), S. 60—Mortgage by occupancy tenant declared void in suit by landlord under S. 60—Such mortgage is also void between mortgagor and mortgagee—Subsequent acknowledgment of mortgagee's right by mortgagor does not validate such mortgage.

A transaction which is void cannot become valid even if the parties thereto act on it, and a Court of law will not render help to the parties to such transaction: *A I R 1930 All 1 (F B)*, *Rel. on.* [P 664 C 2]

Where therefore an occupancy tenant under S. 6, Punjab Tenancy Act, mortgages his occupancy holding, and in a suit by the landlord under S. 60 of the Act the mortgage is declared void, the mortgage is void not only between the landlord and the mortgagee but also between the mortgagor and the mortgagee. And even if the mortgagor acknowledges the rights of the mortgagee subsequent to such avoidance of the mortgage, the mortgage cannot become valid: *17 P R 1892 (F B)* and *A I R 1927 Lah 871, Rel. on.*

[P 664 C 2]

Amar Nath Chopra — for Appellant.*Manzur Qadir* — for Respondents.

Din Mohammad, J.—The facts of the case giving rise to this appeal are these: On 21st March 1922 one Fakira, an occupancy tenant under S. 6, Punjab Tenancy Act, mortgaged his holding to one Sultan for Rs. 1,600 and in pursuance of this transaction Sultan stepped into possession of the holding in question. He was however entered merely as a non-occupancy tenant under his transferor. Some time later Fakira died and was succeeded by his co-tenant Khushia. On 22nd April 1927, Mt. Hayat Begam, who was the owner of the land, brought a suit under S. 60, Tenancy Act, to avoid the mortgage. Her claim was dismissed by the Assistant Collector but on appeal was decreed by the Collector on 23rd February 1929. On 4th November 1929 Sultan instituted a declaratory suit against Khushia which ended in a compromise on 14th January 1930, by which the rights of Sultan as mortgagee of the holding in suit were acknowledged by Khushia. On 14th December 1934 Khushia mortgaged

the holding to one Jalal. On 9th January 1935 Sultan instituted the present suit for a declaration that he was a mortgagee with possession of the holding in suit and that the mortgage executed by Khushia in favour of Jalal should not affect his rights. The Subordinate Judge dismissed the suit on the ground that Khushia's admission did not improve the position of Sultan and that it could not validate the transaction which had been invalidated by a competent Court. On appeal the District Judge affirmed the decision of the Court below. Hence this second appeal. After a full consideration of the facts of the case and the law applicable thereto, we have come to the conclusion that the decision of the Courts below must be affirmed. So far as this Court is concerned, the trend of all the decisions since 1892 has been to declare that an unauthorized transfer by an occupancy tenant in favour of a stranger, if challenged by the landlord is void not only qua the landlord and the transferee but even qua the transferor and the transferee: see among others *17 P R 1892¹* and *A I R 1927 Lah 871.²* There is further abundant authority on the point that a transaction which is void cannot become valid even if the parties act on it. It is further clear that Courts of law cannot render any help to the parties to such transactions and the law on the subject has been correctly summarised in *A I R 1930 All 1.³* As observed by the learned Judges of the Full Bench:

If a void contract has been carried out and consideration has passed, the promisor may not in equity be allowed to go back upon it without restoring the benefit which he has received. But if the promisee comes to Court to enforce, it he would receive no help from a Court of law.

Counsel for the appellant mainly relied on the collusive decree obtained in 1930 and contended that Khushia at least was bound by the admission. We have already observed that an invalid act cannot be validated by the act of the parties and we cannot see how Khushia's admission, made within a few months of the decree of the Collector, could help the appellant. It is clear that on the day when the admission was made the landlord's right to eject the

1. *Khuda Baksh v. Fazil Din*, (1892) *17 P R 1892 (F B)*.

2. *Sham Singh v. Hardit Singh*, *A I R 1927 Lah 871=100 I C 916*.

3. *Dip Narain Singh v. Nageshar Prasad*, *A I R 1930 All 1=122 I C 872=52 All 838=1930 A L J 45 (F B)*.

appellant had not expired. The appellant has been found to be in possession of the land and we are not at present concerned with what his equities would be in case a suit for his ejectment is instituted by Khushia or the subsequent transferee or the landlords, but we are satisfied that he cannot succeed in obtaining the declaration that he prays for. We accordingly dismiss the appeal but order the parties to bear their own costs throughout.

K.B./A.L.

Appeal dismissed.

* A. I. R. 1937 Lahore 665

TEK CHAND AND ABDUL RASHID, JJ.

Karam Chand—Defendant—Appellant.
v.

Ram Singh, Plaintiff and *others* —
Defendants — Respondents.

First Appeal No. 424 of 1936, Decided on 3rd June 1937, from decree of Sub-Judge, First Class, Amritsar, D/- 24th August 1936.

* Mortgage—Priority—Subrogation—Several mortgages on same property—Purchaser of property paying off earlier mortgage may keep mortgage alive for his benefit and thus claim priority over subsequent mortgagees whom he has not covenanted to pay — In absence of express or implied provision, intention of purchaser paying off earlier mortgage to keep it alive for his benefit is to be presumed—It is immaterial whether purchaser or his vendor actually paid money to prior mortgagee.

Where there are several mortgages on a property, the purchaser of the property, subject to the mortgage may, if he pays off an earlier charge, treat himself as buying it and in the same position as the mortgagee whose mortgage he has paid or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply for the purchaser of the property who has covenanted to pay the later mortgage debt. As there is no statute law in force in the Punjab governing cases where a person other than a mere volunteer pays a debt due by another, the relative rights of the parties concerned are regulated by equity, justice and good conscience. Whether the intention of the party paying off the charge was to extinguish it, or to keep it alive, is to be judged by the ordinary rule that a man having a right to act in either of two ways shall be assumed to have acted according to his interest. Therefore, in the absence of any express or implied provision in the deed, it must be presumed that the vendee, by paying off the prior mortgagee, intended to keep it alive for his benefit and use it as a shield in the event of any attack on his title by a subsequent incumbrancer whom he had not undertaken to discharge. In cases of this kind the transaction must be examined as a whole, and it is immaterial as to whose hand

actually paid the money over : A I R 1924 P C 36 10 Cal 1035 ; and A I R 1933 Lah 416, Rel. on. ; Case law discussed. [P 666 C 2 ; P 667 C 1, 2]

Anant Ram Khosla and Mohammad Din Jan — for Appellant.

Dev Raj Sawhney, Nihal Singh (for Plaintiff) and *Shabbir Ahmad* (for Defendant 4) — for Respondents.

Tek Chand, J. — The shop in dispute belonged originally to Sobha Singh, defendant 1. On 30th October 1916, Sobha Singh mortgaged this shop and a house with which we are not concerned in this litigation, to Pandit Ram Ditta and his son Pandit Karam Chand (defendant 4) for Rs. 6,000. The mortgage was with possession and it was agreed that the mortgage money would carry interest at 7 as. per cent. per mensem and that the rent actually realized would be credited towards the interest. On 1st March 1927 Sobha Singh and his son Sundar Singh, defendant 2, mortgaged the same shop and some other property to Karam Chand, son of Sant Ram (defendant 3) for Rs. 13,000. Out of the consideration for this mortgage, Rs. 4,000 was paid to the mortgagors and the remaining Rs. 9,000 was left in deposit with the puisne mortgagee (defendant 3), for payment to the prior mortgagee (defendant 4) whom he was to redeem. It is common ground between the parties that defendant 3 did not pay anything out of this sum of Rs. 9,000 to defendant 4 nor did he take any steps to redeem the earlier mortgage.

In 1928 the prior mortgagee, defendant 4, Pandit Karam Chand, son of Ram Ditta (Ram Ditta having died in the meantime) brought a suit against the mortgagor, Sobha Singh, for recovery of the amount due to him on foot of his mortgage by sale of the mortgaged properties. In that suit the puisne mortgagee (defendant 3) was not impleaded as a party. On 31st May 1929, a preliminary decree was passed under O. 34, R. 4, Civil P. C., declaring that the amount due to the then plaintiff, Pandit Karam Chand, (present defendant 4) was Rs. 5,953-8-0, and fixing a date for payment. The mortgagor having failed to pay within the time fixed, a final decree was passed and the shop and the house ordered to be sold by public auction. In the auction, the shop fetched Rs. 2,200 only and the house Rs. 6,000. Before the confirmation of the

sale, however, the judgment-debtor Sobha Singh obtained the permission of the executing Court to sell the property privately and he sold the shop alone to Ram Singh, plaintiff, for Rs. 10,000. On 18th February 1932, he executed a sale deed in favour of the plaintiff, in which it was stated that out of the sale price Rs. 9,310 had been left with the vendee (plaintiff) from which the vendor would get paid by the vendee "as much amount as is due under the decree" to the decree-holder Pandit Karam Chand, son of Ram Ditta (defendant 4), before the Senior Subordinate Judge, Amritsar, and "will thus get the shop released from attachment", and that the remaining amount would be paid to the vendor. In the deed no mention whatever was made of the second mortgage in favour of defendant 3. On the other hand, it was expressly stated that the shop sold was "free from all liabilities except the charge of Pandit Karam Chand, son of Ram Ditta (i. e., defendant 4), which shall be paid out of the sale money." The deed was registered on 19th February 1932, and on the same day the judgment-debtor (defendant 1), the decree-holder (defendant 4) and the vendee (plaintiff) appeared before the executing Court, and the sum of Rs. 7,400 was paid by the vendee to the decree-holder who executed a receipt in his favour and also handed over the mortgage deed to him.

Some time after the sale, the puisne mortgagee, Karam Chand, son of Sant Ram (defendant 3), brought a suit against the mortgagors Sobha Singh and his son Sundar Singh (defendants 1 and 2), for recovery of the amount due to him on foot of the second mortgage dated 1st March 1927. In that suit he did not implead as parties either the first mortgagee, Pandit Karam Chand, son of Ram Ditta (defendant 4), or Ram Singh (plaintiff) who, as stated above, had purchased the shop in dispute. In due course the suit was decreed, and in execution of that decree the mortgaged properties, including the shop in dispute, were ordered to be sold. Thereupon, Ram Singh (plaintiff) instituted the present suit for a declaration that he was the owner of the shop in question, and that it was not liable to be sold in execution of the decree obtained by defendant 3 against defendants 1 and 2. In the alternative he asked for a declaration that, by paying off the prior

mortgagee (defendant 4), he had been subrogated to that mortgagee's rights and therefore the shop could not be sold in execution of the decree of defendant 3 against defendants 1 and 2 without reservation of the plaintiff's charge which amounted to Rs. 8,300.

The suit was resisted by the puisne mortgagee (defendant 3) who denied the plaintiff's right to claim a prior charge on the shop, and also disputed the correctness of the amount claimed. The learned Subordinate Judge has granted the plaintiff a decree declaring that the shop could not be sold in execution of the decree of defendant 3 without reservation of the plaintiff's charge for Rs. 7,400, carrying future interest at 7 as. per cent. per mensem. From this decree the puisne mortgagee (defendant 3) has appealed, praying for a total dismissal of the suit; while the plaintiff has filed cross-objections in which he urges that the decree obtained by defendant 3 against defendants 1 and 2 is a nullity and that in execution of that decree the shop in dispute cannot be sold at all.

The only point argued on behalf of the appellant is that, even though defendant 4 held a prior mortgage on the shop in question for Rs. 7,400 and that that mortgage was redeemed after the sale of the shop by the mortgagor to the plaintiff with the money paid by the latter to the prior mortgagee out of the purchase price, the plaintiff could not claim priority for that amount over the puisne mortgagee. Both counsel have cited a large number of rulings, but I think it unnecessary to discuss them in detail, as the principles governing cases of this kind are well-settled and the decision in each case proceeded on its own peculiar facts. It will be sufficient to refer to the latest pronouncement of their Lordships of the Privy Council in 47 Mad 190¹ where Lord Phillimore observed (at pp. 194-95) :

It is now settled law that where in India there are several mortgages on a property, the owner of the property, subject to the mortgage may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor; or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt. . . .

1. Mallireddi Ayyareddi v. Adusumilli Gopalakrishnayya, A I R 1924 P O 36=79 IC 592=47 Mad 190=51 I A 140 (P O).

In the case before us, there is no such covenant by the vendee (plaintiff) to pay the later mortgage debt of defendant 3. Indeed, as already stated, the sale deed made no mention of the mortgage in favour of defendant 3; on the other hand, it expressly stated that the only mortgage on the property sold was that of defendant 4, and except for that mortgage, it was "free from all incumbrances." The case therefore is governed by the general rule enunciated by their Lordships in the ruling cited and not by the exception mentioned therein. There is no statute law in force in the Punjab governing cases where a person, other than a mere volunteer, pays a debt due by another and therefore the relative rights of the parties concerned are regulated by equity, justice and good conscience. And it has been laid down by their Lordships of the Privy Council in an earlier case, 10 Cal 1035² (at p. 1046), that in such cases

the obvious question to ask in the interests of justice, equity and good conscience is what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there was no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man, having a right to act in either of two ways shall be assumed to have acted according to his interest.

The learned counsel for the appellant conceded that the general rule is as stated above, and that, in the absence of any express or implied provision in the deed, it must be presumed that the vendee, by paying off the prior mortgagee, intended to keep it alive for his benefit, and use it as a shield in the event of any attack on his title by a subsequent incumbrancer whom he had not undertaken to discharge. He urged however that in this case, though the prior mortgagee was actually paid off by the plaintiff, the latter had really agreed in the deed to hand over the entire sale price to the vendor, who himself was to pay off the prior mortgagee. In support of this argument, counsel referred to the following passage in the sale deed:

The remaining sale money, amounting to Rs. 9,310, has been left in trust with the aforesaid vendee. Out of this amount, I will get as much amount as is due to Pandit Karam Chand, mortgagee, decree-holder, paid by the vendee to him before the Senior Subordinate Judge, Amritsar, and will get the sold shop released from attachment.

2. Gokal Das Gopal Das v. Puran Mal Premsukh Das, (1884) 10 Cal 1035=11 I A 126=4 Sar 543 (P O).

Clearly, this sentence does not bear the construction sought to be put on it by the appellant's learned counsel. But even if it were so, it will not in my opinion make any material difference. As observed by a Division Bench of this Court in 146 I C 239,³ in cases of this kind the transaction must be examined as a whole, and that "it is immaterial as to whose hand actually paid the money over" to the prior mortgagee. In the present case, as has already been stated, the vendee (plaintiff) had no knowledge of the puisne mortgage in favour of defendant 3 (appellant) and it was he who had actually paid the prior mortgagee before the executing Court and obtained the mortgage deed from him. There is therefore nothing from which an intention on the part of the plaintiff to waive the benefit of his equitable right as the subrogee of the rights of the prior mortgagee could be inferred. The cases cited by the appellant's counsel, 2 C L J 288,⁴ 6 C L J 134,⁵ 33 All 101,⁶ 50 All 218⁷ and 34 Mad 119⁸ are clearly distinguishable. They fall within the exception to the general rule enunciated by their Lordships of the Privy Council in the case cited above: 47 Mad 190.¹ In each of these cases the vendee, with full knowledge of the puisne incumbrance, had undertaken to pay both the prior and the puisne mortgagees out of the sale price, which had been kept in deposit with him but as a matter of fact, he had paid the prior mortgagee only, and had sought to rely on this payment as a shield against the puisne mortgagee. This he was not allowed to do, it being held that

A person who has undertaken to discharge a mortgage, but has defaulted, cannot set up as against that mortgagee a right of subrogation based on the discharge of another incumbrance: 6 C L J 134,⁵ at p. 139.

In such cases the vendee having covenanted to pay both the mortgagees out of the purchase price, had taken the obligation on himself and payment by him of the

3. Sita Ram v. Kartar Singh, A I R 1933 Lah 416=146 I C 239=34 P L R 477.

4. Surjiram Marwari v. Barhamdeo Pershad, (1905) 2 C L J 288.

5. Bisseswar Prosad v. Lala Sarnam Singh, (1907) 6 C L J 134.

6. Muhammad Sadiq v. Ghaus Muhammad, (1911) 33 All 101=7 I C 200=7 A L J 914 (F B).

7. Maksud Ali Khan v. Abdullah Khan, A I R 1928 All 77=108 I C 728=50 All 218=25 A L J 1017.

8. Govindaswami Thevan v. Doraiswami Pillai, (1911) 34 Mad 119=6 I C 781=20 M L J 380.

prior mortgage was in discharge of his own obligation; consequently no question of subrogation could possibly arise as against the second mortgagee whom he himself had undertaken to pay, but had not paid. To hold otherwise would be to allow the purchaser to get an advantage by non-fulfilment of his part of the contract, which he would not have obtained if he had carried it out. As has been explained above, the right to use the prior incumbrance as a shield is based on the presumed intention of the purchaser to keep alive that incumbrance for his own benefit; but this presumption is rebutted when the purchaser covenants to discharge both the prior and the puisne mortgages out of the purchase price: see Sheldon on Subrogation, S. 28. As stated already, no such covenant exists in the present case, and therefore the rule laid down in these rulings is not applicable. I hold therefore that the learned Judge of the Court below has rightly decided that in this case the plaintiff is entitled to priority for the sum of Rs. 7,400 which he, at the instance of defendant 1, had paid to defendant 4 on the decree obtained by the latter on foot of his prior mortgage of 30th October 1916. The appeal fails and is dismissed with costs. The cross-objections were not pressed and are dismissed also with costs.

Abdul Rashid, J.—I agree.

T.M./D.S.

Appeal and Cross-objections dismissed.

A. I. R. 1937 Lahore 668

BHIDE, J.

Mangal Dass — Creditor — Petitioner.
v.

Official Receiver and another, Insolvent — Opposite Parties.

Civil Revn. Petn. No. 255 of 1937, Decided on 18th June 1937, from order of Dist. Judge, Lahore, D/- 4th January 1937.

Provincial Insolvency Act (1920), Ss. 53, 54 and 5—Under S. 5, provisions of Civil P. C. are applicable subject to those of the Provincial Insolvency Act—Setting aside of alienations under S. 53 and under S. 54 is on different grounds—Official Receiver not aware of grounds of his second application under S. 54 when his first application under S. 53 presented—Application under S. 53 dismissed—Application under S. 54 held not barred under S. 11, Expl. 4, Civil P. C.

No doubt according to S. 5, Provincial Insolvency Act, the provisions of the Civil P. C. are applicable subject to the provisions of the Provincial Insolvency Act. But the Insolvency Act provides for setting aside alienations under Ss. 53 and 54 on different grounds. Hence the dismissal of an application under S. 53 does not bar the subsequent application under S. 54 under Civil P. C., S. 11, Expl. 4 particularly when the Official Receiver is not proved to be aware of the grounds of his second application at the time when his first application was presented. [P 668 C 2; P 669 C 1]

A. Tandon — for Petitioner.

Ram Ditta Mal — for Opposite Parties.

Order.—This is a petition for revision arising out of insolvency proceedings. The Official Receiver made an application under S. 53, Provincial Insolvency Act, alleging that certain alienations were fictitious. That application failed and thereafter he presented another application under S. 54, Provincial Insolvency Act, alleging that the same alienations amounted to a fraudulent preference and should be set aside on that ground. This application was granted. An appeal was preferred to the learned District Judge, and the main contention raised before him was that the second application under S. 54 was barred by the rule of *res judicata*. The learned District Judge repelled this contention and dismissed the appeal. The present petition for revision has been preferred from that order.

The learned counsel for the petitioner contended that an application under S. 53 or S. 54, Provincial Insolvency Act, is in the nature of a suit and the provisions of S. 11, Expl. 4, Civil P. C., bar the subsequent application under S. 54, Provincial Insolvency Act. No authority directly in point was cited. According to S. 5, Provincial Insolvency Act, the provisions of the Civil Procedure Code are applicable subject to the provisions of the Provincial Insolvency Act. That Act provides for setting aside alienations under Ss. 53 and 54 on different grounds. Moreover, at the time when the first application under S. 53 was made, the Official Receiver may not have been even aware of the grounds on which the second application under S. 54 was based. The learned counsel for the petitioner was unable to point out anything on the record to show that the Official Receiver was aware of the grounds of his second application at the time when the first application was presented and that therefore it was incumbent on him to include those in the first application under S. 53. I see no good reason to hold

that the application under S. 54, Provincial Insolvency Act, was barred under the provisions of S. 11, Expl. 4, Civil P. C. I dismiss the petition for revision with costs.

R.W./R K.

Petition dismissed.

A. I. R. 1937 Lahore 669

TEK CHAND, J.

Mt. Mehraj Begam — Plaintiff —
Appellant.

v.

Din Mohammad — Defendant —
Respondent.

R. S. Appeal No. 1348 of 1936, Decided on 17th February 1937, from decision of Addl. Dist. Judge, Lahore, D/- 17th July 1936.

Mahomedan Law—Will—Construction—A Mahomedan can bequeath a thing to one person and its usufruct to another—Mahomedan bequeathing house by will to his wife for her occupation for life so long as she remained chaste and then to his niece absolutely—Rent from certain shop also given to wife and upon her death to testator's brothers—Power of alienation or subletting these properties not given to her by will—Will held could not confer on her absolute estate with a gift over to niece—It conferred on her usufruct of house for limited period and ownership of same on niece.

It is permissible under the Mahomedan law to make a bequest of the thing itself in favour of one person and of its produce or use to another.

[P 671 C 1]

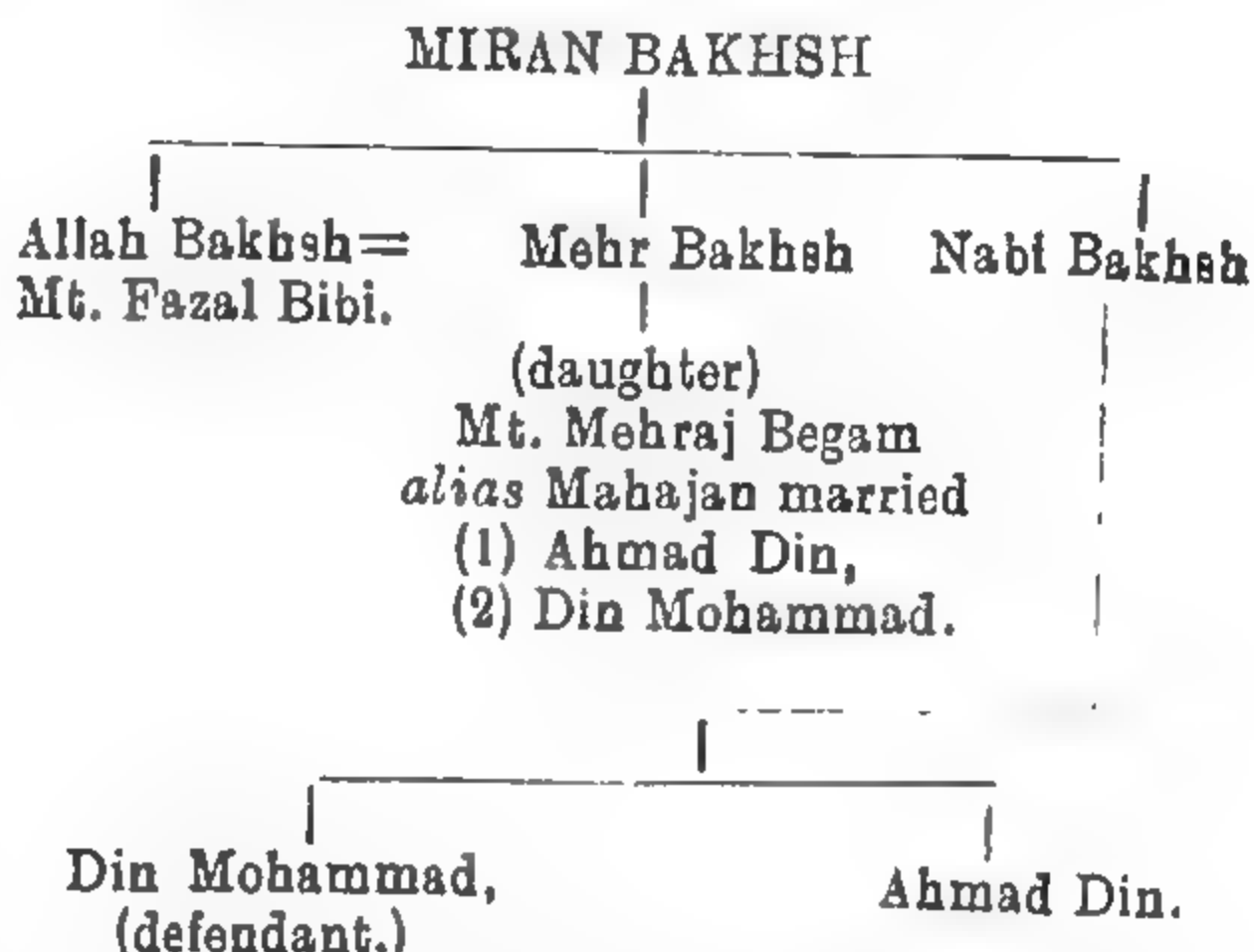
A Mahomedan bequeathed his immoveable property, consisting of a house and a shop, to his wife by a will which was consented to by the other heirs of the testator. It was provided by the will that she was to occupy the house for her residence for her life or so long as she remained of good character. As regards the shop she had only the power to realize the rent of the shop and bring it to her own use. It was also provided that under no circumstances was she to alienate any of these properties and that she was not given the power even to sublet the properties. On her death the shop was to become the absolute property of the brothers of the testator and the house was to be the property of his niece :

Held: that though the word 'malik' was used in one place, yet the dominant intention of the testator was to give his wife the "usufruct" of the properties for a limited period and confer the ownership of the house on the niece and that of the shop on his two brothers. The bequest by the testator of these properties to his wife was not a transfer of the corpus with an inconsistent restrictive condition and a gift over to the niece, but in reality the 'occupancy' or 'use' of the house was given to her for a limited period and its corpus to his niece, and that on the death of the former the usufruct and the corpus both vested in the latter : *A I R 1929 P C 149* and *A I R 1933 Bom 324, Ref.* [P 670 C 2; P 671 C 1]

Barkat Ali and Mohd. Amin —
for Appellant.

Kahan Chand — for Respondent.

Judgment.—The parties to this litigation are husband and wife. They are Qureshis of Lahore, and their relationship with Allah Bakhsh, whose property is in dispute will appear from the following pedigree table :



Mt. Mehraj Begam was first married to Ahmad Din, son of Nabi Bakhsh. On Ahmad Din's death she married his brother Din Mohammad, who has another wife living, from whom he has children. Mt. Mehraj Begum and Din Mohammad appear to have fallen out with each other lately. The property in dispute is a house which originally belonged to Allah Bakhsh who died childless on 23rd May 1918. It is alleged by the plaintiff that one day before his death, i. e. on 22nd May 1918, Allah Bakhsh executed a will (Ex. P-1) which was attested by eight witnesses, including his wife Mt. Fazal Bibi, his two brothers Mehr Bakhsh and Nabi Bakhsh, and his niece Mt. Mehraj Begam, plaintiff. The plaintiff averred that under this will Mt. Fazal Bibi lived in the house in dispute for her lifetime, and on her death, in 1925, the plaintiff became the absolute owner thereof. She remained in possession till April 1933 when her husband, the defendant, unlawfully dispossessed her of the lower storey of the house. Accordingly she brought this action for recovery of possession of this part of the house. The defendant Din Mohammad denied the plaintiff's claim to any part of the house in suit. He did not admit the execution of the will by Allah Bakhsh, and in the alternative pleaded that Allah Bakhsh was not of disposing mind at the time, and that the will was invalid under Mahomedan law. He also alleged that Allah Bakhsh, in his lifetime had orally

gifted the house in dispute to him and he was in possession in his own right.

The trial Judge held that the alleged oral gift by Allah Bakhsh to the defendant has not been proved, that he, while in possession of his senses, had executed the will Ex. P-1 on 22nd May 1918, that though the will was of the entire property of the deceased, it had been validated by consent of the other heirs, Mehr Bakhsh and Nabi Bakhsh, given after the testator's death. He accordingly granted the plaintiff a decree for possession of the portion of the house, of which she had been dispossessed by the defendant a short time before the suit. On appeal the learned Additional District Judge upheld the finding of the Subordinate Judge that the will had been executed by Allah Bakhsh, but he did not come to any definite finding as to whether the testator had a disposing mind at the time. He also found that though the will was in excess of the legal one-third and therefore invalid under Mahomedan law, but this defect had been cured by the consent of the other heirs of the deceased. He interpreted the will as bequeathing the house in dispute to Mt. Fazal Bibi absolutely, with a condition that she will have no power to alienate it, and after her death to Mt. Mehraj Begam. He held that as under the Mahomedan law of the Hanafi School, by which the parties were governed, such a condition and the gift over are void, the legal effect of the bequest was that Mt. Fazal Bibi took the house as absolute owner and the plaintiff got nothing at all. On this finding, he accepted the defendant's appeal and dismissed Mt. Mehraj Begam's suit leaving the parties to bear their own costs.

The plaintiff has come in second appeal and it has been contended on her behalf that the will has been misinterpreted by the learned Additional District Judge and in any case the view of the Mahomedan law taken by him is incorrect in the light of the recent pronouncement of the Privy Council on the point in 4 Luck 305¹ at p. 307. It has also been urged that the learned Judge should have held, in agreement with the Subordinate Judge, that the testator was of disposing mind at the time of the execution of the will. On the last point, I have no doubt that the con-

tention of the appellant is correct. As already stated, both Courts have concurrently found that the will was executed by Allah Bakhsh, and this finding has not been challenged before me by the respondent's counsel, as indeed it could not be, in view of convincing evidence on the record. This evidence also establishes that the deceased, though ill at the time, was in possession of his senses. The will was executed in 1918, and of the eight attesting witnesses all except Basso have since died. Basso gave evidence at the trial and clearly stated that the will was written at the instance of Allah Bakhsh and was thumb-marked by him. The scribe Devi Das has also appeared as a witness and deposed that the testator was in possession of his senses at the time and that the will was attested by Mehr Bakhsh and Nabi Bakhsh, brothers of the deceased, and Mt. Fazal Bibi, his wife. The plaintiff is also one of the attesting witnesses and she too has sworn to the above facts. There is also on the record a group photograph, taken on the day on which the will was executed, and this shows that the deceased was able to sit up and was not unconscious as is alleged by the defendant. There is no rebuttal evidence worth the name produced by the defendant. In my opinion this evidence is quite sufficient to prove the due execution of the will by Allah Bakhsh while he was of disposing mind.

The real question in the case is one of construction of the will, clause (7) of which contains the disposition relating to the immoveable properties owned by the testator, which consisted of a house in Koocha Kababian and a shop inside Mochi Gate, Lahore. Reading this clause as a whole, and not laying too much stress on a word here or a word there, I have no doubt that the bequest by the testator of these properties to his wife, Mt. Fazal Bibi, was not a transfer of the corpus with an inconsistent restrictive condition and a gift over to the plaintiff. On the other hand, it seems clear that the dominant intention of the testator was to give her the 'usufruct' of the properties for a limited period and confer the ownership of the house on the plaintiff, and that of the shop on his two brothers, Nabi Bakhsh and Mehr Bakhsh. Though in one place it is stated that Mt. Fazal Bibi will be the malik of these two properties, it is laid down in clear terms that "She will occupy the house

1. Amjad Khan v. Ashraf Khan, A I R 1929 P C 149=116 I C 405=4 Luck 305 = 56 I A 213 (P C).

for her residence for her life or so long as she remained of good character" and as regards the shop, all that she became entitled to was merely to realize the rent and bring it to her own use. It is also provided that under no circumstances was she to alienate any of these properties and it appears that she was not given the power even to sub-let the properties. On her death, the shop was to become the absolute property of Nabi Bakhsh and Mehr Bakhsh, brothers of the testator, and on her becoming unchaste or on her death (as the case might be) the house was to be the property of his niece, Mt. Mehraj Begum, plaintiff, who, it was stated in the will, had been living with him and whom he had brought up. Now whatever may be the correct legal position under Mahomedan law of the Hanafi School with regard to bequests of a life-estate with a vested remainder, it is beyond doubt that it is permissible to make a bequest of the thing itself in favour of one person and of its produce or use to another. In the *Hedaya*, Vol. 4, Chap. 5, p. 692, it is laid down that :

If a person bequeath the use of his house, either for a definite or indefinite period, such bequest is valid, because as an endowment with usufruct, either gratuitous or for an equivalent, is valid during life, it is consequently so after death.

Similarly in Baillie's Digest, Vol. 1, p. 668, it is stated :

If a person should bequeath this mansion to such a one, and its occupancy to such another each legatee would have what was mentioned for him, without any difference of opinion, whether the bequests are connected together or separate.

I hold, therefore, that the bequest of the house in dispute to Mt. Fazal Bibi was not of an absolute estate with a gift over to the plaintiff, as held by the learned Additional District Judge, but that in reality the 'occupancy' or 'use' of the house had been given to Mt. Fazal Bibi for a limited period and its corpus to the plaintiff, and that on the death of the former the usufruct and the corpus both vested in the latter. In this view of the case, it is not necessary for the purposes of this case to discuss whether the bequest of a life-estate is or is not valid under Mahomedan law. It may be stated that it is not easy to reconcile the various cases on the point, and the latest decision of the Privy Council in 4 Luck 305¹ cannot be said to have set the matter at rest, as has been explained by Mirza, J. of the Bombay High Court in

57 Bom 737,² at p. 757 and in the dissenting opinions on appeal by Beaumont, C. J. and Rangnekar, J. (p. 777 and p. 784 *et seq*). The defendant's learned counsel concedes that his client has no lawful title to the house under the will. It is admitted that even on the interpretation put on the will by the Additional District Judge, Mt. Fazal Bibi took an absolute estate and the defendant is not her heir. He relied merely on the weakness of the plaintiff's title. But as has been held above, the plaintiff is the rightful owner of the house and there is no doubt that she was wrongfully dispossessed of the lower storey by Din Mohammad in April 1933. I accept the appeal, set aside the judgment and decree of the learned Additional District Judge and restore that of the Court of first instance, decreeing the plaintiff's suit with costs throughout.

K.B./A.L.

Appeal allowed.

2. Rasool Bibi v. Yusuf Ajam, A I R 1933 Bom 324=148 I O 82=57 Bom 737=35 Bom L R 643.

A. I. R. 1937 Lahore 671

BEHDE, J.

Derajat Bank Ltd., Dera Ghazi Khan
— Plaintiff — Appellant.
v.

Mt. Sardar Bibi and others —
Defendants — Respondents.

Second Appeal No. 375 of 1937, Decided on 25th June 1937, from order of Dist. Judge, Dera Ghazi Khan, D/- 15th January 1937.

(a) Execution — Attachment — Proof of — Omission to affix notice and make proclamation—Attachment held not valid.

No property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order the other things prescribed by the rules in the Civil Procedure Code have been done. The omission to affix notice, etc., and make proclamation cannot be looked upon as a trivial irregularity as that is the only way in which the public is informed of the existence of an attachment: *A I R 1923 Lah 423* and *A I R 1931 Pat 58*, *Rel. on; A I R 1928 P C 139, Foll.* [P 672 O 2]

(b) Execution—Attachment—Onus to prove prior valid attachment and voidability of subsequent mortgage lies on person challenging mortgage — Latter must also prove that all requirements of law pertaining to valid attachment are fulfilled.

Where the question is whether the mortgage was void owing to a prior valid attachment, the

onus of proof lies on the person challenging the mortgage and it is for him to establish that the requirements of law as regards a valid attachment are fulfilled. [P 672 C 2]

M. C. Sud — for Appellant.

J. L. Kapur — for Respondents 3 to 5.

Judgment.—This appeal arises out of a suit brought by the Derajat Bank Ltd. of Dera Ghazi Khan for recovery of Rs. 230 on the basis of a mortgage effected in its favour by one Abdul Ghafur and his wife Mt. Sardar Bibi. By this mortgage two houses Nos. 45 and 46 were hypothecated in favour of the plaintiff Bank. The suit was resisted by certain decree-holders of Abdul Ghafur who had purchased the house in execution of their decrees, and who contended inter alia that the alienation in favour of the Bank was void as it was effected on 7th December 1934, after the houses had been attached by them in execution of their decrees on 12th June 1934. The trial Court decided most of the issues in favour of the decree-holders, but decreed the suit on the finding that the Bank was a bona fide transferee. On appeal the learned District Judge held that the Bank was not a bona fide transferee and therefore dismissed the suit with costs throughout. From this decision the plaintiff Bank has preferred a second appeal. The learned counsel for the plaintiff has raised three points as follows: (1) That the houses in question were not attached in accordance with law inasmuch as no notices were affixed on the houses or on the court-house as required by the provisions of O. 21, R. 54, Civil P. C.; (2) that the learned District Judge was not right in holding that the appellant was not a bona fide transferee and had laid down a standard for judging "good faith" which is not supported by law; (3) that in any case the plaintiffs should have been granted a money decree.

As regards the first point it appears that a prohibitory order was served on Abdul Ghafur, but there is nothing on the record to show that the other formalities required, viz. the proclamation and the affixing of the notices prescribed by Cl. (2) of O. 21, R. 54, Civil P. C., were complied with. It is well established by the decision of their Lordships of the Privy Council in A I R 1928 P C 139¹

that no property can be declared to be attached unless first the order for attachment had been issued, and secondly in execution of that order, the other things prescribed by the rules in the Civil Procedure Code have been done. In the present case the process-server who was given the warrant of attachment was examined, but he was not asked any questions as regards the proclamation and the affixing of the notices required by law. It was urged that the plaintiff-appellant did not cross-examine the process-server on these points. But the onus lay on the defendants to prove that the mortgage in favour of the plaintiff was void owing to a prior valid attachment (*vide* issue No. 3) and it was therefore for them to establish that the requirements of law as regards a valid attachment were fulfilled. This they failed to do. The omission to affix notice, etc., and make proclamation cannot be looked upon as a trivial irregularity as that is the only way in which the public is informed of the existence of an attachment. That the fulfilment of these requirements is essential for a valid attachment will also appear from 4 Lah 211² and A I R 1931 Pat 58.³ I must therefore hold that it was not established that there was any valid attachment of the property in dispute prior to the mortgage in favour of the plaintiff. Consequently, that mortgage cannot be held to be void under Section 64, Civil P. C.

The mortgage in favour of the plaintiff is duly proved. The learned District Judge has held that the plaintiff was not a bona fide transferee, merely because he would have heard of the attachment if he had made inquiries from the patwari and the neighbours. But, as it has been found above that there was no valid attachment, this question becomes immaterial. On the above findings, no other point requires discussion. I accept the appeal and restore the trial Court's decree with costs throughout.

R.W./R.K.

Appeal accepted.

2. *Mula Ram v. Jiwind Ram*, A I R 1929 Lah 423=72 I O 452=4 Lah 211.

3. *Nagarmull v. Benares Bank, Ltd.*, A I R 1931 Pat 58=129 I O 142=9 Pat 860=12 P L T 398.

1. *Muthiah Chetti v. Palaniappa Chetty*, A I R 1928 P C 139=109 I O 626=55 I A 256=51 Mad 349 (P C).

* A. I. R. 1937 Lahore 673

COLDSTREAM AND BHIDE, JJ.

Model Town Co-operative Society, Ltd.,
Lahore — Defendant—Appellant.

v.

M. Abu-ul-Asar Hafiz Jullundari —
Plaintiff—Respondent.

Second Appeal No. 329 of 1936, Decided
on 8th January 1937, from decree of Addl.
Dist. Judge, Lahore, D/- 18th December
1936.

(a) Co-operative Societies Act (1912), S. 43
—Rules under, R. 18 (i) — Interpretation —
All awards are appealable.

The sub-rules of R. 18 framed under S. 43,
Co-operative Societies Act, must be read together.
If they are so read then there can be no doubt
that the intention under R. 18 (i) was to make
all awards appealable. [P 675 C 1]

(b) Interpretation of Statutes — Powers of
Court — Act declaring that rules framed
under certain section to have effect as if
enacted in Act — Certain rule not in pursu-
ance of purpose for which power to make
rules was given — Courts whether precluded
from questioning its validity (*Quære*).

Quære—It is doubtful whether when a rule
purporting to be made under powers delegated by
a statute of the Indian Legislature is clearly not
made in pursuance of the purpose for which power
to make it was given, Courts are precluded
from questioning its validity merely because the
Act itself declares that rules made under a section
of the statute shall have effect as if enacted in the
Act itself. [P 676 C 1]

* (c) Co-operative Societies Act (1912),
S. 43—Bye-laws under —Bye-law framed by
Co-operative Society providing that award of
arbitrators will not be appealable — Parties
acting on it and getting award — Society
cannot subsequently challenge validity of its
bye-law and claim right of appeal.

There is nothing illegal in the parties agreeing
that there shall be no right of appeal in a parti-
cular case. The consideration for such an agree-
ment on the part of either party is the agreement
of the opposite party to forgo its right of appeal.
[P 676 C 2]

Where therefore a bye-law framed by a Co-opera-
tive Society provides that there shall be no appeal
from the award of the arbitrators and the parties
acting on it get an award, the bye-law must be
taken to govern the contract and be treated as
though it were one of the conditions of the con-
tract. The society cannot subsequently be allowed
to challenge the validity of its bye-law and claim
right of appeal. [P 676 C 2]

Manohar Lal Sachdeva —

for Appellant.

Sheikh Abdul Aziz and Daulat Ram —

for Respondent.

Coldstream, J.—Abu-ul-Asar Hafiz Jul-
lundari, the respondent in the appeal
before us, purchased in 1929 and 1930

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two plots of land from the Model Town
Co-operative Society, Lahore, of which he
was a member. He was dissatisfied with
his bargain alleging that the Society had
not satisfied the conditions published in
their prospectus and he claimed damages.
On 20th October 1932, the dispute bet-
ween the respondent and the Society was
referred to a Board of Arbitrators by the
Registrar, Co-operative Societies, in accord-
ance with the bye-laws framed by the
Society in exercise of the power conferred
upon it by the rules made by the Local
Government under S. 43, Co-operative
Societies Act, as provided by bye-law
No. 37. Three arbitrators were appointed,
one being nominated by each party and
the third, the Chairman of the Board, by
the Registrar. The Board gave their
award on 29th May 1933. Their decision
was that Rs. 1,268 were due to the Society
by the respondent who however was en-
titled to deduct a set-off of Rs. 1,000, that
is to say the Society was awarded Rs. 268.
The bye-law made the decision final but
the Society appealed to the Registrar
against the award and the Deputy Regis-
trar accepting its appeal decided on 20th
October 1933 that the Society should be
paid Rs. 1,594.7.4 with interest at 9 per
cent. per annum.

On 31st October 1933 the respondent
instituted a suit in the Court of the Sub-
ordinate Judge, First Class, Lahore, for a
declaration that the Deputy Registrar's
decision was not binding on him as under
the bye-law no appeal lay against the
arbitrators' award. The bye-laws in force
when the dispute was referred to arbitra-
tion had, it appears, been amended before
the date of the Deputy Registrar's deci-
sion, and bye-law No. 70 of the amended
bye-laws allowed an appeal against an
arbitration award as did R. 18 (i) of the
rules framed by the Local Government
under the Act and published in Noti-
fication No. 13819 dated 23rd June 1917,
and in subsequent amending Notifications.
It is however conceded by the parties
before us that the original bye-law No. 37
was in force at the time of the arbitra-
tion. It was contended by the defendant
Society in the trial Court that the bye-
law No. 37 could not override R. 19 (i)
framed by the Local Government, which
provides for an appeal against an arbitra-
tor's award. R. 18 (i) runs :

Any party aggrieved by an award of an arbi-
trator may appeal to the Registrar in person or

by agent within one month of the date of the award.

This argument was met by the plaintiff with the plea that R. 19 (i) in the rules was ultra vires as the Act did not empower the Local Government to provide for appeals against arbitration awards. The Subordinate Judge held that under R. 18 (i), which by virtue of sub-s. 5 of S. 43 of the Act has "effect as if it had been enacted in the Act itself", an appeal lay against an award by one arbitrator but not against an award by a Board of three arbitrators to which the Registrar had power under R. 18 (b) to refer a dispute if he did not proceed to decide it himself or to refer it to a single arbitrator. His conclusion being therefore that the award in this case was final and the proceedings of the Registrar on appeal ultra vires, he decreed the plaintiff's claim. The Society appealed to the District Judge contending that R. 18 (i) contemplated an appeal from all awards made by arbitrators. This contention was overruled by the learned Judge who agreed with the view taken by the trial Court and dismissed the appeal. Against this decision the Society submitted the present appeal to this Court. The appeal came before my learned brother Bhide, J. who, in view of the importance of the issues involved, referred it to a Division Bench and this appeal is now before us.

Appellant's counsel urges that the learned District Judge erred in interpreting the rules to mean that there could be no appeal to the Registrar from an award unless the award was of a single arbitrator and that as the bye-law No. 37 was clearly ultra vires being in conflict with R. 18 (i) which has effect as if it was part of the Act itself, the appeal was in accordance with law and the Registrar's decision cannot be questioned. The contention on the other side is that the parties referred their dispute expressly under bye-law No. 37 framed by the appellant Society itself, that there was thus an implied contract not to appeal, that the Society was bound by the contract and estopped from pleading the right to appeal. It is also argued that R. 18 (i) is itself ultra vires as it does not carry out the purpose of the Act stated in its Preamble (the promotion of thrift and self-help) to make rules for which purpose sub-s. (1) of S. 43 of the Act gives the Local Government a general power, nor is it a rule about any matter regard-

ing which power is specifically given by sub-s. (2). It is not disputed, I may note here, that the bye-law No. 37 was approved and registered by the Registrar as required by the rules made under the Act.

The last argument raises an interesting question of law regarding the jurisdiction of the civil Courts to consider the validity of R. 18 (i), but as in my view the first argument of appellant's counsel has force, it is not necessary to discuss at any length either the question whether the rule is one which the Local Government had power to make or the question whether its validity can be attacked by a civil Court. That the lower Court's view of the intention of R. 18 (i), namely that it was to allow appeals against those awards only which are given by single arbitrators, is wrong, I have, however, no doubt.

Rule 18 (a) provides that any dispute concerning the business of a Co-operative Society between members shall be referred to the Registrar. R. 18 (b) states that the Registrar may either decide the dispute himself, or appoint an arbitrator, or refer the dispute to three arbitrators (as provided in the Society's bye-law No. 37). R. 18 (c) gives the Registrar or arbitrator power to administer oaths, summon parties and witnesses, etc. R. 18 (f) runs: "The Registrar or arbitrator shall hear the evidence of the parties or witnesses who attend", and R. 18 (i) which I have already quoted, "any party aggrieved by an award of an arbitrator may appeal to the Registrar." Sub-r. (j) is as follows:

An arbitrator's award, if no appeal has been made within a month, or a decision of Registrar originally or in appeal shall not, as between the parties, be liable to be called in question in any Civil or Revenue Court and shall be in all respects final and conclusive except on proof of a corrupt gratification by the arbitrator.

The last sub-r. (i) is "In proceedings before the Registrar or an arbitrator, no party shall be represented by a legal practitioner."

Now if, instead of applying the general rule that words in the singular shall include the plural and vice versa, to which effect is given in S. 13, General Clauses Act, we interpret the rules in the manner in which the lower Courts have done, we have the remarkable result that though a board of arbitrators may administer oaths, summon parties, etc. [R. 18 (e)], a single arbitrator has no such power, that a board need not hear evidence [R. 18 (f)], that there is no provision allowing an award

by a Board being called in question on proof of a corrupt gratification [R. 18 (j)], and that while a party may not be represented by a legal practitioner in proceedings before the Registrar or a single arbitrator, there is no such prohibition in the case of proceedings before a Board. We must read the rules together, and if they are so read then there can, in my opinion, be no doubt that the intention was to make all awards appealable and that the use of the singular word in one sub-rule and the plural in another is due to unskilful drafting only.

The statute itself in Cl. (1) of sub-s. 2 of S. 43 specially empowers the Local Government to make rules providing for the reference of disputes to arbitration and prescribing the mode of appointing an arbitrator or arbitrators and the procedure to be followed in proceedings before the Registrar or the arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or the awards of the arbitrators. But no special power is given to make rules providing for appeals against arbitration awards. A reference to arbitration necessarily implies that the parties are deprived of the right to resort to a Court of law and there is always a presumption that there can be no appeal against an arbitration award except on the ground of fraud or corruption. If therefore the intention of the Act was to allow the Local Government to set up an extraordinary procedure providing for appeals against awards in arbitration, one would expect it to have expressed its intention positively and clearly, the more so in view of the fact that the declared purpose of the act is to promote thrift, and presumably, therefore, to restrict litigation. It is to be noticed that Cl. (s) of sub-s. (2) expressly gives power to frame rules determining in which cases appeals shall lie from the orders of the Registrar, but whether this is intended to refer to the Registrar's decisions in disputes referred to arbitration is perhaps doubtful. On the other hand sub-s. (1) of S. 43 certainly gives a wide discretion to the Local Government and it might be argued, not perhaps unreasonably, that rules providing for the settlement of disputes by arbitration, with one appeal to the Registrar, in place of their decision by the long process of judicial trial followed by appeals allowed by the Code of Civil Procedure, with all their attendant ex-

pense and uncertainty, are rules providing for a cheap and speedy disposal of disputes and so carrying out the purpose of the Act. In any case the matter is one calling for the attention of the Legislature. The rule has been acted upon since 1917 (it was R. (f) in the notification of 23rd June 1917) and its validity does not appear to have been doubted before now, but if it is the intention of the Legislature to empower the Local Government to make a rule providing for appeals against decisions of arbitrators, this should be made clear.

As regards the point whether it is open to a Court to go into the question of the validity of sub-r. (i) of R. 18, appellant's counsel has referred us to the judgment of the House of Lords in (1894) A C 347.¹ That was a case in which it was questioned whether certain rules made under S. 2, Patents, Designs and Trade Mark Acts, 1883 and 1888, made by the Board of Trade were *intra vires*. S. 101 (3) of the Act of 1883 provided that the rules were to be laid before Parliament for forty days during which time they might be annulled by a resolution of either House and that "they shall be of the same effect as if they were contained in the Act and shall be judicially noticed". The rules were found to be *intra vires* in view of the wideness of the rule-making power given to the Board of Trade and it became unnecessary to decide the point whether it was competent to the Courts to canvass the validity. The point was, however, considered. The Lord Chancellor (Lord Herschell), Lord Watson and Lord Russell of Killowen held that the Courts had no jurisdiction to question the validity of the rules having regard to the provision that by the statute the rules were given effect as if they were part of the enactment. Lord Morris was of opinion that it was not only competent for the Courts of Justice to consider, but that it was their duty to consider, whether the rules were *intra vires* and that if a Court found that certain rules did not come within the power delegated by the enactment, the Court ought not to regard them as operative. This judgment has been held by Dass, J. in 2 Pat 134² to lay down

1. Chartered Institute of Patent Agents v. Lockwood, (1894) A C 347=63 L J P C 74=6 R 219=71 L T 205.

2. Emperor v. Abdul Hamid, A I R 1923 Pat 1=68 I C 945=23 Or L J 625=2 Pat 134=3 P L T 585 (S B).

definitely the proposition that where a statute under the authority of which rules are promulgated itself declares that they shall have the same effect as if enacted in the statute, the validity of the rules cannot be questioned in any Court of law, but as I have said the House of Lords did not decide this point. Lord Watson expressed his opinion thus :

Assuming that the regulations before us were made by the Board of Trade in pursuance of S. 1, sub-s. (2) of the Act of 1888, then in that case these words apply, shall be of the same effect as if they were contained in the Act and shall be judicially noticed.

Lord Russell of Killowen's words were :

I think that if the rules are to be read as part of the Act (as I think they ought to be), it is not in this case competent to judicial tribunals to reject them.

It seems to me doubtful whether this judgment is authority for the view that where a rule purporting to be made under powers delegated by a statute of the Indian Legislature is clearly not made in pursuance of the purpose for which power to make it was given, Courts are precluded from questioning its validity merely because the Act itself declares that rules made under a section of the statute shall have effect as if enacted in the Act itself. It is however unnecessary to speculate further on this part of the argument for, as I have already indicated, the appeal should not in my opinion be accepted on the ground that the Society was bound by its own contract not to appeal against the decision of the Board of Arbitrators. Its bye-law may have been *intra vires* or *ultra vires* in view of the R. 18 (i), but I see no reason for holding that because of the existence of that rule, the Society was at liberty to go behind its contract and appeal to the Registrar. The bye-law was in conformity with the general law in so far as it allowed no appeal against an award. It did not prevent the parties attacking the award in a civil Court on any ground such as fraud or misconduct and the Contract Act in S. 28 expressly validates a contract of this kind. By agreeing to the reference in accordance with the bye-law, the Society must be understood to have intentionally permitted the appellant to believe that the right of appeal, if any existed, had been waived by both sides. The rules of justice, equity and good conscience compel us to give effect to that contract. This principle has

been recognized and enforced by the Indian Courts : *see* Casperz on Estoppel, 1915, para. 452; and applying it to this case, I would dismiss the appeal with costs.

Bhide, J.—I agree. The parties having gone to arbitration when the old bye-law No. 37 was in force, that bye-law must be taken to govern the contract and be treated as though it were one of the conditions of the contract. There is nothing illegal in the parties agreeing that there shall be no right of appeal in a particular case : *cf.* Casperz on Estoppel, para. 452. The consideration for such an agreement on the part of either party is the agreement of the opposite party to forgo its right of appeal. When the Society has thus given up its right of appeal, and the opposite party has acted upon that basis, the Society cannot now be allowed to challenge the validity of its bye-law and claim a right of appeal. It was urged that there is no estoppel against an illegality of a statute. I think the real question in this case is not the illegality of any statute, but only whether the parties can, by a mutual agreement, give up their right of appeal in a matter referred to arbitration. Even assuming that there was a right of appeal given by the statute, there seems to be nothing illegal in the parties giving it up for consideration as stated above. In the present instance the rules framed by the Local Government allowed a reference to one or three arbitrators, but under the bye-laws of the Society in force when the present dispute was referred, provision was made for a reference to three arbitrators only and the decision of the arbitrators was made final. Whether the bye-law was *intra vires* or not, it may, therefore, be taken that the parties agreed to refer to three arbitrators only in consideration of the right of appeal being abandoned, and such an agreement not being illegal, the Society is, I think, estopped from repudiating it.

P.R./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 676

BLACKER, J.

Ata Mohammad — Complainant

— Petitioner.

v.

Abdul Rahman and others —

Opposite Parties.

Criminal Revn. No. 386 of 1937, Decided on 29th April 1937.

(a) Criminal P. C. (1898), Ss. 133, 137 and 139-A—Order under S. 133 against person for obstructing public way—Person denying right of way on site—Proceedings under S. 139-A must be taken before order under S. 137.

Where in a case a conditional order is passed against a person for obstruction of the public way under S. 133, Criminal P. C., and in an enquiry such person denies the public right of way, the Magistrate must first take proceedings under S. 139-A before taking proceedings under S. 137.

[P 677 C 2]

(b) Criminal P. C. (1898), S. 139-A—Magistrate mentioned in S. 139-A is one before whom person was ordered to appear under S. 133 (1).

The Magistrate taking proceedings under S. 139-A, Criminal P. C., need not be a First Class Magistrate. The Magistrate mentioned in S. 139-A must be the Magistrate before whom a person is ordered to appear under the last sentence of S. 133 (1).

[P 677 C 2]

Facts.—Abdul Rahman, Lakha, Nur Mohammad and Abdullah applied to the Subdivisional Magistrate, Rupar, under S. 133, Criminal P. C., praying that certain obstruction on the public path be removed. The Subdivisional Magistrate passed a conditional order under S. 133, Criminal P. C., on 7th November 1936. This order was made absolute by an order of the Tehsildar, Rupar, dated 15th January 1937 under S. 137, Criminal P. C. The applicant Ata Mohammad has put in a petition against this order under Ss. 435/438 Criminal P. C.

Report.—The order of the Subdivisional Magistrate clearly shows that the petitioner had created an obstruction in the public path by erecting a kacha platform enclosing it with heavy wooden pieces. An enquiry was made from the petitioner and he stated under S. 139-A that there was no right of way at the site of the obstruction. Now, according to S. 139-A, Criminal P. C., the learned Magistrate should have held an enquiry into this matter first before proceeding under S. 137, Criminal P. C. After the denial mentioned above, the Magistrate took the whole evidence in the case, and in the judgment he has undoubtedly dealt with the denial of the public right first. However, I think the procedure adopted is not in accordance with the law. The case is submitted to the learned Judges of the High Court with the request that the order be set aside and the Court concerned be asked to comply with the mandatory provisions of S. 139-A, Criminal P. C.

Order.—I agree with the learned District Magistrate that proceedings under

S. 139-A should have been taken before the proceedings under S. 137. Counsel however urges that there is a further irregularity, i. e. the S. 139-A only empowers a Magistrate with First Class or higher powers who took cognizance originally, and there is nothing in the chapter enabling such Magistrate to delegate this part of the enquiry to a Second Class Magistrate. This view does not appear to me to be correct. The Magistrate mentioned in S. 139-A must be the Magistrate before whom the respondent is ordered to appear under the last sentence of S. 133 (1). I accordingly accept the recommendation of the learned District Magistrate, and setting aside the order direct that the proceedings be taken afresh by the Second Class Magistrate according to law.

S.C./R.K.

Order accordingly.

A. I. R. 1937 Lahore 677

ADDISON AND DIN MOHAMMAD, JJ.

Ghulam Hussain — Defendant —

Appellant.

v.

Mahand — Plaintiff — Respondent.

Second Appeal No. 573 of 1936, Decided on 11th January 1937, from decree of Senior Sub-Judge, Sialkot, D/- 20th April 1936.

(a) Court-fees Act (1870), Sch. 2, Art. 22 (as inserted by Punjab Court-fees Amendment Act, 1922)—Applicability—Suit under Art. 22 does not fall within scope of S. 3, Suits Valuation Act—It is not competent for Local Government to frame any rule governing such suit as empowered under S. 3, Suits Valuation Act.

Sec. 3, Suits Valuation Act, empowers the Local Government to make rules to determine the value of the land for purposes of jurisdiction in suits mentioned in S. 7, paras. v, vi and x (d), Court-fees Act. A suit under Art. 22 of Sch. 2, Court-fees Act, as inserted by the Punjab Court-fees Amendment Act of 1922, does not fall under any of these provisions, and the Local Government is not competent under S. 3, Suits Valuation Act, to frame any rules governing those cases which do not fall under the paragraphs mentioned in the section itself.

[P 679 C 1]

(b) Lahore High Court Rules and Orders, Vol. 1, Ch. 3-C, R. 2 — Rule relates to immoveable property other than land.

It is under S. 9, Suits Valuation Act, that the High Court is empowered to make rules with respect to subject matter in suits other than those mentioned in the section. S. 9 falls in the chapter dealing with suits other than those relating to land. Consequently the power to make rules can be exercised by the High Court only in respect of

those suits that do not relate to land. Rule 2 of Ch. 3-C, Vol. 1 of the Rules and Orders as framed under S. 9 by the Lahore High Court refers therefore to immoveable property other than land. [P 679 C 2]

(c) Lahore High Court Rules and Orders, Vol. 1, Ch. 3-D—Inclusion of Art. 22, Punjab Court-fees Act, is ultra vires.

The inclusion of Art. 22, Court-fees Act (Punjab Amendment) in Ch. 3-D, Vol. 1 of the Rules and Orders of the High Court is ultra vires with the result that there is no specific provision in the rules dealing with the jurisdictional value of the suits that fall under Art. 22 of Sch. 2 to the Court-fees Act. [P 679 C 2]

(d) Court-fees Act (1870), Sch. 2, Art. 22 (as inserted by Punjab Court-fees Amendment Act of 1922)—Suit under, to declare that certain sale does not affect plaintiff's reversionary right — Suit for jurisdictional purposes should be valued at 30 times revenue assessed on land in question.

A suit falling under Art. 22, Court-fees (Punjab Amendment) Act, to declare that certain sale deed should not affect the plaintiff's reversionary rights is to be valued for the purposes of jurisdiction at 30 times the revenue assessed on the land and not the market value of the property. This method of value would avoid the anomaly of assessing a lesser value on a declaratory suit where consequential relief is prayed for and a higher value on a similar suit where no consequential relief is prayed for : 60 P R 1907 (F B), Rel. on ; A I R 1918 P C 188 and A I R 1927 Mad 563, Disting. [P 680 C 1, 2]

(e) Suits Valuation Act (1887), S. 4 — Section requires amendment in view of S. 22, Court-fees Act.

S. 4, Suits Valuation Act, requires amendment in view of S. 22 inserted in the Court-fees Act by the Court-fees (Punjab Amendment) Act of 1922. [P 680 C 2]

Narotam Singh — for Appellant.

Ghulam Mohyud Din Khan —

for Respondent.

Din Mohammad, J. — This appeal has been referred to a Division Bench by Jai Lal, J. on the ground that the question of jurisdictional value of the suit out of which the appeal has arisen is not free from difficulty and that an authoritative pronouncement on this matter is required for the guidance of Courts. The suit giving rise to the appeal was instituted by Mahand, plaintiff, against Pir Bakhsh and Ghulam Hussain for a declaration that the sale deed executed by Pir Bakhsh in favour of Ghulam Hussain on 7th August 1934 should not affect his reversionary rights on the death of Pir Bakhsh. He valued the suit for the purposes of jurisdiction at 30 times the land revenue assessed on the land. The value thus calculated amounted to Rs. 150. The suit was however tried by a Subordinate

Judge, First Class, as the sale price of the land had been stated to be Rs. 5,000. The trial Judge dismissed the suit on which the plaintiff preferred an appeal to the Senior Subordinate Judge invested with enhanced appellate powers under which he could hear appeals in land suits of the value of Rs. 250. At the hearing, the respondent raised an objection that the Senior Subordinate Judge was not competent to hear the appeal inasmuch as the jurisdictional value of the suit was the market value of the property, viz. Rupees 5,000. The Subordinate Judge however repelled this contention and came to the conclusion that he was competent to hear the appeal. He accordingly heard the appeal and partially accepted it. A further appeal was preferred to this Court by the vendee Ghulam Hussain and the main point taken on appeal was that the Senior Subordinate Judge had no jurisdiction to hear the appeal.

This suit admittedly falls under Art. 22, Sch. 2, Court-fees Act, which was inserted by the Court-fees (Punjab Amendment) Act, 1922. On behalf of the appellant, reliance is placed on Rules and Orders of the High Court, Vol. 1, Ch. 3-D, in which suits falling under Art. 22 are for the purposes of jurisdictional value shown to be governed by S. 9, Suits Valuation Act, read with R. 2 of Ch. 3-C, Vol. 1 of the Rules and Orders of the High Court. S. 9, Suits Valuation Act, enacts that when the subject matter of suits of any class, other than suits mentioned in the Court-fees Act, 1870, S. 7, paras. (v) and (vi) and para. (x), Cl. (d), is such that in the opinion of the High Court it does not admit of being satisfactorily valued, the High Court may, with the previous sanction of the Local Government, direct that suits of that class shall for the purposes of the Court-fees Act and of the Suits Valuation Act and any other enactment for the time being in force be treated as if their subject matter were of such value as the High Court thinks fit to specify in this behalf. R. 2 of Ch. 3-C lays down that jurisdictional value of a suit by a plaintiff during the lifetime of a person alleged to have a restricted power of alienation in respect of immoveable property, in which the plaintiff in the plaint seeks to have an alienation of immoveable property made by such person declared to be void, except for the life of such person or for some other determinate period, will be : (i) when the alienation is by a written

instrument which declares the value of the interest purporting to be created or the amount of the consideration for which the alienation is made such value or amount. (ii) In other cases the market value at the date of institution of the suit of the property alienated, subject in either case to the provisions of Part. 1, Suits Valuation Act, and of the rules in force under the said part, so far as those provisions are applicable.

The Suits Valuation Act is divided into different parts. Part 1 is headed "Suits relating to land" and comprises Ss. 2 to 6. Part 2 is headed "Other Suits" and comprises Ss. 7 to 10. Part 3 is headed "Supplemental Provisions" and includes Ss. 11 and 12. S. 3 empowers the Local Government to make rules subject to the control of the Governor-General in Council, for determining the value of land for purposes of jurisdiction in the suits mentioned in the Court-fees Act, S. 7, paras. (v) and (vi) and para. (x), Cl. (d). Para. (v) deals with suits for possession of land, houses and gardens. Para. (vi) provides for suits to enforce a right of pre-emption and para. (x), Cl. (d), provides for specific performance of an award. It is obvious that a suit under Art. 22 does not fall under any of these provisions and the Local Government is not competent under this section to frame any rules governing those cases which do not fall under the paragraphs mentioned in the section itself. S. 4 lays down that where a suit mentioned in the Court-fees Act, S. 7, para. (iv), or Sch. 2, Art. 17, relates to land or an interest in land of which the value has been determined by rules under S. 3, the amount at which, for purposes of jurisdiction, the relief sought in the suit is valued shall not exceed the value of the land or interest as determined by those rules. Para. (iv) of S. 7 provides for suits: (a) for moveable property where the subject matter has no market value, (b) to enforce a right to share the joint family property, (c) to obtain a declaratory decree or order, where consequential relief is prayed, (d) to obtain an injunction, (e) for a right to some benefit to arise out of land not otherwise provided for in the Court-fees Act and (f) for accounts.

Article 17 to Sch. 2 provides for plaint or memorandum of appeal in each of the following suits: (1) to alter or set aside a summary decision or order of any of the civil Courts not established by Letters

Patent or of any revenue Court; (2) to alter or cancel any entry in a register of the names of proprietors of revenue-paying estates; (3) to obtain a declaratory decree where no consequential relief is prayed. (4) to set aside an award; (5) to set aside an adoption; (6) every other suit where it is not possible to estimate at a money-value the subject matter in dispute and which is not otherwise provided for by this Act. From the inventory of suits covered by para. (iv) it would be clear that this suit does not fall under that paragraph. It could have fallen under Art. 17 to Sch. 2, and possibly does fall under that Article in every other Province in India but for the enactment of a separate Art. 22 which as stated above was for the first time inserted in the Punjab in 1922. Technically speaking, therefore, S. 4 is not applicable to the suit before us; Ss. 3 and 4 as remarked above apply to suits relating to land. We now consider the scope and the applicability of S. 9. This section falls under Part 2 which, as stated above, is headed "Other Suits". It cannot be denied, therefore, that this section does not refer to suits relating to land, and consequently the powers vested in the High Court by this section can be exercised only in respect of those suits which do not relate to land. It is for this reason that R. 2 framed by the High Court, in Ch. 3-C refers to immoveable property and not land which evidently means that it deals with immoveable property other than land. It follows therefore that no rule relating to suits falling under Art. 22 could be framed by the High Court, nor could it be framed by the Local Government as Art. 22 to Sch. 2 finds no place in S. 3. The inclusion of Art. 22 in Ch. 3-D of Vol. 1, of the Rules and Orders of the High Court is consequently ultra vires, with the result that there is no specific provision in the rules dealing with the jurisdictional value of the suits that fall under Art. 22 of Sch 2, to the Court-fees Act.

The question would then naturally arise as to what should be the jurisdictional value of such suits. Counsel for the appellant refers to 43 Bom 507¹ and 50 Mad 646,² and contends that in these circum-

1. Raohappa Subba Rao v. Shidappa Venkatrao, A I R 1918 P C 188=50 IC 280=43 Bom 507=46 I A 24 (P C).

2. Vasireddi Veeramma v. Marupudi Butchiah, A I R 1927 Mad 563=101 I C 379=50 Mad 646=52 M L J 381.

stances we must hold that the jurisdictional value of the suit should be the market value of the property and not the notional value, or in other words the arbitrary value placed upon a suit by artificial methods. We have however considered the effect of these judgments on the case before us and have come to the conclusion that they do not afford any help in the solution of the problem involved in this case. The Privy Council case referred to a practice not uncommon in Bombay of valuing a prayer for a declaratory decree at Rs. 130 and condemned it as being unwarranted in law, but in the end their Lordships came to the conclusion that they would not be justified in assisting an objection of the type "which rests on no sort of merit but on the most technical of technicalities". In 50 Mad 646² the learned Judges dealt with a suit the subject matter of which was not land or other properties which might be affected directly or indirectly by the declaration of adoption. In the present case we are dealing with a land suit which but for Art. 22 would have clearly fallen under Art. 17 of Sch. 2 to the Court-fees Act. Under the Punjab Courts Act, 'land suit' means a suit relating to land as defined in the Punjab Tenancy Act or to any right or interest in such land. In 60 P R 1907³ a Full Bench of the Punjab Chief Court held that for the purposes of the Punjab Courts Act, the value of a suit for a declaration that a sale by a male proprietor of ancestral agricultural land would not be binding after the alienor's death, was the value of the land calculated at thirty times the revenue and not the amount of the consideration of the sale in dispute. By S. 12, Suits Valuation Act, the jurisdiction of a Court is not affected in any manner with respect to any suit instituted before rules under Part 1, applicable to the valuation of the suit, take effect, or Part 2 comes into force, or with respect to any appeal arising out of any such suit.

On all these grounds we are disposed to hold that the plaint was properly valued for jurisdictional purposes at 30 times the revenue assessed on the land and that consequently the Subordinate Judge was competent to hear the appeal. This finding would further avoid the anomaly of assessing a lesser value on a declaratory suit where consequential relief is prayed for

and a higher value on a similar suit where no consequential relief is prayed for. Counsel for the appellant has frankly conceded that in view of the finding arrived at by us on the jurisdictional value of the suit he has nothing to urge on the merits of the case. We accordingly dismiss the appeal but make no order as to costs. Before we close we may remark that the trouble in this case has arisen on account of the oversight of the Punjab Legislature to amend S. 4, Suits Valuation Act, at the time when it amended the Court-fees Act and inserted Art. 22 as a separate Article dealing with plaint or memorandum of appeal in a suit by a reversioner under the Punjab Customary law for a declaration in respect of an alienation of ancestral land. Previously, such declaratory suits were governed by Art. 17 of Sch. 2 to the Court-fees Act, and were provided for under S. 4, Suits Valuation Act. What the Legislature really intended in enacting Art. 22 was partially to amend Art. 17 in this respect, and if it did not introduce the amendment in Art. 17 itself, it should have brought the Suits Valuation Act into line with the new amendment. As we have held that the Local Government is not competent to make any rules relating to suits falling under Art. 22 by virtue of the powers conferred upon it by S. 3, Suits Valuation Act, and that so long as Art. 22 is not expressly inserted in S. 4, no rule framed under S. 3, Suits Valuation Act, can be referred to in order to determine the jurisdictional value of suits falling under Art. 22, we consider it necessary to bring this lacuna to the notice of the Local Government with a view to enable them to remove this defect by the requisite amendment of the Suits Valuation Act. A copy of this judgment will be forwarded to the Local Government through the Registrar of this Court for necessary action.

V.B.B./A.L.

Appeal dismissed.

* A. I. R. 1937 Lahore 680

SKEMP, J.

Murad and others — Debtors —

Petitioners.

v.

Lala Hans Raj (Official Receiver, Jhang) and another — Opposite Party.

Civil Revn. No. 890 of 1936, Decided on 28th January 1937, from order of Dist. Judge, Jhang at Sargodha, D/- 22nd June 1936.

3. Jalla v. Gehna, (1907) 60 P R 1907=79 P L R 1908=76 P W R 1907 (F B).

(a) Punjab Relief of Indebtedness Act (7 of 1934), S. 25 — Word 'proceeding' in S. 25 includes an appeal against adjudication as insolvent.

A proceeding is a matter which proceeds or is going on. Therefore the word 'proceeding' in S. 25 includes an appeal against adjudication as an insolvent. [P 681 C 2]

* (b) Provincial Insolvency Act (1920), Ss. 38 and 28 — Debtor — Member of agricultural tribe in Punjab adjudged insolvent for debts incurred by his father — His lands exempt from sale in execution of decree and also not liable for debts of his father under S. 9, Punjab Debtors' Protection Act — Insolvent's land does not vest in Official Receiver under S. 28, Provincial Insolvency Act — Such member though adjudicated insolvent is debtor within meaning of S. 38, Insolvency Act — He can apply to Debt Conciliation Board set up under Punjab Relief of Indebtedness Act for settlement of his debts even after he is adjudged insolvent.

Where a member of the agricultural tribe in the Punjab is adjudged insolvent for debts incurred by his father, his land, being exempt from sale in execution of a decree against him under S. 16, Punjab Alienation of Land Act, and it not being liable for the debt under S. 9, Punjab Debtors' Protection Act, cannot vest in the Official Receiver under S. 28, Provincial Insolvency Act. Such person, though adjudicated insolvent, is a 'debtor' within the meaning of S. 38, Insolvency Act. The member therefore can apply to the Debt Conciliation Board set up under the Punjab Relief of Indebtedness Act for the settlement of his debts even after he is adjudicated insolvent. [P 682 C 1]

(c) Interpretation of Statutes — Later enactment — Conflict between S. 28, Provincial Insolvency Act and S. 25, Punjab Relief of Indebtedness Act — Provision of former statute being earlier is impliedly repealed by latter Act.

If it is assumed that S. 28, Provincial Insolvency Act, is in conflict with S. 25, Punjab Relief of Indebtedness Act, the provision of the former Act being earlier is impliedly repealed by the provision of the latter Act which is a later statute. [P 682 C 1]

Mohammad Din Jan — for Petitioners.

Shamair Chand and Qabul Chand — for Opposite Party.

Order.—Three brothers, Ludhiana Sials of the Jhang District were adjudicated insolvents on the petition of a creditor. They appealed against the order of adjudication to the District Judge, and pending the hearing of the appeal applied to the local Debt Conciliation Board, set up under the Punjab Relief of Indebtedness Act, to effect a settlement between them and their creditors. Before the hearing of the appeal, the Board issued a letter to the District Judge to stay proceedings. In due course, the effect of this was argued before the

District Judge who held that he still had jurisdiction to hear the appeal and rejected it. The debtors have come here in second appeal. It is contended that no second appeal lies and this is well founded. S. 75, Provincial Insolvency Act, lays down that the appellate order of a District Court shall be final. But the proviso lays down that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit, and I shall treat the matter as a revision. It is urged that the District Judge acted without jurisdiction in view of S. 25, Punjab Relief of Indebtedness Act, in proceeding to hear the appeal after receiving the letter of the Debt Conciliation Board. S. 25 is as follows :

When an application has been made to a Board under S. 9, no civil Court shall entertain any new suit or other proceeding brought for the recovery of any debt for the settlement of which application has been made to the Board, and any suit or other proceeding pending before a civil Court in respect of any such debt shall be suspended until the Board has dismissed the application or an agreement has been made under S. 17.

Mr. Shamair Chand for the respondent urged that an appeal in an insolvency case is not a proceeding. 'Proceeding' is not defined in the Civil Procedure Code, and the provisions of law and the rulings cited before me are not relevant. A proceeding is a matter which proceeds or is going on, and I do not see why this should not include an appeal against adjudication as an insolvent. The argument of the District Judge is that although the Punjab Relief of Indebtedness Act has made certain amendments in the Provincial Insolvency Act, it does not touch the effect of adjudication ; that under S. 28 (1) of the latter Act the insolvent shall aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors ; that to make an application to the Debt Conciliation Board to arrange a settlement for him is entirely violating these directions ; further that under S. 28 (2), while the order of adjudication remains in force, no creditor can move any Court against the debtor and that it would be anomalous if an adjudicated insolvent could under similar circumstances seek the help of the Debt Conciliation Board. The person applying must be one in free control of his property whereas the insolvent's property vests in the Court or

in the Official Receiver. The learned District Judge overlooked the effect of sub-s. (5) of S. 28 which runs :

The property of the insolvent for the purposes of this section shall not include any property . . . which is exempted by the Code of Civil Procedure 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree.

As the insolvents are members of a notified agricultural tribe, their land is not liable to sale in execution of a decree and further their learned counsel, Mr. Mohammad Din Jan, points out that according to the appellants some of the debts were incurred by their father so that under S. 9, Debtors' Protection Act, 1936, their land would not be liable for these debts. I think there is weight in these arguments, and the land exempt from attachment and sale cannot be taken into account for purposes of S. 28, Provincial Insolvency Act. There is thus no doubt that the insolvents are debtors. Indeed, S. 38, Provincial Insolvency Act calls an adjudicated insolvent a debtor. The argument of the District Judge assumes that S. 28, Provincial Insolvency Act, is in conflict with S. 25, Relief of Indebtedness Act. Even if this is correct, then the provision of the earlier statute, (5 of 1920) is impliedly repealed by the later (Punjab Act 7 of 1934): see Maxwell, Interpretation of Statutes, Ch. 7, 7th Edn., p.136. I do not understand why the respondents are opposing this application. I think they have a much better chance of realizing something and realizing it quickly through a Conciliation Board than through an Insolvency Court. In any case, if the proceedings before the Conciliation Board fail, the respondents can continue the insolvency proceedings. I accept the revision and set aside the order of the learned District Judge rejecting the insolvents' appeal and direct that in accordance with S. 25, Punjab Relief of Indebtedness Act, the hearing of the appeal shall be suspended until the Conciliation Board has dismissed the application or an agreement has been made. As the point is a novel one, the parties are to bear their own costs.

W.D./A.L.

Revision allowed.

A. I. R. 1937 Lahore 682

ABDUL RASHID, J.

Chaudhri Nazar Muhammad and others — Petitioners.

v.

Jumma — Opposite Party.

Criminal Revn. Petn. No. 244 of 1937,
Decided on 16th April 1937.

Criminal P. C. (1898), S. 203 — Dismissal of complaint under — Further inquiry.

Even in a case of dismissal of a complaint under S. 203, Criminal P. C., the order directing further inquiry is improper unless the order of dismissal is perverse or foolish or is based on incomplete record of evidence: *A I R 1928-Lah 97, Rel. on.*

[P 683 C 1]

Shamair Chand — for Petitioners.

Malik Mohammad Amin —

for Opposite Party.

Order.—On 29th May 1936, Jumma, complainant, filed a complaint against Nazar Muhammad and 20 other persons under S. 395, I. P. C. The principal allegation in the complaint was that Nazar Muhammad and his companions had forcibly carried away a large amount of wheat belonging to the complainant and that in doing so they had given a beating to him and his womenfolk. It was also stated in the complaint that the womenfolk belonging to the family of the complainant had been dragged along the ground. The complainant was asked to produce his evidence on 1st July. On that day the statements of six witnesses were recorded by the trial Court. The complainant however wanted another opportunity to produce further evidence. The case was therefore taken up on 14th July and the statements of two other witnesses for the complainant were recorded. On that day the complainant made a statement to the effect that he had no further evidence to produce. The learned Magistrate on a consideration of the entire evidence produced by the complainant came to the conclusion that no wheat had been carried away by the accused persons, and that no beating was given to the complainant or to any of his womenfolk. On these findings the complaint was dismissed under S. 203, Criminal P. C.

Against the dismissal of the complaint Jumma preferred a petition for revision in the Court of the District Magistrate, Gujranwala. The learned District Magistrate observed in his judgment that he had dealt recently with two mutation appeals where certain facts had come to his notice and that it is possible those facts may have an important bearing on the present case. He therefore accepted the revision, set aside the order of dismissal and sent the case back to the Magistrate for further enquiry. In his judgment the learned District Magistrate suggested that the case required further investigation

and that after such an investigation had been made by the Magistrate it would be for Nazar Muhammad, accused, to explain what exactly he did and why he did it. The Magistrate was directed to pass whatever orders he thought fit after hearing both parties. The order of the learned District Magistrate therefore directs the Magistrate to summon and question the accused.

It has been held by a Full Bench of the Punjab Chief Court * that further enquiry after discharge is improper unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. In the present case the order dismissing the complaint has not been held by the District Magistrate to be manifestly perverse or foolish. Moreover, it is not based on a record of evidence which is obviously incomplete as the complainant himself made a statement in the trial Court that he had no further evidence to produce. In a case reported in A I R 1928 Lah 97¹ the Magistrate dismissed a complaint under S. 203, Criminal P. C. It was held that the dismissal of the complaint could not be set aside unless it was shown that the order of the Magistrate was perverse or foolish or was based on an incomplete record of evidence. The observations made in the Full Bench ruling are fully applicable to cases where a complaint has been dismissed under S. 203, Criminal P. C. For the reasons given above, I accept this petition for revision, set aside the order of the learned District Magistrate, dated 15th December 1936, and restore the order of dismissal of the complaint passed by the trial Court on 12th September 1936.

T.M./D.S.

Petition accepted.

* [See Emperor v. Kiru, (1911) 10 P R 1911=11 I O 132=12 Cr L J 364=205 P L R 1911 (F B)—*Ed.*].

1. Moti Lal v. Emperor, A I R 1928 Lah.97=106 I O 455=29 Cr L J 39.

A. I. R. 1937 Lahore 683

COLDSTREAM AND DIN MOHAMMAD, JJ.
Nawab and others — Plaintiffs

— Appellants.

v.

Mt. Subhani and others — Defendants

— Respondents.

First Appeal No. 322 of 1936, Decided on 7th May 1937, from decree of Senior Sub-Judge, Shahpur at Sargodha.

Custom (Punjab) — Succession — Tullas of Shahpur District—Married daughters.

Under the Customary law which governs all the Mussalman tribes including Tullas of Shahpur District, married daughters do not inherit their father's estate in any circumstances. [P 683 C 2; P 684 O 1]

M. L. Puri and Qabul Chand —

for Appellants.

R. C. Manchanda and S. L. Puri —

for Respondents.

Din Mohammad, J.—On 8th September 1934, Salehon's widow, Mt. Subhani, made a gift of the whole of the estate in her possession to her married daughters, Mt. Fateh Bibi and Mt. Sat Bharai. On the 15th June 1935 the suit out of which the present appeal has arisen was instituted by Salehon's collaterals for a declaration that the said gift was null and void as against them after the death or the remarriage of Mt. Subhani. The only plea raised in defence was that the property in suit being non-ancestral, daughters excluded collaterals, especially those of the 10th degree, which the plaintiffs were. This plea found favour with the Senior Subordinate Judge and the plaintiffs have appealed. It is common ground that under the Customary law which governs all the Mussalman tribes of Shahpur District, to which the parties belong, married daughters do not inherit their father's estate in any circumstances. Reference in this connection may be made to Questions 16 and 18 in the Manual of Customary Law prepared by Mr. (afterwards Sir) James Wilson, and the answers thereto, which affirm this proposition in clear and unequivocal terms. It is contended, however, on behalf of the daughters that, in the first instance, Tullas, which the parties are, do not appear to have been consulted at the time the Manual was compiled and hence the entries therein have no binding force on them and secondly, that even if they were, the instances relied on by the daughters displace the presumption arising against them.

So far as the first contention is concerned, we are not impressed by the argument advanced on behalf of the defendants. In the glossary of Tribes and Castes, Tulla is described as a Jat clan found in Shahpur and it cannot be denied that some branches of the principal tribe were consulted by the compiler of the Manual. Moreover, this plea was not even remotely suggested in the Court

below, both parties having proceeded on the assumption that they were bound by the custom found prevalent among the other Mussalman tribes of the district. In fact, the defendants, not being able to find any instance from their own tribe, relied on the instances that they could lay hands on from their neighbours. The compiler himself has remarked that he had consulted the miscellaneous Mussalman tribes and Tulla is a miscellaneous tribe. This contention therefore fails. The only question that remains to be considered is whether the presumption arising from the Customary law has been rebutted. In this connection the defendants rely on certain judicial decisions relating to some other Mussalman tribes residing in the district as well as on some copies of pedigrees of some other tribes living in the neighbouring villages. We have given due consideration to the evidence relied on by the defendants and have come to the conclusion that in the light of the Full Bench decision reported in 39 P L R 349,¹ the recent judicial decisions are not sufficient to abrogate the custom so clearly laid down in the Manual of Customary law governing the parties. As regards the pedigrees, it is enough to say that they do not show whether the daughters who were found in possession of their father's estates, when those pedigrees were prepared, were married or unmarried and in the absence of this information, those documents can be of little avail to the defendants, inasmuch as the custom prevailing in the district recognizes the right of unmarried daughters to succeed to their father's estate in certain circumstances and under certain conditions. Further, it cannot be ignored that in the tribe to which the parties belong, this gift appears to be the first attempt to depart from the rule laid down in the Customary law.

The result is that we allow this appeal, set aside the order of the Court below and decree the plaintiffs' suit. In view of the fact, however, that the action taken by Mt. Subhani was possibly influenced by certain decisions of this Court and the resistance to the suit was also offered on that basis, we leave the parties to bear their own costs throughout.

S.O./D.S.

Appeal allowed.

1. Bahadur v. Nihal Kaur, A I R 1937 Lah 451 = 39 P L R 349 (F B).

A. I. R. 1937 Lahore 684

COLDSTREAM, J.

Mohammad Rashid Ahmad — Accused
— Petitioner.

v.

Emperor.

Criminal Revn. Petns. Nos. 588 and 764 of 1936, Decided on 19th August 1936, from order of Sess. Judge, Karnal, D/- 2nd December 1935.

Stamp Act (1899), S. 2 (24) — Settlement — Instrument even if includes agreement by beneficiary to act in particular way in consideration of settlement is settlement.

Even if an instrument making a settlement includes an agreement by the beneficiary to act in a particular way in consideration of the settlement, the instrument can be regarded as a settlement within the meaning of S. 2 (24), Stamp Act. [P 685 O 2]

Parkash Chand for *Shamair Chand* —
for Petitioner.

Manohar Lal Mehra for Govt. Advocate
— for the Crown.

Order.—This judgment will dispose of the two Revn. Petns. Nos. 588 and 764 of 1936. Mt. Nasib-un-nisa, the mother of the two petitioners Mohammad Rashid Ahmad and Mir Meharban Ali, owned agricultural and residential property in Rohtak and Hissar districts worth approximately Rs. 5,32,000. In order to settle disputes between Mt. Nasib-un-nisa and her sons over this property, the three of them on 14th July 1935 executed and registered at Jhajjar an instrument recording that Nasib-un-nisa transferred her rights in all this property to her two sons in equal shares, the shares to be determined by lot, each of her sons undertaking to give her Rs. 30 monthly, and ten maunds of wheat annually by way of maintenance. The deed also provided that Mir Meharban Ali would agree to the appointment of a second lambardar in the village Barkatabad (included in the property transferred by the deed) and if no second lambardar was appointed, the two sons would during their mother's lifetime share the lambardar's dues in Barkatabad and Sulakhani equally. If Mohammad Rashid Ahmad was appointed lambardar of Barkatabad, he would not have any right to the lambardar's dues in Sulkhani. The deed was stamped with a stamp of the value of one rupee.

The default clauses are not clearly expressed but it is admitted that their intention was that if the sons did not give

their mother the cash and grain fixed for her maintenance, the transfer of the land in their favour would be ineffectual. On 16th August 1933, a year after the deed had been registered, Damodar Mal, the Head Registration Muharrir, Rohtak, who had received the document from the Registrar's Office at Jhajjar in due course, brought it to the notice of the Collector, Rohtak, that the deed was under-stamped, as it was a deed of gift the stamp on which under Art. 33, Sch. 1 to the Stamp Act, was a great deal more than one rupee. Twenty months later, in April 1935, a complaint was filed by a Stamp Auditor in a Rohtak Magistrate's Court charging Mt. Nasib-un-nisa, Mohammad Rashid Ahmad and Mir Meharban Ali under Ss. 62 and 64, Stamp Act. The Magistrate found that the deed was a deed of settlement as defined in S. 2 (24) (b), Stamp Act, the stamp on which should, according to Art. 58, Sch. 1, have been of the value of Rupees 3,990, the value of the property settled being Rs. 5,31,989. He found that the accused had not acted with fraudulent intent in under-stamping the deed and acquitted them of the offence under S. 64 of the Act. He convicted them all under S. 62 and sentenced them to a fine of Rs. 500 each or six months' simple imprisonment in default. On appeal, the Sessions Judge upheld the conviction but considering that Mt. Nasib-un-nisa was a purdah-nashin lady acting under her sons' guidance reduced her sentence to Rs. 5. Mohammad Rashid Ahmad and Mir Meharban Ali have petitioned against their conviction. Their counsel has taken one point only, namely that the lower Courts have erred in holding the deed to be a settlement. No objection has been taken to the valuation of the property concerned or the calculation of the stamp duty on the assumption that the instrument is a deed of settlement.

Petitioner's counsel's contention, as I understand it, is simply that the deed is not a deed of settlement but an agreement which was properly stamped with a stamp of one rupee (in the Punjab) under Art. 5 (c), of the Schedule to the Act. In support of this contention his argument is that the deed cannot be a settlement because the settlement provisions made by it are conditional on the performance by the beneficiaries of their promise recorded in the deed. A settlement, he contends, must be independent of consideration and not

voidable or revocable on the breach of its conditions by another party. Therefore this deed is not one falling within any special provision of the schedule to the Stamp Act and was properly stamped as an agreement; counsel has not been able to cite any authority supporting his proposition. That a settlement may be an agreement for consideration is clear from the definition in the Stamp Act [see S. 2 (24) (a)], and I can see no reason for holding that if an instrument making a settlement includes an agreement by the beneficiary to act in a particular way in consideration of the settlement, the instrument cannot be regarded as a settlement. This particular deed appears to me to be clearly a non-testamentary disposition of immoveable property made for the purpose of distributing the property of Mt. Nasib-un-nisa among her family and appears therefore to be a settlement as defined in S. 2 (24), Stamp Act. The petitioners were therefore rightly convicted. Having regard to the finding of the trial Court that the petitioners had no intention to defraud, I think that a fine of Rs. 75 in the case of each will suffice. The petitioners might have effected a valid gift by mutation proceedings. The fine paid in excess of that now imposed will be refunded. To this extent the petitions are accepted.

P.R./D.S. *Petitions partly accepted.*

A. I. R. 1937 Lahore 685

BHIDE, J.

Ilachi Ram — Plaintiff — Petitioner.

v.

Amir Ali and another — Defendants
— Opposite Party.

Civil Revn. Petn. No. 71 of 1937,
Decided on 28th April 1937, from decree of Small Cause Court Judge, Amritsar, D/- 26th August 1936.

(a) Revision—Fresh petition—First petition dismissed in default—Second petition lies.

Where the first petition for revision is dismissed for default, a second petition for revision can lie :
54 P R 1901 (FB) and A I R 1928 Lah 550, Foll.
[P 686 O 1]

(b) Punjab Relief of Indebtedness Act (7 of 1934), S. 13—Scope—S. 13 only deals with discharge of liability of debtor applying to Board.

Section 13, Punjab Relief of Indebtedness Act, only deals with the discharge of liability of the debtor who applies to the Board and not with the

liability of other persons who are not parties to the proceedings before the Board. [P 686 O 1]

Bannerji — for Petitioner.

B. D. Qureshi for *Maurice* —

for Opposite Party.

Order. — This petition for revision arises out of a suit for recovery of Rs. 275 on the basis of a promissory note which was executed by three persons named Nawab Din, Amir Ali and Ghulam Qadir. Nawab Din made an application to the Debt Conciliation Board, Amritsar, upon which he was discharged from the debt. The plaintiff thereupon instituted the present suit against Amir Ali and Ghulam Qadir, the other two executors of the promissory note. They raised the plea that the debt having been discharged by the Debt Conciliation Board, the suit was not competent even against them by virtue of the provisions of S. 13 (2), Punjab Relief of Indebtedness Act, which lays down that the debt must be deemed to have been duly discharged for all purposes and all occasions. The learned Judge of the Small Cause Court upheld this plea and dismissed the suit. The plaintiff has preferred a petition for revision of this order. A preliminary objection is raised that a petition for revision of the said order has already been dismissed and a second petition is not competent. The learned counsel for the petitioner has cited 54 P R 1901,¹ a Full Bench decision of the Punjab Chief Court, according to which a second petition for revision would seem to lie when the first one was dismissed in default, as it was in the present case. A similar view was taken by a learned Judge of this Court in A I R 1928 Lah 550.² I accordingly hold that the present petition is competent.

On merits, I am unable to agree with the construction placed upon the provisions of S. 13, Punjab Relief of Indebtedness Act by the Court below. The only person who had applied to the Debt Conciliation Board was Nawab Din. The present respondents were not parties to those proceedings and it seems to my mind clear that S. 13 only deals with the discharge of liability of the debtor who applies to the Board and not with the liability of other persons who are not parties to the proceedings before the

Board. The learned Judge of the Small Cause Court has, however, not decided some of the other objections raised by the respondents, e. g. as regards the compliance with the provisions of the Punjab Relief of Indebtedness Act, and the case has therefore to be remanded. I therefore accept this petition for revision and setting aside the order of the learned Judge, remand the case for re-decision in the light of the above remarks. Costs will follow final decision. Parties to appear in the Court below on 17th May 1937.

W.D./A.L.

Case remanded.

A. I. R. 1937 Lahore 686

ADDISON AND DIN MOHAMMAD JJ.

Karam Singh — Defendant —

Appellant.

v.

Khairati Ram, Plaintiff and others,
Defendants — Respondents.

First Appeal No. 179 of 1936, Decided on 7th January 1937, from decree of Sub-Judge, First Class, Amritsar, D/. 7th January 1936.

Mortgage — Mortgage executed to stifle criminal prosecutions—Mortgage cannot be enforced against executants nor against persons standing sureties.

A mortgage executed to stifle criminal prosecutions against some of the executants cannot be enforced against the executants. Their sureties are also not bound by their agreement in the mortgage entered into for the purpose of stifling criminal prosecution: *Jones v. Merionethshire Permanent Benefit Building Society*, (1892) 1 Ch 173; A I R 1928 Bom 539 and 11 Bom 566, Rel. on; 19 Bom 697, Disting. [P 687 O 2]

D. R. Sawhney and *S. L. Puri* — for Appellant.

J. G. Sethi and *Chiranjiva Lal Aggarwal* — for Respondents 10 to 13.

Madan Mohan — for Respondents 3 to 5.

Judgment. — Defendants 1 to 3, Lal Chand, Chuni Lal and Sohan Lal, sons of Radha Kishen, mortgaged certain property in favour of Bhola Nath deceased, father of defendants 6 to 8, and defendants 4 and 5, Chet Ram and Amar Nath, were sureties for payment of the mortgage consideration in case of default. This mortgage is dated 13th May 1927, and was for Rs. 4,000. Bhola Nath transferred his mortgage rights in favour of Dr. Karam Singh, defendant 9, for Rs. 2,500 by a

1. *Umar Din v. Ala Baksh*, (1901) 54 P R 1901 = 45 P L R 1901 (F B).

2. *Neba Ram v. Khota Ram*, A I R 1928 Lah 550 = 110 I O 833.

deed dated 19th February 1928. Dr. Karam Singh then transferred his rights to the plaintiff Khairati Ram for Rs. 3,000 by a deed dated 1st January 1929. In this deed Dr. Karam Singh contracted that if the transferee, the plaintiff, suffered any loss in the amount due to him on account of any legal flaw, such loss would be recoverable from his person and property up to the sum of Rs. 3,000 but no more. The plaintiff sued by reason of his transfer deed to make the original mortgagors defendants 1 to 3 and the sureties defendants 4 and 5 liable thereon. His suit has been dismissed against every one except Dr. Karam Singh who has been made liable to the extent of Rs. 2,000 on the guarantee clause in his transfer deed. Dr. Karam Singh has appealed against the decree passed against him. Defendants 1 to 5 pleaded that the mortgage in favour of Bhola Nath was secured by undue influence and that they had signed it in order to stifle a series of criminal prosecutions against defendants 1 and 2, Lal Chand and Chuni Lal. The case for these defendants is as follows: Chuni Lal, defendant 2, purchased the share of Bhola Nath in certain outstandings amounting to Rs. 22,322 for Rs. 13,000. In order to get this sale cancelled, Bhola Nath brought four criminal complaints against Chuni Lal alone, and, in one case, against Chuni Lal and Lal Chand. Most of these cases were not compoundable, the offences charged being under Ss. 406, 408, 420 and 477, I. P. C. At the same time, Lal Chand brought one criminal case under S. 417, I. P. C., against Bhola Nath, and Chuni Lal did the same. One Sobha Ram intervened and told Chuni Lal that if he wished to be safe from jail, he should mortgage his property in favour of Bhola Nath. Under this pressure Chuni Lal has stated that on 13th May 1927 he was made to sign a reference to arbitration with respect to this dispute, the arbitrator appointed being Sobha Ram. On the same day Sobha Ram gave his award and the mortgage deed was executed. On the next day most of the criminal cases were withdrawn, though one was not withdrawn till 20th May 1927. In the award it was clearly stated that the parties had filed criminal cases against each other and one of the decisions of the arbitrator forming part of his award was that the criminal cases pending between the parties should be withdrawn either by compromise or in

any other possible way. As a matter of fact, in accordance with this award, these cases were withdrawn and the mortgage effected.

It is clear from the evidence and from the facts stated that the mortgage deed in question was executed by defendants 1 to 3, who are brothers, in order to stifle the criminal prosecutions against Chuni Lal and Lal Chand, and we are in full agreement with the decision of the trial Court in this respect. It follows that the mortgage deed cannot be enforced against defendants 1 to 3. Nor is the case of defendants 4 and 5, the sureties, different. They stood surety in order to stifle the same criminal cases. In (1892) 1 Ch 173,¹ the relatives of the secretary of a building society who had embezzled money, gave a written undertaking to the society to make good the greater part of the debt, the consideration being the forbearance of the society to sue the secretary for the amount embezzled. It was held that the agreement of the relatives was founded on illegal consideration and void. In A I R 1928 Bom 539,² it was held that a surety, who guaranteed the performance of an agreement without consideration was not bound by his guarantee. In 11 Bom 566,³ a third party gave the creditors of *H* a guarantee for the payment of the debts of *H*, the creditors agreeing to abstain from proceeding criminally against *H* for fifteen days. It was held that such a guarantee could not be enforced by the creditors as they could not by stifling a prosecution obtain a guarantee from a third party. 19 Bom 697,⁴ relied upon by the appellant's counsel, is not in point. We therefore hold that the sureties also cannot be bound by their agreement in the mortgage in question which was entered into for the purpose of stifling criminal prosecutions. It is not disputed that the decree is correct on these findings. We, therefore, dismiss the appeal with costs.

S.O/D S.

Appeal dismissed.

1. Jones v. Merionethshire Permanent Benefit Building Society, (1892) 1 Ch 173=61 L J Ch 138=65 L T 685=40 W R 273=17 Cox C C 389.
2. Pestonji Manekji Mody v. Bai Meherbai, A I R 1928 Bom 539=112 I C 740=30 Bom L R 1407.
3. Kessowji Tussildas v. Hurjivan Mulji, (1887) 11 Bom 566.
4. Kashiba v. Shripat Narshiv, (1895) 19 Bom 697.

A. I. R. 1937 Lahore 688

TEK CHAND, J.

Ihsan Ilahi — Plaintiff — Appellant.

v.

Ata Ullah and others — Defendants — Respondents.

Second Appeal No. 72 of 1937, Decided on 15th April 1937, from decree of Senior Sub-Judge, Sialkot, D/- 5th October 1936.

(a) Civil P. C. (1908), S. 149—Mistake—Bona fides — Appeal filed within time on insufficient stamp on basis of valuation of suit — Appellant making good deficiency within time allowed but after limitation—Appeal is not barred—Delay can be condoned under S. 149.

Where an appeal is filed on an insufficiently stamped paper on the basis of the valuation as given in the judgment and the decree of the lower Court, but subsequently the valuation is found much more than that which is stated in the decree, and the appellant pays the deficiency within the time allowed by the Court, the delay can be condoned in such cases under S. 149, Civil P. C., and the appeal does not become time-barred even if deficiency is made good after expiration of the period of limitation for appeal. [P 688 C 1, 2]

(b) Evidence Act (1872), S. 13—Document—Mortgage deed—Plaintiff bringing suit for declaration of title to property mortgaged by predecessor-in-interest — Mortgage deed is admissible in proof of title as assertion of right.

An act of transfer by way of sale or mortgage of property necessarily involves the assertion that the transferor owns the interest transferred. It is therefore a transaction by which the right is claimed or asserted, and consequently a mortgage of the property in dispute by the predecessor-in-interest of the plaintiff is admissible in proof of his title: *A I R 1921 Mad 383*; *16 I C 746* and *A I R 1928 Cal 315, Rel. on.* [P 688 C 2]

Mehr Chand Mahajan—for Appellant.*M. M. Aslam Khan* — for Respondents.

Judgment.—A preliminary objection is raised by counsel for the respondents that this appeal is barred by time, inasmuch as the memorandum of appeal, as originally presented, was insufficiently stamped and the deficiency was made good long after the period prescribed by law for presentation of the appeal had passed. The objection is without force. In the certified copies of the judgment and the decree of the Senior Subordinate Judge, the value of the suit for purposes of jurisdiction was given as Rs. 5, and it was on this amount that the appellant paid court-fee while presenting the appeal. Subsequently it transpired that the real value of the suit was much more and therefore the appellant was called upon to pay the deficient

court-fee, which he made good within the time allowed. The defendants-respondents themselves had stamped their appeal before the Senior Subordinate Judge with a court-fee of 6 annas valuing the appeal for purposes of jurisdiction and court-fee at Rs. 5. This mistake was not noticed while their appeal was pending before the Senior Subordinate Judge, and it appears that the valuation as given in the defendants' memorandum of appeal was taken as correct at the time of preparing the decree-sheet by the office of the Senior Subordinate Judge. This is eminently a fit case in which the delay in filing the deficient court-fee be condoned under S. 149, Civil P. C. I overrule the preliminary objection.

On the merits, the question involved is really one of fact, but the finding of the learned Senior Subordinate Judge is vitiated by the circumstance that he has excluded from consideration important documentary evidence on the erroneous ground that it was legally inadmissible. It appears that on 1st July 1921 the plaintiff's father executed a mortgage deed (Ex. P. 1) in favour of one Ghasita Mal in respect of his house and other properties including the site now in dispute which is described as *chabutra nishastgah mosuma chah Deuranwala*. The Senior Subordinate Judge has held that this deed is inadmissible under S. 21, Evidence Act, as it merely contains an admission by the executant in his own favour. The learned Judge appears to have entirely overlooked the provisions of S. 13, Evidence Act, which lays down inter alia that where the question is as to the existence of any right, any transaction by which the right in question was asserted is relevant. An act of transfer by way of sale or mortgage of property necessarily involves the assertion that the transferor owns the interest transferred. It is therefore a transaction by which the right is claimed or asserted, and consequently a mortgage of the property in dispute by the predecessor-in-interest of the plaintiff is admissible in proof of his title: see *70 I C 389*,¹ *16 I C 746*² and *55 Cal 355*.³ The omission of the

1. *Nallasiva Mudaliar v. Ravan Bibi*, *A I R 1921 Mad 383*=*70 I C 389*.

2. *Rama Iyengar v. M. Kasinivenda Iyengar*, (1912) *16 I C 746*=*23 M L J 327*.

3. *Monmatha Nath v. Rajeswar Rai*, *A I R 1928 Cal 315*=*107 I C 81*=*55 Cal 355*=*32 C W N 184*.

learned Senior Subordinate Judge to consider this important piece of evidence clearly vitiates the finding.

There is another serious defect in the trial of the suit. The plaintiff had relied upon an application made in 1910 by Jalal Din, father of defendant 6, and his brother Barkat Ali, to the Deputy Commissioner as President of the Municipal Committee, Sialkot, in which the applicants admitted that the plot now in dispute belonged to the father of the plaintiff. This document is in a municipal record, which from the very beginning had been mentioned by the plaintiff as evidence on which he relied. The municipal record was accordingly sent for, and formally produced by the municipal clerk; but no attempt was made to have this application formally proved, or its contents put to the respondents. The learned Senior Subordinate Judge rightly recognized the importance of this evidence, but observed that he was unable to refer to it as it had not been formally proved. It appears that both parties were under a misapprehension with regard to the admissibility of the contents of this record. This is apparent from the fact that in his arguments before me, counsel for the respondents referred to an application stated to have been made to the Municipal Committee by the father of the plaintiff in 1924, another application by plaintiff himself in 1933, and a third application by his son in 1934 to raise structures on the site in dispute. These applications are on the same municipal file, but none of them had been formally proved, apparently under the misapprehension, which generally prevails in the lower Courts, that by merely summoning a record all its contents are automatically proved and become evidence in the case. It is hardly necessary to say that this is an entirely erroneous view of the law. However, as the mistake appears to have been made by both sides and was not noticed by the trial Court, and as the documents above referred to appear to have an important bearing on the cases of both sides, I think it is in the interests of justice that the parties be given further opportunity of having them proved and formally brought on the record.

Having regard to all these defects, the finding of the learned Judge cannot be accepted as final, and the proper course is to accept this appeal, set aside the judgment of the Senior Subordinate Judge and remand the case to him for re-hearing and

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re-decision. In coming to his decision, the learned Judge will take into consideration the mortgage deed, Ex. P. 1, which, as has been held above, is legal evidence in the case. He will also allow the plaintiff an opportunity to prove the application by Jalal Din and Barkat Ali presented on 6th April 1910, which is on the municipal record. The defendant-respondent will also be allowed to prove the applications above mentioned, or other documents on the municipal file, if they so desire. The Senior Subordinate Judge may record this additional evidence himself, or if he thinks proper, he may remit the case to the Court of first instance under O. 41, R. 25 or R. 27 for this purpose. Court-fee on this appeal shall be refunded; other costs shall be costs in the cause. Both counsel have been directed to cause their clients to appear before the Senior Subordinate Judge, Sialkot, on 17th May 1937, when a date for further proceedings in the case will be fixed.

K.B./A.L.

Case remanded.

A. I. R. 1937 Lahore 689

YOUNG, C. J. AND MONROE, J.

Mt. Aziz Begum—Convict — Appellant.

v.

Emperor.

Criminal Appeal No. 935 of 1935, Decided on 28th November 1935, from order of Addl. Sess. Judge, Lahore, D/. 9th August 1935.

(a) Criminal Trial—Approver — Statement of approver corroborated—Pardon forfeited — Statement is sufficient evidence for his conviction.

Where an accused who is made an approver makes a statement which in its general aspect is abundantly corroborated and there is no doubt of the truth of the story told in it, such statement is sufficient evidence for his conviction when he turns hostile and forfeits his pardon. [P 691 C 1]

(b) Criminal Trial—Sentence — Prerogative of mercy—Murder case — Accused sentenced to transportation for life — Sentence though could not be reduced by Court, case held strong for exercise of prerogative of mercy.

The accused was a girl less than 17 years old at the time of the murder. Her husband and mother were determined on murder. Though the accused failed to earn pardon, her statement as approver led to the successful investigation and conviction of the principal criminal. She had already served a considerable sentence and had also suffered by reason of the birth of her child in jail. She was convicted under S. 302, I. P. C., and was sentenced to transportation for life ;

Held : that the Court had no power to reduce the sentence. However, the case was very strong for the exercise of the prerogative of mercy.

[P 691 C 1, 2]

M. Mohammad Aslam Khan —

for Appellant.

R. C. Soni for Govt. Advocate —

for the Crown.

Monroe, J.—Mt. Aziz Begum has been convicted under Ss. 302 and 120-B, I.P.C., of being accessory to the murder of Duni Chand, and has been sentenced to transportation for life. The accused was one of four persons who were charged with the murder of Duni Chand, namely the accused, Mt. Mahtab Bibi, her mother, Aziz Din, her husband, and Chiragh Din, her step-brother. The accused became an approver and made a statement after a promise of pardon had been duly made to her : this statement involved herself as well as the other three persons who were charged. Before the committing Magistrate she gave evidence on 8th, 9th and 17th June 1933: in her direct examination on 8th and 9th July she supported the statement already made by her, but on the 17th in cross-examination she stated that she had made her statement to the police and the District Magistrate as well as before the committing Magistrate because the police had told her that if she did not make the statement she would be hanged : she also said that the police had told her that similar statements had been made by other members of her family ; she accused the police of having ill-treated her and asserted that she knew nothing of the occurrence. At the trial she was again called as a witness and was declared hostile and her evidence before the committing Magistrate was brought on the record under S. 288, Criminal P. C. At the original trial, Aziz Din and Chiragh Din were convicted under S. 302 : Mt. Mehtab Bibi was acquitted on the ground that the approver's statement was not corroborated as against her : but both the trial Judge and on appeal this Court relied on Mt. Aziz Begum's statement in upholding the convictions of Aziz Din and Chiragh Din. The learned Sessions Judge has found that she has forfeited her pardon, and, as already stated, has convicted her of participation in the murder.

The first question before us is whether she has forfeited her pardon. On this point she has repeated her earlier allegations that she made her statement under the

influence and threat of the police, and before the committing Magistrate she added that when she made the statement she was not in her normal senses, having given birth to a child eight days earlier. We have not however to consider the difficult question, suggested by this statement, whether the mother of a newly born child may not be unfit soon after the birth to make a statement, for the statement that her child had then been born eight days previously is untrue and is actually in conflict with her own statement, "I am pregnant", made before the committing Magistrate in the earlier trial on 17th June 1933, 12 days after her statement before the District Magistrate : her baby is in fact now only about a year and a half old and was not born till some six months after her statements were made. There is no evidence of any kind to support the charge of ill-treatment by the police and the fact that for two days she gave evidence before the committing Magistrate without a suggestion of this kind and it was only after an interval of more than a week when under cross-examination by counsel for her mother and husband that, for the first time, she became an unwilling witness. We agree with the learned Sessions Judge that the statement of Mt. Aziz Begum was made voluntarily and that she has forfeited her pardon.

There remains the question whether she is guilty of the crime attributed to her. Mt. Mehtab Bibi, Mt. Aziz Begum's mother, was indebted to Duni Chand: the debt was once renewed and on that occasion he demanded the signature of Mt. Aziz Begum on the new note : she afterwards married Aziz Din and some months after the marriage Duni Chand demanded his money : Duni Chand renewed the note once more, requiring Aziz Din to sign in addition. After a time Duni Chand began to press for his money and, as he had been deceived in certain respects, he was persistent : the matter was discussed and it was decided that he should die, the first suggestion of this being made by Aziz Din. An elaborate plot for the destruction of Duni Chand was then made : the details are fully set out in Mt. Aziz Begum's statement and it is unnecessary to reproduce them : it is sufficient to state that she took part in the discussion of the plot in which a definite part was allotted to her. Duni Chand was then informed that

the note would be paid and an appointment was made for payment at his shop. At the appointed time Mt. Mehtab Bibi and Mt. Aziz Begum went to the shop ostensibly to pay off the note: at the same time Aziz Din and Chiragh Din entered Duni Chand's premises from the rear: Mt. Aziz Begum was sent home to fetch the money after the promissory notes had been examined and as she went out, she fastened the outer chain of the door of the compound: she stood at the door of her own house close-by watching: an hour afterwards she returned and unfastened the chain and found that the door was bolted on the inside: she returned home and saw Mt. Mehtab Bibi, Aziz Din and Chiragh Din: Aziz Din and Chiragh Din were washing off blood and afterwards changed their bloodstained clothes. Later, the notes were burned and after a further interval, Aziz Din brought a tonga and he took away the corpse placed in a bag: Mehtab Bibi accompanied Aziz Din on his mission. The approver's statement in its general aspect is abundantly corroborated: there can be no doubt of the truth of the story told in it: and it and it alone is in our opinion sufficient evidence for the conviction of Mt. Aziz Begum. In addition, however, the statement is corroborated by evidence which connects Mt. Aziz Begum with the crime. She produced articles of clothing, referred to in her statement, which were found to be stained with human blood and kerosine oil: she was seen standing near the tonga when the corpse was being placed in it: she was seen carrying water towards Duni Chand's house early the next morning, the purpose being, as stated by her, to remove bloodstains from Duni Chand's floor. These facts show a connexion with and knowledge of the death of Duni Chand: standing alone, they support but do not establish the case against Mt. Aziz Begum: It is her confession itself corroborated exactly in detail after detail that gives convincing proof of her guilt.

The conviction must be upheld, and we have no power to reduce the sentence. If we had the power, we should do so. Mt. Aziz Begum was less than seventeen years old at the time of the murder; though Mt. Mehtab Bibi was acquitted, the grounds for her acquittal were technical and there can be little doubt that she and Aziz Din were the chief actors in the plot: the situation of a girl whose mother

and husband are determined on murder is not an enviable one and though she failed to earn her pardon, it should be remembered in her favour that her statement as approver led to a successful investigation and to the conviction of the principal criminal. Mt. Aziz Begum has already served a considerable sentence and has also suffered by reason of the birth of her child in jail. There could not be stronger case for the exercise of the prerogative of mercy. A copy of this judgment should be sent to the Local Government.

P.R./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 691

JAI LAL, J.

Barkat Ali and others — Decree-holders
— Appellants.

v.

Municipal Committee, Gujrat, and others
— Judgment-debtors — Respondents.

Exn. Second Appeal No. 396 of 1936,
Decided on 7th December 1936, from
order of Senior Sub-Judge, Gujrat, D/
9th November 1935.

(a) Practice—Duty of Court — On hearing of appeal appellant present but his counsel absent—Appellant unable to support grounds of appeal — Court should decide appeal on merits.

On the hearing of the appeal before the lower appellate Court, the appellant was present but his counsel did not appear. The appellant could not support the grounds of appeal and the only order passed by the Court was: "Counsel is absent. the appellant does not say anything against the order of the lower Court. Dismissed with costs":

Held: that the appellant being present, the Court ought to have written an order on the merits after examining the judgment of the lower Court and the grounds of appeal. [P 692 C 1]

(b) Limitation Act (1908), S. 5—Applicability — Copy not given owing to negligence of copying department—Appeal filed after copy given on fresh application—Time held could be extended.

An application was made for the copy of the judgment along with an application for the grounds of appeal before the lower appellate Court. The copy of judgment was given but copy of the grounds of appeal was not given through the negligence of the copying department. An appeal was filed after getting such copy on a fresh application:

Held: that under such circumstances time could be extended under S. 5, Limitation Act.

[P 692 C 1]

Mohammad Din Jan — for Appellants.

V. N. Sethi — for Respondents.

Judgment.—A preliminary objection that this appeal is barred by time has no force. An application for a copy of the

grounds of appeal before the lower appellate Court was made along with an application for the copy of the judgment appealed against and the copy of the grounds of appeal was not given along with the copy of the judgment by the negligence of the copying department. Subsequently, another application for the copy of the grounds of appeal was made on which a copy was given to the appellant. If the whole of the time from the date of the original application to the date of the delivery of the copy of the grounds of appeal be deducted, then the appeal is well within time. In any case the circumstances are such that I would have extended the time under S. 5, Limitation Act. On the merits, this appeal must be accepted. It appears that on the hearing of the appeal before the Senior Subordinate Judge the appellants' counsel did not appear. The appellants were present and the only order passed by the Senior Subordinate Judge was: "Counsel is absent. The appellant does not say anything against the order of the lower Court. Dismissed with costs." No grounds are given for dismissing the appeal on the merits. When the appellants were present it was the duty of the Senior Subordinate Judge to decide the appeal on the merits. It is not a case in which the appellants withdrew the appeal or expressed their inability to support it. Apparently the appellants were anxious to proceed with it, but in the absence of their counsel they were unable to support the grounds of appeal by arguments. The learned Senior Subordinate Judge should therefore have written an order on the merits after examining the judgment of the Court below and the grounds of appeal. The case is an important one from the point of view of all concerned and it is not desirable that a case of this description should go practically in default.

I accordingly accept this appeal, set aside the decree of the Senior Subordinate Judge and send the case back to him with direction to hear the appeal on the merits and to decide it in accordance with law. The appellants are initially responsible for the situation that has arisen and consequently I make no order as to the costs of this appeal. The parties have been directed to appear before the Senior Subordinate Judge on 4th January 1937.

S.O./R.K.

Case remanded.

A. I. R. 1937 Lahore 692

YOUNG, C. J. AND MONROE, J.

Jagar Beg Jat — Convict — Appellant.
v.
Emperor.

Criminal Appeal No. 309 of 1937, Decided on 22nd April 1937, from order of Sess. Judge, Hissar, D/- 5th January 1937.

(a) Penal Code (1860), S. 302—Accused can be convicted of murder even though there is no injury on head of deceased.

It is not necessary to injure the head of the deceased in order to kill him. Where the accused inflicts not less than 44 injuries on the body of the deceased, he can be convicted of murder even though there is no injury on the head.

[P 692 C 2]

(b) Penal Code (1860), S. 300, Excep. 1—Applicability—Husband seeing wife committing adultery but taking time for deliberation and then killing lover—S. 300, Excep. 1, does not apply—But case is fit one for reduction of sentence by Local Government.

In a case where a husband finds his wife actually committing adultery and kills her or her lover at once, that of course would be grave and sudden provocation; but where the injured husband has taken time for deliberation, Exception 1 to S. 300, I. P. C., cannot apply. But in such a case the provocation is no doubt grave and although the offence comes technically under S. 302, it is a fit case where the Local Government may reduce the sentence substantially.

[P 693 C 1]

Nanak Chand — for Appellant.

D. R. Sawhney — for the Crown.

Young, C. J. — Jagar Jat has been condemned to transportation for life by the learned Sessions Judge of Hissar for the murder of Moman Jat. Jagar Jat was married to Mt. Rajia and had three children by her. Moman Jat took Mt. Rajia away for two months and returned to the village. On his return he was seen by Jagar Jat having connexion with his wife in a field. Jagar Jat returned to his house, obtained a gandasa, came back, hid himself behind a heap of cowdung cakes and waited for Moman Jat to return. When he did, he killed him, the deceased man having 44 incised wounds upon his body. Pandit Nanak Chand for the appellant argued first of all that as Jagar Jat had not touched the head of the deceased, he could not be guilty under S. 302, I. P. C. We have pointed out on more than one occasion that this argument cannot be considered. It is wholly unnecessary to injure the head of any person in order to kill him. One of the methods of killing in this country with a sharp weapon is to attack the stomach.

The second point urged was that the offence did not come under S. 302 as there was grave and sudden provocation. This again is an argument which cannot be allowed. In a case where a husband finds his wife actually committing adultery and kills her or her lover at once, that of course would be grave and sudden provocation, but where the injured husband has time for deliberation, the Exception to S. 300 cannot apply. The reason for excusing a person who acts under grave and sudden provocation is that he has lost his reason. If however the accused shows that he has deliberated in any way, or there has been a lapse of time which would enable him to cool down, then he cannot be said to be acting under sudden provocation. In this case the accused showed that he had reason and control. He went and got a gandasā and he deliberately hid behind a heap of cow-dung cakes to wait for the deceased. Therefore the Exception does not apply. S. 302 is the only section under which Jagar Jat could be convicted on the facts of this case.

While it is not open to us to reduce the sentence from one of transportation for life, we think this is a case where the Local Government might well consider reducing the sentence substantially. There is no doubt that the provocation was grave and that although technically the offence comes under S. 302 the provocation was so extreme that it is not surprising that Jagar Jat killed Moman Jat.

K.B./R.K.

*Appeal dismissed.***A. I. R. 1937 Lahore 693**

TEK CHAND, J.

Ali Khan — Plaintiff — Appellant.

v.

Amar Das and others — Defendants — Respondents.

First Appeal No. 450 of 1936, Decided on 16th February 1937, from order of Dist. Judge, Attock at Campbellpur, D/. 30th October 1936.

Custom (Punjab)—Landlord and Tenant—Distinction in positions of occupancy tenant and muqarraridar in Attock District stated—Land situate in Mari Kanjur under muqarraridar acquired by Government—Apportionment of compensation between proprietor and muqarraridar is not governed by para 12 of Wajubularz of Mari Kanjur.

In the district of Attock a muqarraridar does not hold the same position as an occupancy

tenant. He is not an adna malik and holds a position inferior to him; but at the same time he is not an occupancy tenant either and occupies a much more exalted position. He possesses the valuable rights of free alienation and of succession according to his personal law which the occupancy tenant does not possess. Hence where the land situate in Mari Kanjur under a muqarraridar is acquired by the Government, the apportionment of compensation between the landlord proprietor and the muqarraridar cannot be governed by para. 12 of the Wajub-ul-arz of Mari Kanjur which governs the apportionment of compensation between the landlord and the occupancy tenant. [P 694 C 1, 2]

*Barkat Ali and Mahammad Amin —
for Appellant.*

Achhru Ram — for Respondents.

Judgment.—This is a dispute between the proprietor and the muqarraridars of a small plot of land, 5 marlas and 4½ sarsahis in area, situate in mauza Mari Kanjur, a suburb of Campbellpur, and included within the limits of the Municipal Committee of Campbellpur. It appears that this land was originally a part of a larger area, 22 kanals in extent, which was sandy banjar. It was owned by the predecessor-in-interest of the present plaintiff-appellant. In 1913-14, the predecessor-in-interest of the defendants-respondents acquired rights in this area, undertaking to sink a well, make the land culturable and erect buildings. One of the respondents examined as R. W. No. 3 stated that they had spent about Rupees 25,000 on these improvements. The agreement was that the muqarraridars would pay Rs. 2 per kanal as rent to the proprietor. This rent has admittedly been paid all along. Out of the land, in which the respondents acquired muqarraridari rights, 5 marlas and 4½ sarsahis have since been acquired by Government. Compensation for this plot was assessed as Rs. 502.13-3, at the rate of Rs. 1,000 per kanal. Before the Collector, disputes arose between the proprietor and the muqarraridars as to the apportionment of the compensation. The Collector awarded 1.3rd to the proprietor and 2.3rd to the muqarraridars more or less arbitrarily, as there was no precedent before him. Both parties were dissatisfied with his award. The proprietor claimed 9.10th, leaving 1.10th only to the muqarraridars; while the muqarraridars contended that they were entitled to the entire amount, their status being really that of owners. A reference was accordingly made to the District Judge, who has awarded the muqarraridars 7.8th

of the compensation, leaving 1.8th to the proprietor.

The proprietor appeals and urges that he be allowed 9.10th of the amount awarded. His learned counsel has relied principally on para. 12 of the *Wajib-ul-arz* of Mari Kanjur prepared in the settlement of 1923-24. In this paragraph it is stated that if any portion of the land under occupancy tenants is acquired by Government, the landlords will get 9.10th of the compensation and the occupancy tenants 1.10th. The learned District Judge has held this clause inapplicable, as it does not in terms refer to *muqarraridars*, but applies to occupancy tenants only. Apart from this entry in the *Wajib-ul-arz*, no evidence has been led by the appellant in support of his claim. The only question, therefore, is whether para. 12 of *Wajib-ul-arz* governs the case. It is quite true that while the position of a *muqarraridar* in Rawalpindi and Attock districts is not analogous to that of an *adna malik* as it is in some other parts of India, he certainly occupies a position very different from that of an occupancy tenant. For instance, an occupancy tenant, whether holding under Ss. 5, 6 or 8 of the Punjab Tenancy Act, does not possess an unrestricted power of alienation over his tenancy. Under S. 53 an occupancy tenant under S. 5 can transfer that right by sale, gift or mortgage under certain conditions mentioned in that section, which include serving of a notice of his intention to do so on the landlord through a Revenue Officer. Occupancy rights under any section other than S. 5 cannot be transferred by private contract without the previous consent in writing of the landlord. It is admitted that a *muqarraridar* in the Attock district has got a free right of alienation, and is under no obligation to take the consent of the proprietor or to offer the property to him in the first instance. Similarly, succession to occupancy tenancy of whatever kind (whether under S. 5 or any other section) is governed by S. 59 of the Act. Succession to the rights of a *muqarraridrr*, on the other hand, is regulated by his personal law, and it is not necessary that the collateral can succeed only if the common ancestor had occupied the land. It is no doubt true that by the amending Act 11 of 1925, a *muqarraridar* in the Attock district has been made subject to the same conditions for enhancement of rent and ejection as

an occupancy tenant, but the valuable rights which he possesses of free alienation and of succession uncontrolled by S. 59, Tenancy Act, have remained untouched. In these circumstances it cannot be said that in this district a *muqarraridar* holds the same position as an occupancy tenant. As already pointed out, he is not an *adna malik* and holds a position inferior to him: but at the same time he is not an occupancy tenant either, and occupies a much more exalted position. In these circumstances, it cannot be said that the provisions of para. 12 of the *Wajib-ul-arz* will govern the case of apportionment of compensation in the event of land under a *muqarraridar* being acquired by Government.

The respondents also were unable to produce any evidence from this village, which is of direct application to the case. They, however, produced copies of two awards given by the Collector in 1913-14 in reference to apportionment of compensation awarded on acquisition of land in village Pir Dad, which is situate at a distance of 15 miles from Mari Kanjur. In those cases the Collector awarded 1.8th of the compensation to the proprietor and 7.8th to the *muqarraridar*. The learned District Judge has adopted these awards as good precedents and in the absence of any evidence to the contrary I am not prepared to dissent from his conclusion. The appeal fails and is dismissed with costs.

V.B.B./A.L.

Appeal dismissed.

* A. I. R. 1937 Lahore 694

ADDISON AND DIN MOHAMMAD, JJ.

Malik Feroze Din and others —

Defendants — Appellants.

v.

Malik Mohd. Din — Plaintiff —

Respondent.

First Appeal No. 2156 of 1934, Decided on 26th June 1935, from order of Sub-Judge, First Class, Lahore, D/- 31st July 1934/30th August 1934.

* (a) Court-fees Act (1870), S. 7 (iv) (f) — Appeal—Word 'suit' includes both plaint and memorandum of appeal—Suit for dissolution of partnership and rendition of accounts—Appeal by defendant against preliminary decree—He must value appeal at valuation by plaintiff and not at any figure he likes.

The word 'suit' in part 2 of S. 7 (iv) (f), Court-fees Act, is wide enough to include both

plaint and memorandum of appeal. In a suit for dissolution of partnership and rendition of accounts, the plaintiff alone can reasonably be expected to know approximately the amount which will turn out to be due to him. On a preliminary decree for taking accounts in such a suit, if the defendant appeals disputing his liability to account for the amount fixed by the plaintiff, the defendant must value his appeal at the valuation put in by the plaintiff in the plaint for purposes of court-fees. He cannot value the appeal at any figure he likes and different from that in the plaint: *A I R 1917 Mad 668*; *A I R 1914 Lah 507* and *A I R 1931 Lah 143, Rel. on*; *A I R 1931 Rang 146 (F B)* and *A I R 1925 All 787, Dissent.*; *A I R 1929 P C 147, Disting.* [P 696 C 1, 2]

(b) Court-fees Act (1870), S. 11 — Applicability.

Section 11, Court-fees Act, has no application to a defendant appealing from a preliminary decree in a suit for dissolution of partnership and rendition of accounts, whereby the defendant disputes his liability to account to plaintiff.

[P 696 C 1]

Iqbal Singh, D. C. Kapur, Kh. Feroz-Ud-Din and D. D. Kapoor — for Appellants.

Nawal Kishore and Tufail Malik — for Respondent.

Addison, J.—The plaintiff sued the defendants for dissolution of partnership, rendition of accounts and for a decree for such sum as might be found due. He valued the suit under S. 7 (iv) (f), Court-fees Act, at Rs. 5,250. A preliminary decree was passed declaring that the partnership was dissolved from a particular date and it was ordered that the accounts be taken. Against this decision, the defendants have appealed on the ground that there should have been no preliminary decree. They have valued the appeal for purposes of jurisdiction at Rs. 5,250, as fixed by the plaintiff in the lower Court, but have paid court-fees only on a sum of Rs. 130, at which they themselves have valued the appeal.

At the hearing a preliminary objection was taken that court-fee should have been paid on Rs. 5,250. This was disputed by the appellants. A Division Bench of the Punjab Chief Court held in 7 P R 1915¹ that an appeal of this nature must bear court-fees ad valorem on the amount at which the relief is valued in the plaint. This view was also taken by this Court in *A I R 1931 Lah 143*² and there is no doubt that with some few exceptions, this

has been the view of the Punjab Chief Court and this Court. Some High Courts, however, particularly the Rangoon and Allahabad High Courts, have, since the decision of their Lordships of the Privy Council in 10 Lah 737,³ taken the view that the defendant can in such an appeal value it at any figure he cares. These Courts were aware that such a decision would give rise to many anomalies. Amongst others, this appeal is before this Court because the value for purposes of jurisdiction as fixed by the plaintiff was over Rs. 5,000, but as the value is only Rs. 130 according to the defendant, the appeal should have been heard by a Subordinate Judge. We have carefully considered the decision, 10 Lah 737,³ and do not think that it has any application to the present case. That was a suit in which there was a final decree and the plaintiffs appealed against the decree passed against them in favour of the defendants and valued the appeal at the amount decreed in favour of the defendants. All that their Lordships decided was that they were justified in doing so, pointing out that the amount, upon which court-fee was paid, might be not only in full but largely in excess of the true sum of relief at which a sound valuation could in the circumstances be said to reach and it covered the appeal as a whole. They further went on to hold that, even if that were not so, the appellate Court should have exercised its power under the Code of Civil Procedure, S. 149, to allow a further payment, and should not have precluded the plaintiffs from the full relief which they sought.

The Full Bench decision in 9 Rang 165⁴ is, however, on all fours with the present case. There the Madras view, as set forth in 39 Mad 725,⁵ was not followed on the ground that the decision of their Lordships of the Privy Council was against that view. 47 All 756⁶ is a decision of that Court in the same terms as the decision of the Full Bench of the Rangoon

3. Faizullah Khan v. Mauladad Khan, *A I R 1929 P C 147=117 I C 493=10 Lah 737=56 I A 232 (P C)*.

4. O. K. Ummer v. C. K. Ali Ummer, *A I R 1931 Rang 146=133 I C 91=9 Rang 165 (F B)*.

5. Dhupati Srinivasachari v. Perindevaruma *A I R 1917 Mad 668=33 I C 602=39 Mad 725=30 M L J 402 (F B)*.

6. Chunni Lal v. Sheo Charan Lal, *A I R 1925 All 787=89 I C 122=47 All 756=23 A L J 725*.

1. Kanji Mal v. Pannalal, *A I R 1914 Lah 507=28 I C 262=7 P R 1915=15 PLR 1916*.

2. Batna Ram v. Rahmatullah, *A I R 1931 Lah 143=131 I C 337=32 P L R 62*.

Court. S. 7 (iv) (i), Court-fees Act, is to the effect that the amount of fee payable in suits for accounts shall be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. But there is an additional sentence to the effect that "in all such suits the plaintiff shall state the amount at which he values the relief sought." The words 'or appellant' are not in this sentence. In the Privy Council case it was observed that:

In S. 7 the amount of the fee is to be computed, in suits for accounts, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. If, therefore, the appellant values the relief in the memorandum of appeal and pays a fee thereon, that is the amount of fee properly payable. Of course, if the appellant recovers more, he pays the extra fee under S. 11 of the Act. But you cannot complain that the amount valued in the memorandum of appeal is not the proper amount. In suits for accounts it is impossible to say at the outset what exact amount the plaintiff would recover. The legislature, therefore, leaves it open to him to estimate the amount. That is the scheme of the Act.

The Rangoon High Court relying on the supposed effect of these observations held that a defendant appealing from a preliminary decree in an account suit had the liberty of valuing his appeal as he liked. We doubt if this is a correct construction to put upon that decision. There appears to be nothing in the observations of their Lordships to support the theory that a defendant, appealing from the preliminary decree, can value his appeal at an amount different from that at which the suit was valued. In the case before the Privy Council, the appeal was by the plaintiffs and a decree had already been passed for certain amounts. The main reason put forward for accepting their approximate valuation of the appeal was, that under S. 11, Court-fees Act, the balance court-fee could be recovered from them, should a decree for a higher amount be given. S. 11, however, has obviously no application to a defendant appealing from a preliminary decree. The defendants in this case are not claiming any amount, but are only disputing the liability to account which has been fastened upon them. S. 11, therefore, cannot apply.

On the other hand, the plaintiff's case is that the approximate value which will turn out to be due him would be Rs. 5,250; and he has got a decree for accounts to be taken on that basis. The defendant is appealing against his liability to account

for the sum approximately fixed by the plaintiff as being Rs. 5,250. If he is successful, the decree will be set aside, and he will be discharged from that liability. The plaintiff alone can reasonably be expected to know approximately the amount which will turn out to be due to him. That appears to be the reason why in the last sentence of Cl. (f) it was enacted that in all such suits the plaintiff shall state the amount at which he values the relief sought. Further, in the first part of Cl. (i), the fee to be computed is to be according to the amount at which the relief sought is valued in the plaint or memorandum of appeal, though the second part is that in all such suits the plaintiff shall state the amount at which he values the relief sought. It is not said that the appellant shall state this value; nor is it said that in all such plaints or memoranda of appeal, the plaintiffs or the appellants shall state the amounts at which they value the reliefs sought. This would seem to show that the word 'suit' in this sentence is not synonymous with 'plaint' in the first sentence of the clause. 'Suit' is wide enough to include both plaint and memorandum of appeal. It follows that the effect of the mention of the memorandum of appeal in the first sentence in a case, such as the present, is not to allow the appellant to state in the appeal a fresh valuation different from that in the plaint. The sentence is only a general statement that the fee is to be computed on the amount or value stated in the suit or memorandum of appeal and by the last sentence it is the plaintiff who is to value that relief. For the reasons given, we hold that court-fees must be paid on the sum of Rs. 5,250 and we allow the appellants up to 24th July 1935, in order to pay court-fees on that amount. The case will be posted for hearing before us on that day and the appellant has been warned that the appeal will be dismissed if court-fees are not paid by then.

K.B./A.L.

Order accordingly.

A. I. R. 1937 Lahore 696

TEK CHAND, J.

Dillu — Plaintiff — Appellant.

v.

Ram Ditta — Defendant — Respondent.

Second Appeal No. 996 of 1936, Decided on 5th January 1937, from decree of Addl. Dist. Judge, Karnal at Ambala.

(a) Punjab Alienation of Land Act (13 of 1900), S. 6—Mortgage by one agriculturist to another to pay off debts due to non-agriculturist is legal.

There is nothing illegal or opposed to public policy in one agriculturist taking the land of another agriculturist on mortgage, undertaking in exchange to pay off the debts due by the mortgagor to a non-agriculturist: *Case law referred.*

[P 693 C 1]

(b) Minor — Death of agriculturist — His minor son inheriting non-ancestral property — Mother of minor acting as guardian mortgaging some portion of land to pay off debts of minor's father and keeping remainder for maintenance of minor—Transaction is binding on minor.

An agriculturist owed some debts to a non-agriculturist. On death of the debtor his minor son inherited his non-ancestral property. The mother of the minor acting as his guardian, mortgaged some portion of the land to an agriculturist who in exchange undertook to pay off the debts of the minor's father. The remainder of the estate was kept intact for the maintenance and up-bringing of the minor:

Held: that the transaction was binding on the minor.

[P 698 C 1]

Asa Ram Aggarwal and Yashpal Gandhi — for Appellant.

Charanjiva Lal Aggarwala — for Respondent.

Judgment.—The facts of the case which have given rise to this appeal are as follows: One Mam Chand Jat of Mauza Khurana, Tehsil Kaithal, Karnal District, owed a debt to Amar Nath, a non-agriculturist. He owned a half share in a holding of 394 bighas 13 biswas. On Mam Chand's death his land devolved on his minor son Ram Ditta. The debt due by Mam Chand to Amar Nath amounted to Rs. 4,000 on 3rd February 1933. On that date Mt. Basanti, mother of Ram Ditta, acting as his guardian, entered into two mortgage transactions by registered deeds with Dillu, plaintiff-appellant, a Gujjar of Mauza Malakpur, Tehsil Kaithal, who is an agriculturist. By the first of these transactions she mortgaged 50 bighas 6 biswas of land to Dillu for Rs. 3,000. By the second transaction, she effected a self-redeeming mortgage of 37 bighas of land in favour of Dillu for a period of 20 years in lieu of Rs. 1,000. In consideration, Dillu undertook to discharge the debt due by Mam Chand to Amar Nath. On the same day he made entries to that effect discharging Ram Ditta from liability for his father's debt. He also executed a nawan in the bahi of Amar Nath binding himself to pay Rs. 4,000 to him. The revenue authorities sanctioned the muta-

tion with regard to the mortgage of 37 bighas for 20 years for Rs. 1,000, but rejected the mutation relating to the first mortgage of 50 bighas 6 biswas for Rupees 3,000. Thereupon, Dillu, mortgagee, instituted the present suit against Ram Ditta minor, through his mother Mt. Basanti as his guardian, for possession of the land comprised in the first mortgage.

In defence Mt. Basanti denied the factum of the mortgage in favour of Dillu and pleaded that a fraud had been perpetrated on her by Amar Nath and that really she had mortgaged 50 bighas 6 biswas of land to Amar Nath for a period of 20 years only. She further raised the plea that the mortgage was without consideration. The trial Judge found that no fraud had been committed by Amar Nath on Mt. Basanti, that the transaction, which was evidenced by a registered deed, was for valuable consideration but that it was not binding on Ram Ditta, minor, as it was not for his benefit. On this finding he dismissed the suit. On appeal the learned District Judge observed that the transaction was not binding on the minor as it was an attempt by Amar Nath, a non-agriculturist to circumvent the provisions of the Alienation of Land Act by arranging a mortgage of Ram Ditta's land to Dillu, another agriculturist. Further he found that the transaction was not for the benefit of the minor as all that could be done under the law to pay off Amar Nath was to effect a temporary alienation of his land for a period of 20 years, but by the transaction in dispute all his land had been mortgaged except a small plot of 5 bighas which was insufficient for his maintenance. He accordingly affirmed the decision of the trial Judge and dismissed the plaintiff's appeal. The plaintiff has come up on second appeal and it has been pointed out on his behalf that the learned Judge was in error in assuming that the entire land of the minor had passed out of his hands by the transactions referred to above, with the exception of a small plot of 5 bighas. It appears from the copy of the jamabandi on the record that Ram Ditta had a half share in a joint holding of 394 bighas 13 biswas: in other words he owned 197 bighas 6 biswas. By the two mortgage transactions his mother had alienated 87 bighas 6 biswas of land only. This left him with 110 bighas of unencumbered land, beside houses and moveable property which he had inherited from his

father. The learned counsel for the respondent has not been able to show that the figures given in the jamabandi are erroneous and that the minor was left with anything less than 110 bighas of land.

The learned District Judge was obviously in error in presuming that the transaction in dispute was contrary to the provisions of the Alienation of Land Act. It has been ruled by the Chief Court and this Court in a number of cases that there is nothing illegal or opposed to public policy in one agriculturist taking the land of another agriculturist on mortgage, undertaking in exchange to pay off the debts due by the mortgagor to a non-agriculturist: see 142 P R 1907,¹ 119 P L R 1916,² 60 I C 463³ and A I R 1934 Lah 434.⁴ There is no allegation—much less proof—that Dillu was acting benami for Amar Nath in this transaction. The learned counsel for the respondent has urged that as a debt due by Mam Chand to Amar Nath was unsecured, his land, which passed on his death to his son Ram Ditta, was not liable for his debts on the principle laid down in 4 P R 1913.⁵ But that ruling applies to land which was ancestral in the hands of the deceased father. In the present case, there is no allegation that the land was ancestral and this was eventually conceded by the respondent's counsel before me. This being the position, the entire property which Ram Ditta inherited from his father would have been liable for his debt, and his land consisting of 197 bighas 6 biswas could have been alienated for a period of 20 years, and in that event the minor and his mother would have been left wholly unprovided for this long period. By the transactions referred to above, Mt. Basanti mortgaged 87 bighas of land only and kept intact the remainder of the estate for the maintenance and up-bringing of the minor. In these circumstances the transaction in dispute is binding on the minor. I accept the appeal, set aside the judgment and decree of the learned District Judge and grant the plaintiff-appellant a decree for

possession of the land in dispute with costs throughout.

P.R./D.S.

Appeal accepted.

A. I. R. 1937 Lahore 698

BHIDE, J.

Mt. Ruqia Bibi—Plaintiff—Appellant,
v.

Mahbub Ali Shah and others —

Defendants — Respondents.

Second Appeals Nos. 91, 92 and 93 of 1936, Decided on 11th January 1937, from decree of Dist. Judge, Jullundur, D/. 21st November 1935.

Custom (Punjab) — Sayyeds in Jullundur Tahsil—Succession — Non-ancestral property — Daughter does not succeed in preference to collateral of second degree.

Amongst the Sayyeds in Jullundur Tahsil a daughter does not succeed in preference to a collateral of the second degree in case of property which is non-ancestral: 172 P R 1889, *Dissent.*; 86 P R 1900, *Disting.*; Case No. 641 of 1906, *Rel. on.* [P 700 C 1]

Achhru Ram — for Appellant.

Gurudatta — for Respondents.

Judgment. — Civil Appeals Nos. 91, 92 and 93 of 1936 are connected and will be disposed of together. They arise out of three connected suits in which the plaintiff sued for possession of certain properties partly on the basis of a will by her mother Mt. Zenab Bibi, and partly on the basis of a tamliknama executed by her husband Shah Chiragh. The trial Court found that the parties were governed by agricultural custom and that Mt. Ruqia Bibi's mother had no power to make a will, but the tamliknama was valid. The plaintiff was accordingly granted a decree in respect of the property covered by the tamliknama, but her suit for the property covered by the will was dismissed. From this decision the plaintiff appealed to the District Judge before whom it was contended on behalf the plaintiff that the trial Court had relied on the *Riwaj-i-am* on the point of custom without giving the plaintiff an opportunity to rebut it. This contention was upheld and the plaintiff was allowed an opportunity of rebutting the evidence. After considering the additional evidence produced, the learned District Judge however found that plaintiff had failed to prove that she was entitled to succeed to the property in question according to custom, and her appeals were dismissed. From this

1. Jahan Khan v. Dalla Ram, (1907) 142 P R 1907=48 P L R 1908=86 P W R 1907.

2. Haider v. Fateh Khan, A I R 1917 Lah 71=37 I C 193=119 P L R 1916.

3. Ladha Singh v. Ahmad Yar, (1921) 60 I C 463.

4. Wasinda Ram v. Bahadur Khan, A I R 1934 Lah 434=1934 Cr O 697=152 I C 224=36 Cr L J 20=35 P L R 361.

5. Jagdip Singh v. Narayan Singh, (1913) 4 P R 1913=15 I C 866=173 P L R 1912.

decision the present appeals are preferred supported by the required certificate on the question of custom.

The point on which the learned District Judge has granted a certificate is : "Whether amongst Sayyeds in Jullundur Tahsil, a daughter can succeed in preference to a collateral of the second degree". It appears that the contesting defendants are collaterals of the third degree, but it is not suggested that this will make any difference in this case so far as the custom is concerned. The property in question has been held to be non-ancestral and this finding is not contested. On the question of custom, defendants rely on the statements in the *Riwaj-i-am* prepared in 1913-17 : see questions 45-A and 45-B; and it is conceded that these statements are against the plaintiff-appellant. The only point for decision is whether these statements have been rebutted by the evidence adduced by the plaintiff. The oral evidence was worthless and was not relied on before me. As regards documentary evidence, a number of documents were produced, but it will be sufficient to discuss those documents only which were relied on before me. The learned District Judge has omitted to mark these documents as exhibits as required by the rules and this has caused considerable inconvenience in tracing and referring to them. I have however numbered them now, the documents relied on by the counsel for the appellant being marked as A-1, A-2, etc., and those by the counsel for the respondents as R-1, R-2, etc. The documentary evidence relied upon by the learned counsel for the appellant consists of instances of succession of daughters in certain mutations, judicial decisions or pedigree tables. I shall deal with these briefly in the order in which they were taken up in arguments :

Exhibit A-1 is a mutation order of the year 1905, but it does not show whether any collaterals entitled to claim the property were in existence. The instance is therefore of no value.

Exhibit A-2 is a *Robkar* of the year 1854. This was a case of a gift by a mother in favour of daughter. Mutation was at first refused but the gift was upheld in appeal after enquiry. This order does not show to which tribe the parties belonged. The relevancy of this instance is therefore not proved.

Exhibit A-3 is a judgment by the Divisional Judge, Jullundur, dated 16th

November 1896. The question for decision in the case was whether amongst Sayyeds of Shekhapind in Pargana Jullundur, daughters and daughters' sons were entitled to succeed as against collaterals of the second degree. In this case, an enquiry was made under the order of the Judge and it was held that daughters succeeded in preference to collaterals. This instance supports the appellant.

Exhibits A-4 to Ex. A-9 are the pedigree tables relating to Sayyeds of Jullundur City or the neighbourhood which show that daughters have succeeded to the land of their fathers in certain cases. But the pedigree tables do not show the circumstances in which the daughters were allowed to succeed. It is possible that the collaterals were not in existence when the succession opened out or they may have consented for some good consideration. Some of these may possibly be cases of gifts, etc. No evidence was led to support the instances in the pedigree tables and in the absence of such evidence it seems unsafe to place reliance on these instances merely on the basis of the pedigree tables. The pedigree tables are moreover of the year 1884 and were prepared long before the *Riwaj-i-am* of 1913-17.

One of the reported cases relied on, 172 P R 1889,¹ supports the appellant, but 86 P R 1900² is against her. It was urged that the latter case is distinguishable as the plaintiff is married to a first cousin in her own family. But the plaintiff's case was not based on any such ground. As regards instances in favour of the respondents, two are referred to. Ex. R-1 is a judgment of the Punjab Chief Court in Case No. 641 of 1906. The parties were agriculturist Sayyeds of the village Dokoha in Jullundur Tahsil. This seems a remarkable case in which even unmarried daughters were held to be not entitled to succeed. *Riwaj-i-am* was then apparently in favour of the daughters, but in spite of it the onus of proof was laid on the daughter on the basis of para. 23 of Rattigan's Customary Law. Reliance was also placed on 86 P R 1900.² That case however related to a daughter who had been married out of the family.

The next instance for the respondents referred to was Ex. R-2. The parties were

1. *Mt. Fatima v. Gulam Muhammad Shah*, (1889) 172 P R 1889.

2. *Nabi Bakhsh v. Mt. Zebo*, (1900) 86 P R 1900.

Husaini Syeds of Lotera Kalan and the contest was between daughters and collaterals. A good deal of evidence was produced but the learned Munsif held, after considering the same, that the daughters had failed to establish their claim. This case was decided on 13th January 1912. The learned counsel referred to a few cases of Sheikh Ansaris and Arains, but they are of no assistance as the parties in this case are now admitted to be Sayyeds. It will appear from the above that there is only one well ascertained judicial instance of 1896 (Ex. A-3) and one reported case 172 P R 1889¹ in favour of the appellant, whilst there are two judicial instances of 1906 and 1912 as well as the *Riwaj-i-am* of 1913-17 in favour of the respondents. The other evidence relied on by the plaintiff is of little or no value. In these circumstances I am unable to hold on the material before me that the learned District Judge was not right in holding that the plaintiff had failed to rebut the statements in the *Riwaj-i-am* which was prepared long after the instances relied on by her. I dismiss the appeals with costs.

V.B.B./A.L.

*Appeals dismissed.***A. I. R. 1937 Lahore 700**

YOUNG, C. J. AND MONROE, J.

Emperor

v.

Saifal — Accused.

Criminal Appeal No. 689 of 1936, Decided on 24th November 1936, from order of Sess. Judge, Multan, D/- 27th February 1936.

(a) Penal Code (1860), S. 411—Dishonest retention and dishonest reception—Person receiving property dishonestly if he retains, must continue to retain dishonestly.

The offence of dishonest retention of property is almost contemporaneous with the offence of dishonestly receiving it. A man who dishonestly receives property, if he retains it, must obviously continue dishonestly to retain it. It would be different, however, if the reception of the property were innocent. Then it clearly would be for the prosecution to show at what stage guilty knowledge of the receiver supervened to make the retention dishonest: 18 P R 1884 Cr., Dissent.

[P 701 C 1]

(b) Evidence Act (1872), S. 114, Illus. (a)—Presumption cannot be drawn unless facts warrant it.

Where a person is found in possession of stolen articles immediately after theft, presumption

under S. 114, Illus. (a), Evidence Act, cannot be drawn unless the facts warrant it. [P 701 C 1]

Norman Edmunds (Asst. Legal Remembrancer) — for the Crown.

J. G. Sethi and Shabir Ahmad — for Accused.

Young, C. J.—Saifal was charged in the Court of the learned Magistrate under S. 411, I. P. C., with dishonestly retaining stolen property. The learned Magistrate found the accused guilty and sentenced him to nine months' rigorous imprisonment. On appeal to the learned Sessions Judge of Multan, the learned Judge reversed the conviction and acquitted the accused. Against this decision of the learned Sessions Judge, the Local Government appeals to this Court. The facts out of which this case arises are clear and admitted. Two men Karam Chand and Ram Chand were charged under S. 457, I. P. C., with committing burglary. On their arrest they took the police to the house of Saifal, the accused in this case, and he produced from his house a bundle of clothes and an earthen pot containing thirteen silver ornaments. Saifal, the accused in this case, gave evidence for the Crown in the case against Karam Chand and Ram Chand and as a result of his evidence the learned Magistrate trying that case ordered a charge to be framed against Saifal under S. 411, I. P. C. The learned Magistrate clearly said the charge was to be framed for dishonestly receiving or retaining property. The Public Prosecutor drafted a complaint, the words which he used being 'got and retained'. In the charge, however, unfortunately, the learned Magistrate used the word 'retaining' only.

The learned Judge accepted all the facts as found by the lower Court; but, relying upon a decision of Plowden, J. in a case reported in 18 P R 1884,¹ came to the conclusion that the charge as framed by the learned Magistrate had not been made out. The learned Judge, in the case relied upon, drew a distinction between 'dishonest retention' and 'dishonest reception'. He came to the conclusion that dishonest retention supervened after the act of acquisition of possession which was innocent and went on to say:

Neither the thief nor the receiver of stolen property commits the offence of retaining such property dishonestly, as I understand the expression, merely by continuing to keep possession of it.

1. *Najibulla Khan v. Empress*, (1884) 18 P R 1884 Cr.

We, however, respectfully wholly disagree with this view of the law. The offence of dishonest retention of property is almost contemporaneous with the offence of dishonestly receiving it. A man who dishonestly receives property if he retains it must obviously continue dishonestly to retain it. It would be different, however, if the reception of the property were innocent. Then it clearly would be for the prosecution to show at what stage guilty knowledge of the receiver supervened to make the retention dishonest. While we disagree with the authority relied upon by the learned Sessions Judge, on the merits we must dismiss this appeal. We have no information as to the value of the silver ornaments. The evidence is that these two men deposited a tied up bundle of clothes with Saifal and that the ornaments were in some form of earthen jar. The Crown relies upon a statement by this accused in the former case. In that statement he said that these two men whom he had known for years had on three previous occasions deposited bundles with him for a short time for safe custody and that he had not the slightest idea on those occasions what the bundles contained. There is no evidence in this case to show us that the previous procedure with regard to the deposit of bundles was not also followed in this case and certainly there is nothing to show that the accused in this case knew what the contents of the bundle or the chati were. In any event one of the silver ornaments was a ring and I think we may presume in favour of the accused that none of them was of any great value. It is quite possible that Saifal might believe, even if he did see the silver ornaments, that they were of such a nature that they might be honestly possessed by Karam Chand and Ram Chand. It is clear that under S. 114, Illus. (a), Evidence Act, there is a presumption against a man in possession of recently stolen goods that he knew them to be stolen. But it is not necessary to rely on that presumption if the facts do not warrant it. In this case we do not think the facts warrant any such presumption. In any event, if the presumption could be made in this case, the statement of the accused that he had frequently taken the bundles of these two men and kept them with him for a time may be taken in conjunction with the other facts of the case as showing that his possession was reasonable and

not necessarily dishonest, i. e. that he has accounted for his possession. On the whole, therefore, we think that the Crown has failed to prove a case against the accused. We do not interfere with the judgment of the lower Court and dismiss the appeal.

V.B.B./A.L.

Appeal dismissed.

A. I. R. 1937 Lahore 701

DALIP SINGH AND SKEMP, JJ.

Munshi and others — Defendants — Appellants.

v.

Naranjan Singh and others, Plaintiffs and others, Defendants—Respondents.

Second Appeal No. 1418 of 1936, Decided on 1st June 1937, from decree of Dist. Judge, Karnal, D/- 1st August 1936.

Custom (Punjab) — Succession—Jats of Thanesar Tahsil in Karnal District—Sister or sister's son succeeds in preference to collaterals of remoter degree than fifth in absence of daughter or daughter's son.

Among the Jats of Thanesar Tahsil in Karnal District where there are no collaterals of the fifth degree or less, a daughter or daughter's son succeeds in preference to collaterals of a more remote degree and a sister or sister's son succeeds in preference to collaterals of a remoter degree than the fifth in the absence of a daughter or daughter's son. [P 702 C 2]

Ram Lal Anand I — for Appellants.

Shamair Chand — for Respondents.

Dalip Singh, J.—One Sawan, Jat of village Surkhpur, Thanesar Tehsil, District Karnal, died childless leaving his widow Mt. Sansri to succeed him. On 20th June 1935 Mt. Sansri made an oral gift of half the property left by Sawan to defendant 2, Sundar, and the remaining half in favour of defendants 3 to 6. The appellants who are the sisters and sister's sons of Sawan, deceased, brought the present suit to declare that Mt. Sansri had forfeited her estate by reason of unchastity and remarriage with Sundar, defendant 2; that she had no authority to gift the property to defendants 2 to 6, who are not collaterals of Sawan and that, therefore, the plaintiffs were entitled to a decree for possession or, in the alternative, for a declaration that the gift would not affect their rights after the death of Mt. Sansri. The defendants pleaded that defendants 3 to 6 were collaterals and heirs of Sawan and

the gift to them was only an acceleration of succession and plaintiffs had no right to inherit in the presence of collaterals and had, therefore, no right to sue. Defendant 2 also alleged that he was a collateral and further that the gift to him was with the consent of defendants 3 to 6.

The trial Court held that the widow had forfeited her rights by unchastity and remarriage, that defendants 3 to 6 were collaterals of Sawan in the seventh degree and as such had a preferential claim against the sisters and sister's sons; that Sundar, defendant 2, was not proved to be a collateral; that the plaintiffs were in no case heirs of the deceased Sawan; and, therefore, had no locus standi to sue and hence dismissed the suit. On appeal the learned District Judge appears to have held that if the case were to be decided on the question of custom, the *Riwaj-i-am* of Thanesar Tehsil in Karnal District showed by the answers to Question 28 and Question 47 that sisters and sisters' sons had a right to succeed in preference to collaterals of a degree higher than the fifth degree. Further, that the property was not proved to be ancestral of Sawan qua the present collaterals and therefore the *Riwaj-i-am* did not in terms apply. But he proceeded to hold that the question was really covered by Act 2 of 1929 by which all Hindus of the Mitakshara School in the Punjab were governed. Previous to this Act, sisters had no right whatsoever under the existing interpretation of the Hindu law. There could, therefore, be no custom at variance with the personal law of the parties by which sisters were excluded from inheriting. Accordingly, when the Act came into force, sisters were made statutory heirs and, therefore, as there was no custom excluding them from inheritance, the Statute prevailed and sisters and sisters' sons were entitled as heirs to sue to set aside the gift. Holding, therefore, that the plaintiffs were preferential heirs and that the widow had forfeited her estate, he gave them a decree for possession with costs throughout.

In second appeal before us it has been contended that the learned District Judge was wrong entirely in applying Hindu law to the case, that Jats are presumably governed by custom or by Customary law and that sisters are excluded by custom from any inheritance of property, whether ancestral or self-acquired, that the

learned Judge had made no decision under custom and, therefore, no certificate was necessary. It appears from a copy of the Customary law of Ambala District, where the Questions 28 and 47 referred to by the learned District Judge are given, that the learned District Judge was right in holding that daughters were preferred to collaterals of higher than the fifth degree according to the answer to Question 28, and that further the answer to Question 47 showed that sisters or sisters' sons were entitled to succeed in the absence of a daughter or daughter's son. The answers to the questions read together would therefore appear to show that where there were no collaterals of the fifth degree or less, a daughter or daughter's son would succeed in preference to collaterals of a more remote degree and that a sister or sister's son would succeed in preference to collaterals of a remoter degree than the fifth in the absence of a daughter or daughter's son. It would appear, therefore, that the learned District Judge's opinion on the question of the rights of the parties under the *Riwaj-i-am* was right and I would hold that it favours the plaintiffs. In this view it becomes unnecessary to decide the further question as to whether the learned District Judge was right in his application of Act 2 of 1929. The appeal accordingly fails and is dismissed with costs.

Skemp, J.—I agree.

S.C./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 702

BLACKER, J.

Dewan Singh — Petitioner.

v.

Emperor.

Criminal Revn. No. 339 of 1937, Decided on 29th April 1937.

(a) Punjab Pure Food Act (8 of 1929), S. 12 — Halwai in possession of ghee below standard comes under S. 12.

A Halwai found in possession of ghee below standard comes under S. 12, Punjab Pure Food Act, although he does not sell it as such but sells sweetmeats. [P 703 C 1]

(b) Criminal Trial — Revision—New plea.

Pleas not raised before the trial Magistrate cannot be allowed to be raised in revision.

[P 703 C 1]

Harbans Singh — for Petitioner.

Indar Dev for Advocate-General —
for the Crown.

Order. — This reference was made by the learned Sessions Judge of Rawalpindi which recommends revision of the order of the Magistrate convicting the petitioner under S. 13 (e), Punjab Pure Food Act, 8 of 1929. The reason for which the learned Sessions Judge has made his recommendation is that there is no evidence that the petitioner actually sold the ghee, in respect of which he has been convicted. The learned Sessions Judge has however overlooked the definition of "sale" in S. 3, Cl. (h) of the Act and the provisions of S. 12 (i) (b). The petitioner has not denied in Court that the ghee in his shop was for sale but has merely pleaded that it was pure. It has been suggested before me on behalf of the petitioner, though not pleaded at the trial, that as the petitioner is a halwai he does not sell ghee as such but sells sweetmeats. But this plea, even if correct, is again met by S. 12 of the Act. Though not in his order of reference, two other objections have been mentioned by the learned Sessions Judge in his order on the revision petition and have been pressed before me on behalf of the petitioner. The first is that there is no authority proved by the prosecution under which the Inspector could act in lodging this prosecution. Here again this plea was never raised before the Magistrate. Counsel for the respondent Committee appearing before me has shown me a certified copy of a resolution of 1935 expressly granting this authority to the Inspector. In view therefore of the fact that this plea was never raised before the trial Magistrate, I do not propose to allow it to be raised now.

A third objection is that the procedure laid down in S. 10 of the Act has not been proved to have been followed. The evidence however of the Inspector is that he took a sample and under S. 114, Evidence Act, there is an initial presumption that official acts proved to have been performed have been regularly performed. The plea was not raised in the trial Court that he had not carried out the requirements of S. 10 and therefore no attempt was made to rebut this initial presumption that he did so. This therefore cannot in my opinion be made a ground for revision. In the circumstances of the case the fine does not appear to me to be excessive and I reject the petition.

S.C./R.K.

*Petition rejected.***A. I. R. 1937 Lahore 703**

ADDISON AND DIN MOHAMMAD, JJ.

*Raja Painsda Khan and others —*Plaintiffs — Appellants.
v.*Sardar Kahan Singh and others —*

Defendants — Respondents.

Second Appeal No. 697 of 1936, Decided on 12th January 1937, from decree of Dist. Judge, Jhelum, D/- 20th March 1936.

Punjab Pre-emption Act (1 of 1913), S. 15 (c)—Tarfs created for fiscal purposes and not representing homogeneity of area or descent of proprietors—Tarfs are not subdivisions within S. 15 (c).

Tarfs which were only created for fiscal purposes and which in no way represent homogeneity of area or descent of the proprietors, cannot be held to be sub-divisions of a village within the meaning of S. 15 (c), Punjab Pre-emption Act, any more than it can be said that scattered buildings in a town constitute a sub-division of a town: 67 I C 48; 142 P L R 1905; 45 P R 1897 and A I R 1914 Lah 255, Rel. on. [P 704 C 1, 2]

Barkat Ali and Mohammad Amin —

for Appellants.

M. C. Mahajan — for Respondent 1.

Addison, J.—By a deed of sale, dated 18th June 1934, one Sardar Hari Singh sold the suit land to Kahan Singh, etc., for a consideration, put at Rs. 9,000 of which Rs. 7,000 were paid before the Sub-Registrar. Madan Gopal, a collateral of Hari Singh, brought a suit to pre-empt this sale and so did three others, namely Painsda Khan, Feroz Khan and Khushal Khan. The trial Court decreed the claim of Madan Gopal on payment of Rs. 7,000 into Court on or before 27th March 1936, and in default of payment of that amount within the time fixed it was directed that the suit would stand dismissed with costs. The suit of Painsda Khan, Feroz Khan and Khushal Khan was also decreed on payment of the same amount if payment in due time was not made by Madan Gopal. These three plaintiffs were given time up to 28th April 1936 in which to deposit the amount if Madan Gopal failed to do so.

The vendees appealed against the decree in the suit of Painsda Khan, Feroz Khan and Khushal Khan, and the District Judge accepted the appeal and set aside the decree in favour of them. Against this decision the three plaintiffs in the second suit have preferred this second appeal. The claim of the three appellants to pre-empt was based on the allegation that they were the owners in the tariff in which

the land was situated. The District Judge examined this claim and, on the evidence, came to the conclusion that, although the village was divided into five tarfs, each of which had its own lambardar, the actual lands constituting these tarfs were intermingled and these tarfs were only constituted in order to facilitate the collection of land revenue. He also pointed out that the tenure of the village was bhayachara, that is to say, possession was the measure of right and not ancestral shares. Lastly, he stated that the tarfs had no shamilat attached to them, the only shamilat being shamilat deh, i. e. shamilat of the whole village. Following 67 I C 48¹, he held that such tarfs did not constitute a sub-division within the contemplation of S. 15 (c), Punjab Pre-emption Act. This was in fact also the decision of the trial Court, but the trial Court granted the three appellants their decree because they were co-sharers in khata Nos. 16 and 17 in which less than one kanal of the suit land is situated.

An attempt was made before us on behalf of the appellants to show that the finding of the District Judge as regards these tarfs was not based on evidence. There is, however, evidence to this effect on the record and this point was also not taken in the grounds of appeal. In these circumstances the question of fact as to the constitution of the tarfs cannot be challenged before us. The learned counsel for the appellants did not dispute that, if the tarfs were constituted as already mentioned, they would not be sub-divisions within the contemplation of S. 15 (c), Punjab Pre-emption Act and, in our judgment, on the finding as to the constitution of the tarfs they cannot be held to be sub-divisions within the contemplation of S. 15 (c). This follows from the authority already mentioned (67 I C 48)¹ as well as from 142 P L R 1905,² 45 P R 1897³ and 21 P R 1915.⁴ Tarfs, which were only created for fiscal purposes and in no way represent homogeneity of area or descent of the proprietors, cannot be held to be sub-divisions of a village, any more than

it can be said that scattered buildings in a town constitute a sub-division of a town. No other ground of appeal was argued. For the reasons given, we dismiss the appeal but make no order as to costs in this Court.

V.B.B./A.L.

Appeal dismissed.

A. I. R. 1937 Lahore 704

ADDISON AND DIN MOHAMMAD, JJ.

Bakhsh — Plaintiff — Appellant.

v.

Azmat Ali and others — Defendants — Respondents.

First Appeal No. 273 of 1936, Decided on 17th December 1936, from decree of Sub-Judge, First Class, Sargodha, D/- 25th March 1936.

Custom (Punjab)—Alienation — Nangianas of Shahpur District—Proprietor's power of alienation in absence of male issue is unrestricted.

The miscellaneous Mussalmans of the Shahpur District in the Punjab include Nangianas. Amongst them a proprietor having no male issue has an unrestricted power of alienation in respect of immoveable property: *A I R 1921 Lah 210*; *A I R 1925 Lah 231*; *A I R 1933 Lah 158* and *A I R 1935 Lah 208, Rel. on.* [P 705 C 1, 2]

Mehr Chand Sud and R. P. Khosla — for Appellant.

Ghulam Mohy-ud-Din, Bhagu Mal and Abdul Aziz Khan — for Respondents.

Addison, J.—The plaintiff is the collateral of Pir Bakhsh. The latter has no issue and executed a sale deed of certain land in favour of Azmat Ali, defendant 1. The suit was for a declaration that, according to the custom followed by the parties, he had no power to do so without necessity and that the sale deed, dated 25th May 1934, would have no effect, so far as the reversioners' rights are concerned, after the death of Pir Bakhsh. The suit has been dismissed on the ground that Nangianas of this district, namely Shahpur, in the absence of male issue, have unrestricted powers of alienation. The plaintiff has appealed.

The learned counsel for the appellant has relied on the wajibularz of the village Dhareman, to which the parties belong, recorded at the first settlement of 1858. What was stated there was that in this village the estate of no proprietor had so far been alienated; but if this happened, in the future he would have a right to do so

1. *Uttam Chand v. Mehtab Singh*, (1922) 67 I C 48.

2. *Sher Singh v. Maluk Singh*, (1905) 142 P L R 1905.

3. *Bija v. Bishan Singh*, (1897) 45 P R 1897.

4. *Waryam Singh v. Mahtab Singh*, A I R 1914 Lah 255=26 I C 433=21 P R 1915=31 P L R 1916.

in accordance with the dasturi sircar. As we interpret this phrase, this means "as is the practice or custom recorded by the authorities". There is a judgment of the Divisional Judge of this district, dated 10th May 1899, in favour of the appellant. There the phrase "dasturi sircar" was interpreted as meaning "the decision of the judicial authorities", and as the Divisional Judge was of opinion that the trend of the judicial decisions in the Province as a whole was against unrestricted powers of alienation, he upheld the contention then put forward that necessity had to be established for sales by Nangiana proprietors. It is this wajibularz of 1858, and this decision of the Divisional Judge, that alone are relied upon by the appellant's counsel, apart from certain very indefinite oral evidence the value of which is little or nothing. As already pointed out, the judgment is of no importance as the interpretation given to the dasturi sircar does not appear to us to be correct as it cannot be said that there is any such thing as general custom applicable to the Punjab as a whole. Further, the practice of recording village custom in the village wajibularz ceased and when the next settlement of 1896 came on, custom was only recorded in the riwajiam of the whole tahsil or district.

Mr. Wilson, Settlement Officer, drew up a general Code of Tribal Custom in the Shahpur District in that year, and therein at p. 73 the answer of Awans and miscellaneous Mussalmans as regards alienation of immoveable property was that a proprietor having no son or son's son can, without the consent of agnate heirs, make a gift of immoveable property, ancestral or acquired, divided or not, to a person not related to him. That means that amongst miscellaneous Mussalmans there is unrestricted power of alienation in this district. Nangianas are included amongst miscellaneous Mussalmans. This riwajiam does not contradict the earlier village wajibularz of 1858 and is therefore an important piece of evidence entitled to great weight. It was held by this Court in A I R 1933 Lah 158¹ that by custom Nangianas of Shahpur District have unrestricted powers of alienation. There are five other judicial decisions about miscellaneous Mussalman tribes to the same effect. In A I R 1935

Lah 208² it was held that the Vains tribe, who belong to the miscellaneous Mussalman tribes, had unrestricted powers of alienation. The same was held as regards Harrals of this district—another miscellaneous Mussalman tribe—in A I R 1921 Lah 210³ and about Tiwanas in A I R 1925 Lah 231.⁴ There are two other decisions of the subordinate Courts to the same effect as regards Khokhars and Kuts, these also being miscellaneous Mussalman tribes: see Exs. D.1 and D.2. The riwajiam has thus been followed in six cases by the Courts while there is only one case where it was not followed and in that case the riwajiam or customary law of the district was not referred to. It follows that the decision of the Subordinate Judge is correct that it has been established that amongst Nangianas of the Shahpur District there is unrestricted power of alienation. We therefore dismiss the appeal but make no order as to costs.

V.B.B./A.L.

Appeal dismissed.

2. Ali v. Ziada, A I R 1935 Lah 208=158 I C 412=16 Lah 656=37 P L R 97.

3. Bahaduri v. Qadu, A I R 1921 Lah 210=60 I C 526.

4. Sher Muhammad Khan v. Dost Muhammad Khan, A I R 1925 Lah 231=78 I C 451.

A. I. R. 1937 Lahore 705

COLDSTREAM AND BHIDE, JJ.

Karam Ali and others—Appellants.

v.

Shah Muhammad and others —

Respondents.

* Second Appeal No. 676 of 1936, Decided on 7th December 1936, from decree of Dist. Judge, Gujranwala, D/- 10th March 1936.

Custom (Punjab)—Gujrat District—Custom of Khanadamad—Property gifted to Khanadamad reverts to donor's reversioner on extinction of descendants of wife of Khanadamad — Principle applies even if Khanadamad has rendered services.

In the Customary law of the Gujrat District, the custom of Khanadamad is that property gifted to a Khanadamad reverts to a donor's reversioner on the extinction of the descendants of the wife of the Khanadamad. This principle applies even where a Khanadamad has rendered services, as a gift to a Khanadamad is recognized to be a gift in consideration of services rendered or to be rendered : 2 P R 1910, Rel. on ; 109 I C 562, Disting.

[P 706 C 1]

Shabir Ahmad for Asadullah Khan —
for Appellants.

Abdul Karim and Fazal Karim —
for Respondents.

1. Ghulam Ali v. Inayat Ali, A I R 1933 Lah 158=141 I C 389=34 P L R 223.

Coldstream, J.—The circumstances out of which this second appeal has arisen are stated in sufficient detail in the judgment of the District Judge, Gujranwala, and I do not think it necessary to recapitulate them here. The question for decision is whether the District Judge has erred in holding that the land in suit, which was gifted by Mt. Fazlan to her khanadamad Ilam Din, should revert on the extinction of the line of Mt. Nek Bibi, Ilam Din's wife to the reversioners of the donor's husband, Qutba. The suit was instituted by Jowaya's grandsons. It was based on the assumption that the land was ancestral and the ancestral nature of the property was never questioned in the trial Court. We must therefore presume it to be established that the land was ancestral. It was not disputed in the Courts below that Ilam Din was a khanadamad of Qutba. For the appellants, counsel contends that the principle according to which land given to a khanadamad reverts to the donor should not be applied in this case because the land was given to Ilam Din for services rendered and not only because he was a khanadamad. In support of his proposition he relies on 109 I C 562.¹

It is clear from the answers to the questions relating to the custom of khanadamad in the Customary Law of the Gujrat District 1922, that the custom in the district is that property gifted to a khanadamad reverts to a donor's reversioner on the extinction of the descendants of the wife of the khanadamad, and counsel has not been able to show us any authority for holding that if a khanadamad has rendered services then this principle should not be applied. On the other hand, as pointed out in 2 P R 1910,² a gift to a khanadamad is recognized to be a gift in consideration of services rendered or to be rendered. The decision in 109 I C 562¹ has no application to the facts of the present case. There the appeal was found to be barred by limitation, the gift was found to be not the usual customary gift to a khanadamad but one in consideration of services rendered, and the gift was not to the son-in-law alone but to the son-in-law and his son. For these reasons I find no force in the contention put forward. It has also been argued before us that the

appellants are at least entitled to half of the area of 9 bighas of land which was given to Gauhra in consideration of his refraining from prosecuting his suit to contest Mt. Fazlan's gift. But there is no reason to suppose that Gauhra gave up his right as reversioner to the property gifted, should the line of Mt. Nek Bibi die out. The Court below decided the appeal before it correctly and I would accordingly dismiss this appeal with costs.

Bhide, J.—I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 706

SKEMP, J.

Sardar Khan — Judgment-debtor —
Appellant.

v.

Sunder Singh — Decree-holder —
Respondent.

Exn. Second Appeal No. 953 of 1936, Decided on 10th December 1936, from order of Dist. Judge, Rawalpindi, D/- 3rd July 1936.

Execution — Order committing judgment-debtor to prison for unspecified period is appealable as decree.

An order in execution committing a judgment-debtor to prison for an unspecified period conclusively determines the right of the parties with regard to one matter in controversy, namely whether the judgment-debtor should be sent to prison in execution of the decree. The order, therefore, is appealable as a decree: *Case law referred.* [P 707 C 2]

Khurshid Zaman — for Appellant.

Harnam Singh — for Respondent.

Judgment.— This second appeal has arisen from the arrest of a judgment-debtor in execution proceedings. The decree-holder Sunder Singh had a money decree for Rs. 680 and costs against the judgment-debtor Sardar Khan which he was executing in the Court of the Subordinate Judge, Fourth Class at Gujar Khan. On 4th January 1936, Sunder Singh applied for the arrest of Sardar Khan; on 6th January, the Court issued notice to him for 24th January. According to the process server's report, Sardar Khan refused service and the proceedings were adjourned to 25th February 1936, when Sunder Singh was to adduce evidence *ex parte*. In the meantime the Subordinate Judge was transferred and his successor after taking the evidence of

1. *Farangi v. Sukha*, (1928) 109 I C 562.

2. *Nabia v. Fatto*, (1910) 2 P R 1910=5 I C 232=156 P L R 1910=4 P W R 1910.

the decree-holder and another held on 17th April 1936, that Sardar Khan was liable to arrest. On the same day a warrant of arrest was issued in pursuance of which Sardar Khan was brought before the Court on 30th May 1936. He was then given permission to take objections to the order of 17th April and released on bail. On 3rd June he made an application that he was exempt from arrest under S. 135, Civil P. C., and under S. 34, Punjab Relief of Indebtedness Act. Thereupon the Subordinate Judge on 5th June 1936 passed a hasty order translated as follows :

From the reply to the application, dated 31st May (should be 30th May) it appears that it will take much time and the object of arrest will be defeated. Hence the judgment-debtor's security for appearance is cancelled. He will be sent to jail.

Sardar Khan appealed to the learned District Judge who did "not think that the order of the lower Court was at all equitable", but nevertheless dismissed the appeal on the ground that the order was not appealable. Sardar Khan has come here in second appeal and has been on bail since his appeal was admitted. The District Judge's order is dated 3rd July 1936, and after it had been communicated to the Subordinate Judge he wrote a long and careful order of review, dated 11th August 1936, saying that his order of 5th June contained an error apparent on the record and that the period of imprisonment was to be six months. This latter order is not before me. I am hearing a second appeal from the judgment of the learned District Judge and must take the facts as they were on 5th June 1936. Sardar Khan's counsel urges before me that an order passed in execution proceedings has the effect of a decree under S. 2 (2), Civil P. C., and is therefore appealable. He cites 69 P R 1895,¹ 1 Lah 77,² A I R 1922 Lah 259³ and A I R 1924 Lah 360.⁴ 69 P R 1895,¹ concerned an order for imprisonment in execution of a decree and laid down that though such orders were not appealable as orders, they were appealable as decrees. 1 Lah 77,² which dealt with an order disallowing the arrest of the judgment-debtor followed this;

A I R 1922 Lah 259,³ is to the same effect. In A I R 1924 Lah 360,⁴ it was held specifically that an order issuing a warrant for the arrest of a judgment-debtor is an order passed under S. 47 and is appealable as a decree. The respondent's counsel develops the point taken by the learned District Judge in the following terms :

To be appealable at all, the order must fall within the provisions of S. 47, Civil P. C. Not all orders under that section are appealable. To be appealable they must have the force of a decree, i. e. they must finally determine some question at issue between the parties. There are a number of rulings on this point. I think it is a settled law : *vide inter alia* A I R 1930 All 638.⁵

The proposition may be settled law but surely an order committing a judgment-debtor to prison for an unspecified period conclusively determines the rights of the parties with regard to one matter in controversy, namely whether the judgment-debtor should be sent to prison in execution of the decree. Sardar Harnam Singh admits that the original order was illegal, that a judgment-debtor cannot be imprisoned for more than six months and that an order for imprisonment for six months would be appealable as a decree. He was finally constrained to admit that the order in question is also appealable as a decree. I do not think that the order of 5th June was a proper order. The Subordinate Judge had given the judgment-debtor an opportunity to show cause why he should not be sent to prison. He had furnished security and obviously the proper course was to hear the objections before giving a decision. I therefore set aside the order dated 5th June. The review order of 11th August necessarily passes away with the order reviewed. The Subordinate Judge is to dispose of the application dated 3rd June in accordance with law. The respondent decree-holder is to pay the judgment-debtor appellant's costs before the learned District Judge and in this Court. The parties are to appear before the Subordinate Judge on 1st January 1937.

D.S./R.K.

Order set aside.

1. Seva Singh v. Dhaunkal, (1895) 69 P R 1895.

2. Mt. Raj Karni v. Karam Elahi, A I R 1919 Lah 15=53 I C 68=1 Lah 77=22 P L R 1920.

3. Lala Das v. Mina Mal, A I R 1922 Lah 259=79 I C 551.

4. Mehr Chand v. Ram Lal, A I R 1924 Lah 360=73 I C 766.

5. Moti Chand v. Mahabir Prasad, A I R 1930 All 638=125 I C 581=1930 A L J 1381.

A. I. R. 1937 Lahore 708

TEK CHAND, J.

Shib Lal — Defendant — Appellant.

v.

Indraj, Plaintiff and *another*,
Defendant — Respondents.

Second Appeal No. 1350 of 1936, Decided on 9th February 1937, from decree of Senior Sub-Judge, Rohtak, D/- 25th August 1936.

(a) **Compromise—Admissibility—Compromise recorded by Court and decree passed thereon—Subsequent litigation as to portion of property extraneous to former suit—Compromise is admissible even without registration.**

Where in a suit the terms of a compromise were reduced to writing and were recorded by the Court and a decree was passed in accordance with the compromise, the document is admissible in evidence in litigation relating to the portion of the property which was extraneous to the former suit although it is unregistered. [P 708 C 2]

(b) **Compromise—Compromise of doubtful claim is good consideration.**

Compromise of a doubtful claim is a valuable consideration for an arrangement restricting the power of alienation of ancestral lands of parties. [P 709 C 1]

(c) **Custom (Punjab) — Alienation—Compromise—Suit by collateral A challenging gift by B, compromised on condition that B was not to alienate property and A was to withdraw suit—Compromise held allowed alienation for valid necessities.**

Where a suit between A and B, A being a collateral of B, challenging a gift of land made by B, was compromised on condition that A was to withdraw his suit and B was not to sell, gift or mortgage the remaining property :

Held : that under a custom in the Punjab, a person could alienate ancestral property for valid necessity. There were no words in the compromise expressly prohibiting a sale even for necessary purpose. In the absence of such words, the compromise deed should be construed in a fair, liberal and reasonable manner. Hence B could alienate the property to an extent which could be proved for valid necessity : 230 P L R 1913 and A I R 1914 Lah 140, *Ref.* [P 709 C 1]

Shamair Chand — for Appellant.

Fakir Chand Mital—for Respondents.

Judgment.—Jot Ram, defendant 1, a Jat of Mauza Chhara, Tehsil Jhajjar, Rohtak District, owned a certain area of land which had descended to him from his ancestors. On 2nd March 1917 he gifted one-half of this area to Surat Singh, who was the son of his wife from a former husband. On 15th January 1918 Indraj, a collateral of Jot Ram, instituted a suit to contest the gift. On 23rd January 1918 Indraj and Jot Ram entered into a compromise whereby Indraj agreed to with-

draw his suit to contest the gift of the half share in the land to Surat Singh and Jot Ram undertook not to effect a mortgage, sale or gift of the remaining half to any one else. The compromise was reduced to writing and filed in Court. In accordance with the terms of the compromise the suit was dismissed. On 2nd June 1934 Jot Ram sold the land comprised in the other half to Shib Lal for Rs. 965. The consideration of the sale was as follows :

Rs.

408	paid to prior mortgagees of the vendor ;
525	paid in cash before the Sub-Registrar, and
32	received in cash for deed expenses.

 965

Indraj has now brought a suit to contest the sale, urging that it was contrary to the terms of the compromise effected in 1918. The Courts below have decreed the suit. Shib Lal, vendee, appeals. On his behalf the first contention raised is that the compromise of 23rd January 1918 is not admissible in evidence for want of registration. This contention however is without force. The terms of the compromise were recorded by the Court in 1918 and a decree was passed in accordance with the compromise. The document is therefore admissible in evidence in litigation relating to the portion of the property which was extraneous to the former suit. The second contention raised is that the restraint which was placed on Jot Ram's power of alienation with regard to this property was invalid, being without consideration and contrary to law. It is urged that according to the custom of the Jats of Jhajjar tehsil and Rohtak district generally, a male proprietor has unrestricted power of alienation of ancestral land except where the transaction is made for immoral purposes. It is therefore urged that the gift of one-half of ancestral land by Jot Ram to Surat Singh made in 1917 was valid and not open to attack by the donor's collateral, Indraj. It was accordingly argued that there was no justification for Jot Ram to enter into a compromise so as to restrict his power of alienation with regard to the other half of the property. It must be borne in mind however that, in 1918, when the previous suit was brought, the rulings of the Chief Court were not uniform as to whether in the Rohtak district a male proprietor possessed unrestricted power of alienation of ancestral land. Joseph's Customary Law of the

Rohtak District published in 1909 no doubt supported this view, and in 230 P L R 1913¹ and 231 P L R 1913² the same view had been taken by the Chief Court. But as against this, in 76 P R 1914³ and 36 I C 215,⁴ it had been held that a proprietor could not alienate ancestral land without necessity. It could not therefore be said that the matter was absolutely free from doubt and there was no justification for Jot Ram to enter into the compromise. It is well settled that the compromise of a doubtful claim is a valuable consideration for an arrangement of this kind. This part of the argument therefore fails.

The effect of the condition in the compromise however was not to restrict absolutely the power of alienating the other half, even if necessity existed. Admittedly, there are no words in the compromise expressly prohibiting a sale even for a necessary purpose. In the absence of such words, the deed should be construed in a fair, liberal and reasonable manner. Evidently all that was agreed to was that Jot Ram's power of alienation of this half of the land was not restricted, but that it was subject to the restrictions, which were claimed by the collateral in the plaint of that suit, and which are found to exist generally among agricultural communities of the province. It could not have been intended to deprive the owner of the power of alienation even under the stress of urgent and imperative necessity. I hold therefore that the alienation in dispute is valid to the extent to which it can be established to have been effected for valid necessity. As already stated, out of the sale price, Rs. 408 had been paid to three prior mortgagees of Jot Ram as follows : Rs. 268 to Kewal, Rs. 40 to Chand Singh, Rs. 100 to Kirori.

There is no reason to doubt the genuineness of these debts or of their discharge by the appellant. To this extent therefore the alienation was clearly for necessity. There is no proof however of any necessity for the remaining Rs. 525 which were paid in cash before the Sub-Registrar. The

result therefore is that the plaintiff will be entitled to get possession of the land after the death of Jot Ram on payment of Rs. 408 to the vendee. I accept the appeal, set aside the judgment and decree of the Senior Subordinate Judge, and in modification thereof I pass a decree in favour of the plaintiff declaring that the sale in dispute shall not affect his reversionary rights after the death of Jot Ram except to the extent of Rs. 408. Having regard to all the circumstances, I leave the parties to bear their own costs throughout.

B.D./R.K.

Decree modified.

A. I. R. 1937 Lahore 709

ADDISON AND DIN MOHAMMAD, JJ.

*Harnam Singh and others — Plaintiffs
— Appellants.*

v.

*Doola Singh and others — Defendants
— Respondents.*

First Appeal No. 97 of 1936, Decided on 30th November 1936, from decree of Senior Sub-Judge, Sheikhupura, D/- 9th November 1935.

Limitation Act (1908), Arts. 24, 25 and 36 — *A making false accusation against B to police — Case investigated but B not prosecuted — Suit by B for damages for malicious prosecution — Such suit held one for libel or slander and Art. 24 or Art. 25 applies — Art. 36 does not apply.*

A made a false accusation to the police against B that B had set fire to his go-downs. The case was investigated by the police but B was not prosecuted. In a suit by B against A for malicious prosecution :

Held : that a suit for malicious prosecution did not lie under the circumstances but it was one for libel or slander, and Art. 24 or Art. 25, Lim. Act, applied and not Art. 36 as it is only residuary Article : 24 All 368 and A I R 1930 Cal 392, Foll. ; 310 P L R 1900, Ref. [P 710 C 1]

*Dev Raj Sawhney and S. L. Puri —
for Appellants.*

*Anant Ram Khosla, Krishan Lal Kapur, Narotam Singh and Ajit Ram
— for Respondents.*

Judgment.—The plaintiffs sued certain defendants for damages amounting to Rs. 6,000 for malicious prosecution. It was alleged that one of the defendants Ram Lal made a false accusation against the plaintiffs to the police that they had set their godowns containing materials on fire. The police investigated the case but did not prosecute the plaintiffs. Ultimately

1. Sheoji v. Fajar Ali Khan, (1913) 230 P L R 1913=20 I C 475=148 P W R 1913.

2. Telu v. Chuni, (1913) 231 P L R 1913=20 I C 373=147 P W R 1913.

3. Budal v. Kirpa, A I R 1914 Lah 140=23 I C 211=76 P R 1914=148 P L R 1914.

4. Ghansham v. Balak Ram, A I R 1916 Lah 145=36 I C 215=94 P L R 1916.

the police had the case struck off as having been entered as a mistake of fact. The suit has been dismissed as barred by limitation as well as on the merits and the plaintiffs have appealed.

As we are of opinion that the suit was barred by time, we need not go into the facts in detail. There is a Single Bench decision of the Punjab Chief Court, reported in 310 P L R 1900,¹ to the effect that the defendants' giving false information to the officer-in-charge of a police station was actionable as there had been a prosecution of the plaintiffs by the defendants within the meaning of the law though the case never went into Court. A Division Bench of the Allahabad High Court however took the opposite view in 24 All 368,² where it was held that, in these circumstances, a suit for damages on account of malicious prosecution did not lie, for no prosecution had been initiated; but that it was a suit for compensation for libel or slander, the limitation applicable to which was that prescribed by Art. 24 or Art. 25 of Schedule 1. A similar view was taken by Mukerji, J. in 57 Cal 25.³ With this view we are in agreement. It follows that the suit is barred by time whether it falls within Art. 24 or Art. 25, Lim. Act, and it is not disputed that this is so if these Articles apply. It was however contended before us that the suit fell within Art. 36, which runs as follows:

For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for.

This gives the period of limitation as two years. Obviously however, this is a residuary Article and as we have held that Art. 24 or Art. 25 applies, Art. 36 cannot apply. For the reasons given, we dismiss the appeal with costs. The pleader's fees to be allowed to counsel, appearing for the various respondents, will not exceed the maximum which can be allowed to one pleader in this appeal, and if the aggregate is greater than this, the fees of the counsel of the various respondents will be proportionately reduced.

S.C./R.K.

Appeal dismissed.

1. Kirpa Ram v. Mul Raj, (1900) 310 P L R 1900.

2. Ishri v. Muhammad Hadi, (1902) 24 All 368 = 1902 A W N 96.

3. Nagendra Nath v. Basanta Das, A I R 1930 Cal 392 = 125 I C 667 = 57 Cal 25.

A. I. R. 1937 Lahore 710

TEK CHAND, J.

Kahni Ram — Defendant — Appellant.
v.

Molar, Plaintiff and *others*, Defendants
— Respondents.

Second Appeal No. 1712 of 1935, Decided on 5th February 1937, from decree of Dist. Judge, Karnal, D/- 2nd May 1935.

Custom (Punjab)—Succession — Collaterals — Aggarwal Mahajans of Rohtak District—Right of representation is recognized by custom—Nephew can succeed with uncle to property of deceased sonless uncle.

Though the Mitakshara does not recognize the right of representation in succession amongst collateral heirs, yet amongst the Aggarwal Mahajans of Rohtak District, the rule of law has been modified by custom and such right is recognized by custom, and the nephew is allowed to succeed along with the uncle to the property of a deceased sonless uncle: 71 P R 1882 and 39 P R 1884, Rel. on. [P 711 C 1, 2]

F. C. Mital — for Appellant.

Tek Chand — for Respondent 1.

Judgment.—The dispute in this case relates to the property of one Harkishen, an Aggarwal Mahajan of Mauza Jasia Tehsil and District Rohtak, who died without wife or issue in 1927. Mutation of his agricultural land was effected in favour of Kahni Ram, defendant 1, one of his collaterals. It is alleged that Kahni Ram also took possession of a pacca house, a kacha shop and certain outstandings belonging to the deceased. In 1929 Molar, plaintiff-respondent, instituted a suit for possession by partition of 1/18th share of the land, the house and the shop of the deceased, and also asking for an account of the outstandings. He alleged that he was a collateral of the deceased entitled to succeed along with Kahni Ram and other defendants. Kahni Ram resisted the suit on various grounds, one of which was that according to the pedigree, as propounded by the plaintiff, he was not entitled to succeed in the presence of Kahni Ram as the plaintiff's father, who was related to Harkishen, deceased, in the same degree as Kahni Ram, had predeceased Harkishen and under Hindu law, which governed the parties, there was no right of representation in succession amongst collateral heirs. It was also pleaded by the defendant that the property in dispute did not belong to Harkishen. In reply the plaintiff alleged that among the Aggarwal Banias of Rohtak, and the neighbouring districts

strict Hindu law on the point had been modified by custom, under which representation was allowed amongst collateral heirs.

The trial Judge found in favour of the plaintiff on both points holding that among Aggarwal Mahajans of Rohtak District, Hindu law had been modified by custom so that representation was allowed amongst collateral heirs. He also held that the agricultural land, the house and the shop had been proved to be the property of the deceased and further that the defendant Kahni Ram was bound to render account of the outstandings of the deceased which had come in his possession. He accordingly granted the plaintiff a decree for possession of 1/18th of the property in dispute and ordered an account to be taken of the outstandings. The defendant appealed to the District Judge, who affirmed the finding of the trial Court on the question of custom, but found that it had not been proved that the shop in dispute belonged to the deceased or that he had left any outstandings which had come in the hands of the contesting defendant. He accordingly upheld the decree of the trial Court, granting the plaintiff possession of 1/18th of the agricultural land and the pacca house in dispute but dismissed the suit relating to the shop and for rendition of account of the outstandings. On an application by the defendant, the learned Judge granted a certificate under S. 41 (3), Punjab Courts Act, for a second appeal to this Court on the question of custom involved, namely whether a right of succession by representation existed among the Mahajans of Mauza Jasia Tehsil Rohtak.

The defendant Kahni Ram has accordingly come in second appeal praying that the suit be dismissed in its entirety. The plaintiff has filed cross-objections asking for a decree for possession of 1/18th share in the shop and for an account of the outstandings being ordered. The main question involved is that of custom, and on that point, after hearing counsel and examining the record, I have no doubt that the decision of the Courts below is correct. It is no doubt true that the Mitakshara does not recognize right of representation in succession amongst collateral heirs, but there is convincing evidence on the record that among Aggarwal Mahajans of this particular village, and in Rohtak district

generally as well as in the neighbouring districts, this right has been recognized for a long time. In the village itself we have three instances proved by mutations and oral evidence, where strict Hindu law was not followed and nephews were allowed to succeed with their uncles to the property of a deceased sonless uncle. These instances are : (1) Ex. P. G. relating to the estate of Ram Sarup of mauza Jasia ; (2) Ex. P. H. relating to the estate of Mutsadi Lal, on whose death his property was divided equally among his brother's widow and predeceased brother's sons, and (3) Ex. P. I. which shows that on the death of Mt. Ram Kaur, widow of Daulat, the descendants of Daulat's brothers succeeded in equal shares, some of whom were the sons of a predeceased brother's sons or nephew.

In addition to these instances from this village, there are three other instances from Rohtak district as follows : (4) Ex. P. L. relating to the estate of Jawahar Mahajan of mauza Khar Sati, Tehsil Rohtak ; (5) Ex. P. J. relating to succession to the property of Gogan Mahajan of mauza Mahara, Tehsil Gohana, District Rohtak, and (6) Ex. P. K. relating to the estate of Devatia Mahajan of mauza Pithal Pallu, Tehsil Gohana.

In all these cases the right of representation was recognized. As against all this, not a single instance has been proved by the defendant-appellant in which succession went strictly according to Hindu law among the Mahajans of this village or any other place in the Rohtak district. The learned counsel referred me to the judgment of Maulvi Ghulam Hassan, Munsif, dated 10th July 1918, which was a case among Aggarwal Banias of Rohtak town. In that case, the plaintiff had failed to prove his relationship with the deceased, and the suit failed on this ground. The learned Munsif, however, observed that even if the alleged pedigree table had been proved, the plaintiff in that case would still be not entitled to succeed, as the right of representation was not allowed by Hindu law, by which the parties were governed. It is obvious that this obiter dictum, which was wholly unnecessary for the decision of the case and which did not consider the evidence bearing on the point, is of no value whatever as indicating the rule of succession actually prevailing among the Aggarwal Mahajans of Rohtak

town or district. Before concluding, a reference may be made to two reported judicial decisions, 71 P R 1882¹ and 39 P R 1884,² in which after lengthy enquiry, it was found that the right of representation existed in succession amongst collateral heirs of Aggarwal Mahajans of the adjoining districts of Karnal and Gurgaon. I hold, therefore, that the evidence on the record is quite sufficient to establish the custom alleged in derogation of the strict rules of the Mitakshara. No other point was urged in the appeal which fails and must be dismissed with costs.

The cross-objections attack the finding of the learned District Judge that the shop in dispute has not been proved to be the property of Harkishen, deceased, nor has it been proved that any outstandings of his came into the hands of Kahni Ram, defendant-appellant. These are findings of facts based on a consideration of the evidence and nothing has been urged by counsel for the respondents which would justify interference in second appeal. The cross-objections also fail and are dismissed with costs.

K.B./A.L.

Appeal dismissed.

1. *Adjudhia Pershad v. Dwarka Das*, (1882) 71 P R 1882.
2. *Kanhya Lal v. Krishna*, (1884) 39 P R 1884.

A. I. R. 1937 Lahore 712

COLDSTREAM AND BHIDE, JJ.

Babu Lal — Plaintiff — Petitioner.

v.

Siri Ram and others — Defendants — Opposite Party.

Civil Misc. Petn. No. 453 of 1936, Decided on 14th December 1936, for leave to appeal to Privy Council, against the judgment of Coldstream and Bhide, JJ., D/- 19th May 1936.

Civil P. C. (1908), S. 110—Affirming judgment — Appellate decree modifying lower Court's decree only on single point not disputed in either Court—Point decided completely in favour of applicant — Appellate decree is decree of affirmance.

Where the Appellate Court has varied the lower Court's decree only by modifying it on a single point, which was neither in dispute in the lower Court nor in the Appellate Court and that completely in favour of the applicant for leave to appeal, the appellate decree is to be taken as a decree of affirmance, though it is not a decree merely dismissing the appeal, and the applicant is not entitled to a certificate under S. 110, Civil P. C., as he has no right to litigate upon other

points, upon which the Courts have been in agreement, unless he shows some substantial question of law : *Case law referred.* [P 714 C 2]

Asa Ram — for Petitioner.*Badri Das* — for Opposite Party.

Coldstream, J.— This is an application by Babu Lal, the respondent in Appeal No. 901 of 1932, decided by this Bench on 19th May 1936 for leave to appeal to His Majesty in Council against our decision. The value of the subject matter of the suit exceeded Rs. 10,000 and the value of the subject matter in dispute in appeal also exceeds this sum. The suit was brought by Babu Lal for a declaration that he was the owner of the property left by his granduncle Ganpat Rai who died on 6th July 1928 on the ground that he and Ganpat Rai had been members of a joint Hindu family to the property of which he was entitled by the rule of survivorship. The suit was against Sant Lal who claimed to be the adopted son of Ganpat Rai and six executors of a will which they alleged Ganpat Rai had executed making his widow his heir. The facts and the validity of the alleged will and adoption were denied by Babu Lal who, however, asked for a decree for partition of the property if a lawful adoption were proved.

The defendants resisted the suit pleading that Babu Lal had separated from Ganpat Rai in 1906 and had not since then been a member of the joint family, that Ganpat Rai's will had been acted on by Babu Lal who had accepted a bequest of Rs. 5,000 in his favour, and that there had been a valid adoption of Sant Lal by Ganpat Rai. All the property in suit except some immovable property at Churu in Bikaner State was property which had either passed by partition to Ganpat Rai or been acquired by him after the partition. The property at Churu had not been partitioned. The trial Court found that partition had taken place as alleged by the defendants, that Sant Lal had been adopted by Ganpat Rai and the adoption was valid and that Babu Lal had been excluded from succession by Ganpat Rai's will which left him only a sum of Rs. 5,000. This sum Babu Lal had received. As regards the property at Churu, the Court held that it could not give any relief, the property not being within its territorial jurisdiction. On these conclusions the Court dismissed the suit: Babu Lal appealed to this Court. My

learned brother Bhide, J. and I affirmed all the findings of the Court below on the issues relating to partition, adoption and the will. As regards the property at Churu there was no dispute before us. It was admitted that it had always remained joint property and as Babu Lal did not ask for any relief in respect of this property other than a declaration that he was owner of half of it, and the defendants agreed that such a declaration should be decreed, we thought it proper to accept the appeal to the extent of giving Babu Lal the declaration he desired. It is argued by Babu Lal's counsel that our variation of the decree in respect of the Churu property entitles his client to the certificate prayed for, the case being of the value required by S. 110. It is not contended that the appeal involves any substantial question of law or that the case is a fit one for appeal for any other reason than that the case satisfies the requirements of that section.

The application is opposed by the defendants on whose behalf it is urged that our decree affirmed the decision of the Court below in respect of all matters in dispute before us, the variation of the decree in respect of the Churu property being not the result of an adjudication on the merits of the case but of an agreement between the parties and therefore not open to appeal. For the applicants, reliance is placed on 51 Cal 969¹ and 54 All 146². In the former case their Lordships of the Privy Council in giving special leave to appeal from a decree of the Court of the Judicial Commissioner of the Central Provinces, expressed in their brief ex parte judgment their opinion that the petitioner before them had a right of appeal under S. 110, Civil P. C., in the circumstances, described as follows in the head-note to the report: [51 Cal 969¹]

In a suit claiming by adoption property of over Rs. 10,000 in value, one of the defendants, while denying the adoption, claimed to be entitled to Rs. 3,000 per annum as widow's maintenance. The first Court decided in favour of the plaintiff upon the question of adoption but decreed to the widow Rs. 800 per annum as maintenance charged upon the estate. The Appellate Court increased the maintenance to Rs. 1,200 per annum but in all other respects affirmed the decree of the first Court. An application by the

defendants to the Appellate Court for leave to appeal to the Privy Council was rejected.

It was argued for the petitioner before their Lordships of the Privy Council that the petitioner had a right of appeal under Ss. 109 and 110, as the case satisfied the requirements of S. 110 as regards the value of the subject matter even if the maintenance alone was regarded as in dispute, and that the Appellate Court had varied the decision of the first Court. The petitioners desired to appeal only with regard to the amount of their maintenance. Their Lordships in granting leave limited the leave to the question of maintenance. The Allahabad judgment dealt with the question whether, when an appeal had been dismissed by the High Court, who had at the same time accepted cross-objections so as to vary the decree granted by the lower Court, to the prejudice of the appellant, the appellate judgment could be regarded as one varying the decision of the trial Court so as to give the appellants a right of appeal under S. 110. It was held that the appellate decree was not an affirming one. In the course of his judgment, Sulaiman, Ag. C. J. remarked :

There is no reason why we should introduce new words in the section (110) and say that the expression 'affirms the decision of the Court below' necessarily means 'affirms the decision substantially' If the decree of the Court below has been varied, no matter to what extent, the decree cannot be one of affirmance : p. 149.

We are asked to act on the principle indicated here, namely that if the appellate decree in any way and to any extent varies the decision of the Court below, the decree cannot be an affirming one and a certificate must be granted if the requirements of S. 110 as to value are satisfied. As has been remarked by my learned brother Bhide, J. in 11 Lah 465,³ the Privy Council judgment throws some doubt on the correctness of the rulings to the effect that a slight variation in the decree in the matter of costs, interest, etc., being not a variation in substance, is not sufficient to convert a decree of affirmance into a decree of variation. Nor, in view of the Privy Council's judgment, can it be said that where a higher Court differs from a lower in favour of the applicant only, the decree must be regarded as one of affirmance. It is not necessary, however, to discuss the applicability of these rulings to the pre-

1. Annapurnabai v. Ruprao, A I R 1925 P C 60 = 86 I C 504 = 51 Cal 969 = 51 I A 319 (P C).

2. Nathu Lal v. Raghubir Singh, A I R 1932 All 65 = 135 I C 234 = 54 All 146 = 1931 A L J 968 (S B).

3. Asa Ram v. Kishen Chand, A I R 1930 Lah 554 = 123 I C 523 = 11 Lah 465 = 31 P L R 236.

sent case, the facts of which are peculiar, because, as I will show below, the judgment which the applicants seek to impeach did not decide any point against them.

The judgment in *Annapurnabai v. Rup-rao*¹ has been discussed and explained by the Calcutta Court in 31 C W N 572⁴ and 62 Cal 257,⁵ by the Madras Court in A I R 1936 Mad 881⁶ and by the Patna Court in 163 I C 139.⁷ In *Narendra Lal v. Gopendra Lal*⁴, the original decree gave the appellant a certain share in the property in dispute but the Appellate Court in confirming the original decree in every other respect modified it in respect of the share, giving him the whole share he claimed. The question was whether the Appellate Court had varied the original decree so as to entitle the applicant to a certificate under the provisions of S. 110. Rankin, C. J., referring to the Privy Council judgment, observed :

We may take it, I think, that where the amount is a question in dispute, the fact that the Courts differ and that the High Court differs in favour of the applicant (for leave to appeal) does not mean that the decision is one of affirmance, but I am not . . . prepared in a case of this kind to say that because on a totally different point, namely a point about the share, the applicant has succeeded and succeeded altogether, so that he had no further grievance in that matter; he can, without showing a substantial question of law, have a right to litigate upon other points upon which the Courts have been in agreement.

In *Bibhutibhusan Dutta v. Sreepati Dutta*,⁵ Mukerji, A. C. J. and Ghosh, J. accepted this view as to the true effect of *Annapurnabai's case*,¹ holding that it did not lay down that in every case where the decree of the High Court is not a decree merely dismissing the appeal, the decree is to be taken as not a decree of affirmance. "The enormity of the opposite view," the learned Judges remarked, is so very great that a far more clear and express pronouncements of the Judicial Committee would be necessary to uphold it.

The same view of the Privy Council's judgment was adopted by the Madras

Court in A I R 1936 Mad 881⁶ and by the Patna High Court in 163 I C 139.⁷ With great respect I agree with the opinion expressed by Rankin, J. regarding the applicability of the judgment of their Lordships of the Privy Council to cases where the appellate Court has varied the lower Court's decree only by modifying it on a single point and that completely in favour of the applicant for leave to appeal. In the present case the applicants asked for no relief in respect of the Churu property when they came before us on appeal other than a declaration that they were owners of half of it. This declaration they were granted upon the defendants expressing their agreement that it should be granted. There was no contest on this point. It is true that their memorandum of appeal complained that the lower Court erred in not giving a decree for partition of the Churu property and for the taking of account in respect of it, but no request for any relief other than the declaration granted by us was made by their counsel before us. Their claim in respect of this property was then fully satisfied and applying the principle accepted in *Bibhutibhusan Dutta v. Sreepati Dutta*⁵ and the cases in which the judgment in that case has been approved and followed, I would hold that the judgment against which the applicants desire to appeal affirmed the lower Court's decision on all points on which we had to adjudicate, and dismiss this application with costs.

Bhide, J.—I agree.

V.B.B./R.K. Application dismissed.

A. I. R. 1937 Lahore 714

BHIDE, J.

Id Mohammad and another —

Defendants—Appellants.

v.

Mirza Maqbul Hussain, Plaintiff and
another, Defendant—Respondents.

Second Appeal No. 198 of 1937, Decided on 23rd April 1937, from decree of Dist. Judge, Ludhiana, D/- 7th December 1936.

Injunction—Suit for—Relief—Person building upon neighbour's land without ascertaining boundaries of his site—Encroachment not noticed by neighbour—Order of compensation held not justifiable but demolition should be ordered.

A person without taking precaution to ascertain boundaries of his site, built after encroaching

4. *Narendra Lal v. Gopendra Lal*, A I R 1927 Cal 543=103 I C 65=31 C W N 572=45 C L J 426.

5. *Bibhutibhusan Dutta v. Sreepati Dutta*, A I R 1935 Cal 146=154 I C 1072=62 Cal 257=38 C W N 1174.

6. *Venkitasami Chettiar v. Sakkutti Pillai*, A I R 1936 Mad 881=166 I C 251=71 M L J 590=I L R (1937) Mad 121.

7. *Mahabir Prasad v. Brij Mohan Prasad*, A I R 1936 Pat 553=163 I C 139=15 Pat 637=17 P L T 602.

upon the neighbour's land, who was in service elsewhere. Although he occasionally used to come, he did not notice the building erected. The building site was not easy to acquire :

Held : that mere award of compensation was not justifiable. Order of demolition should be upheld. [P 715 C 1]

Shamair Chand — for Appellants.

Shabir Ahmad — for Respondent — (Plaintiff).

Judgment. — This second appeal arises out of a suit for possession of certain land which was alleged to have been encroached upon by the defendants. The encroachment has been proved and there is no good ground for interference with the finding of fact in this respect. The learned counsel for the defendant-appellant however urged that the Court should not have at any rate ordered demolition of the building erected on the encroached area. The learned District Judge has remarked that the defendant had agreed to remove the building if any encroachment were proved. This does not appear to be correct and the learned counsel for the plaintiff-respondent concedes this. But there seems to be evidence to support the learned counsel's contention that plaintiff had acquiesced in the construction of the building. Defendants' witnesses admit that plaintiff was not present when the building was constructed. He was in service elsewhere and though he used to come occasionally he may not have noticed the encroachment. Building site is not easy to acquire and the learned counsel for the plaintiff stated that the plaintiff himself wants to build on this land. Defendants do not appear to have taken any precautions to ascertain the boundaries of this site. In the circumstances mere award of compensation does not seem to be justifiable. I dismiss the appeal with costs.

K.B./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 715

TEK CHAND, J.

Raja Ram — Defendant — Appellant.
v.

Daulat Ram, Plaintiff and another,
Defendant — Respondents.

Second Appeal No. 647 of 1936, Decided on 2nd December 1936, from decree of Dist. Judge, Ludhiana, D/-28th February 1936.

Partnership — Lease deed signed by one partner alone, purporting to be on behalf of

firm—Co-partner is bound by lease — Co-partner working in leased property, instead of repudiating lease — Co-partner ratifies transaction by acts and conduct and is bound by it.

Where a partner alone in a firm signs a lease deed purporting to be on behalf of the firm, it is binding on co-partner. If the co-partner instead of repudiating the lease actually works in the leased property from the commencement of the tenancy and continues to do so during the period of dispute, the co-partner by his subsequent acts and conduct ratifies the transaction and is liable under it, even though the partner signing is not originally authorized by him : 16 Bom 568, *Disting.* ; 19 Mad 471, *Rel. on.* [P 715 C 2 ; P 716 C 1]

J. L. Kapur — for Appellant.

Indar Dev for *Achhru Ram* and
Achhru Ram — for Respondents.

Judgment.—This appeal arises out of a suit instituted by Daulat Ram against Raja Ram and Jhagroo Mal as proprietors of firm Banarsi Das-Ram Partap for recovery of rent and ejectment. The suit was contested by Raja Ram, who denied his liability on the ground that he was not a partner in the firm Banarsi Das-Ram Partap and that he never took the premises on rent from the plaintiff nor did he recognize the plaintiff as landlord. The trial Court overruled these objections and decreed the suit against both defendants. Raja Ram appealed to the District Judge, who affirmed the decision of the trial Court. The learned District Judge has found as a fact that Raja Ram was a partner in the firm Banarsi Das-Ram Partap on 1st April 1931, when the rent deed was executed and the tenancy started. Mr. J. L. Kapur for the appellant has attempted to challenge this finding urging that it is not based on any evidence. But after hearing him, I see no force in the contention. The evidence, direct and circumstantial, referred to by the learned District Judge, clearly supports his conclusion. It must therefore be taken as finally settled that the appellant was a partner in the firm on the date on which the lease was executed.

Mr. Kapur next argued that, even if Raja Ram was a partner in the firm, he is not liable as the entry in the plaintiff's bahi evidencing the lease was executed by Jhagroo Mal alone and was not signed by him. The entry, however, purports to be on behalf of firm Banarsi Das-Ram Partap, and though it is signed by Jhagroo Mal alone, there is no doubt that he was acting on behalf of the firm and his act is binding on his co-partner. Mr. Kapur

referred me to 16 Bom 568,¹ but the facts of that case are clearly distinguishable. There the lease had been taken not in the name of the firm but in that of one of the partners only. In the case before me however, Jhagroo Mal expressly signed the entry on behalf of the firm. Mr. Kapur relies particularly on the obiter dictum at p. 574 of the report of the Bombay case where Farran, J. observed that where one partner takes a lease of premises in his own name, though on behalf of the partnership and with the assent of his partners, the latter are not liable to be sued by the lessor for the rent reserved by the lease. This proposition appears to me too widely expressed and, with all respect, I am unable to agree with it. This dictum has been expressly dissented from by the Madras High Court in 19 Mad 471,² at p. 476 where certain rent-deeds executed by some partners were held to be binding on others, when it was proved that the executants had not exceeded their power in taking the leases and the other partners took part in the management of the affairs of the firm after the leases had been taken. In the present case Raja Ram, instead of repudiating the lease, actually worked in the shop in dispute from the date of the commencement of the tenancy and continued to do so during the period in dispute. Therefore, even if he had not originally authorized Jhagroo Mal to take the lease from the plaintiff, he, by his subsequent acts and conduct, ratified the transaction and is clearly liable to pay the rent and to surrender possession of the demised premises to the plaintiff. The appeal fails and is dismissed with costs.

V.B.B./R.K.

Appeal dismissed.

1. Ragoonathdas Gopaldas v. Morarji Jutha, (1892) 16 Bom 568.

2. Chinnaramanuja Ayyangar v. Padmanabha Pillaiyan, (1896) 19 Mad 471.

A. I. R. 1937 Lahore 716

COLDSTREAM, J.

Madho Parshad — Plaintiff —

Decree-holder — Appellant.

v.

Kura and others — Defendants —

Judgment-debtors — Respondents.

Exn. Second Appeal No. 216 of 1937, Decided on 7th June 1937, from order of Dist. Judge, Ambala, D/- 23rd November 1936.

Punjab Debtors' Protection Act (2 of 1936), S. 4—Applicability — Land of agriculturist attached in execution—Collector reporting that land could not be leased out—Proceedings consigned to record-room by order dated 4th July 1936—Punjab Debtors' Protection Act coming in force on 6th June 1936—Court held ought to have transferred proceedings to Collector under S. 4.

The Debtors' Protection Act is not retrospective. The intention of the Act is that if an attachment and temporary alienation of land are ordered by a civil Court at any time after the passing of the Act in execution of a decree, the whole execution proceedings are to be transferred to the Collector.

[P 717 C 1]

The land of an agriculturist judgment-debtor was attached in execution of a decree. The Collector on being moved by the Court reported that the land was only sufficient for the maintenance of the judgment-debtor and he could not recommend a lease of it. The Court, therefore, consigned the proceedings to the record room by an order dated 4th July 1936. The Punjab Debtors' Protection Act had in the meantime come into force on 6th June 1936 :

Held : that the Court ought to have transferred the proceedings to the Collector under S. 4, Punjab Debtors' Protection Act. Although there was no express order for temporary alienation, the order of attachment must be read as one for temporary alienation in view of the provisions of the Alienation of Land Act : A I R 1937 Lah 560, Ref.

[P 717 C 1]

Shamair Chand — for Appellant.*J. R. Agnihotri* — for Respondents.

Judgment.—Madho Parshad, the appellant, having obtained an award decree against Kura, Daya Ram and Kirpa Ram, the respondents, for Rs. 1445, future interest and costs, applied for execution by attachment of the judgment-debtors' land. The judgment-debtors are admittedly agriculturists whose land cannot be sold in execution of a decree. On 30th April 1935 the land was attached. The Collector was moved by the Court under the rules, and on 4th May 1936 he reported that as the land was only sufficient for the judgment-debtors' maintenance, he was not prepared to recommend a lease of the land. Therefore the executing Court consigned the proceedings to the record room. Meanwhile the Punjab Debtors' Protection Act had come into force on 6th June 1936. The decree-holder appealed to the District Judge on the ground that when the Collector made his report on 4th May 1936, the Court was not bound to exempt any of the judgment-debtors' land from temporary alienation as is required by S. 5, Debtors' Protection Act, which was not then in force. The District Judge dismissed the appeal holding that on the date when the executing Court passed its order, that is to

say 4th July 1936, that Act had come into force. Against this order Madho Parshad has appealed and it is contended by counsel on his behalf that if the proceedings of the executing Court were subject to the provisions of the Debtors' Protection Act, the whole proceedings for the attachment and alienation of land should have been transferred to the Collector.

The Debtors' Protection Act is not retrospective and had a lease been completed of the land before 6th June 1936, the matter might have been different, but it seems to me that the intention of the Act was that if an attachment and temporary alienation of land were ordered by a civil Court at any time after the passing of the Act in execution of a decree, the whole execution proceedings were to be transferred: *see* 39 P L R 243.¹ It is true that in this case the Court did not expressly order temporary alienation but in view of the provisions of the Alienation of Land Act, the order of attachment must be read as one for temporary alienation of the attached land. There is therefore force in the contention that the proceedings ought to have been transferred. For the respondents it is objected that to order the transfer now, will merely prolong the proceedings unnecessarily. But presumably an appeal would lie on the revenue side against an order passed by the Collector in the transferred proceedings and the judgment-debtors cannot have it both ways by taking advantage of S. 5 and at the same time depriving the decree-holder of the advantage of an appeal open to the decree-holder as a result of a compliance with S. 4 of the Act. I accordingly accept this appeal, set aside the order of the executing Court and order that Court to transfer the proceedings to the Collector under the provisions of S. 4, Debtors' Protection Act. No order as to costs.

S.O./R.K.

Appeal allowed.

1. *Telu v. Jethu Mal*, A I R 1937 Lah 550=39 P L R 243.

A. I. R. 1937 Lahore 717

ABDUL RASHID, J.

Ibrahim and another — Petitioners.

v.

Emperor.

Criminal Revn. Petn. No. 1511 of 1936,
Decided on 20th January 1937.

Criminal Trial—Security bond—Forfeiture
—*M* required not to commit breach of peace
—Dispute between Sikhs and Muslims because of cow sacrifice by Muslims in village owned by Sikhs—*M* sacrificing cows openly near abadi of his village but outside its boundaries — Place of sacrifice near thoroughfare and under pipal tree and not in slaughter house near by—*M* held had committed wrongful act and his security could be forfeited.

There was a dispute in a certain village owned by Sikhs, between the Sikhs and the Mahomedans on a question of killing cows on the occasion of Id-ul-Zuha. As there was likelihood of breach of peace, the leader of the Mahomedans was required to execute a security bond under S. 107, Criminal P. C., binding himself not to commit a breach of the peace for one year. The Mahomedan sacrificed a cow a few yards away from the village, in the boundaries of another village but within sight of the village owned by the Sikhs. The sacrifice of the cow was made under a pipal tree near a thoroughfare although a slaughter house of the other village was close by. The Mahomedans claimed to sacrifice cows as a matter of religious right. Moreover due to the act of sacrifice there was a likelihood of a serious riot:

Held: that the Mahomedan under the circumstances had committed a wrongful act within the meaning of S. 298, I. P. C., and the security bond under S. 107, Criminal P. C., could be forfeited: 32 All 571, *Disting.*; 33 All 775, *Rel. on*

[P 718 C 2]

B. A. Cooper — for Petitioners.

R. C. Soni for Govt. Advocate —

for the Crown.

Order.—Kaluwal Kotla is a small village in the Hoshiarpur District. The proprietors of the village are mostly Sikhs. There are some Mahomedan inhabitants. For the last ten years, there has been a great deal of tension between the Sikhs and Mahomedans on the question of cow sacrifice on the occasion of Id-ul-Zuha. The Mahomedans insist that they are entitled to sacrifice cows on the occasion of the *Id* while the Sikhs object to cow sacrifice in a village owned by them. During the last three years a few persons on each side have been bound down under S. 107, Criminal P. C., in order to avoid a riot taking place on the occasion of the *Id*. Ibrahim, petitioner, who is the leader of the Mahomedans in this village, was bound down under S. 107, Criminal P. C., by the order of Khan Ghulam Sarwar Khan, Magistrate, First Class, Hoshiarpur, on 14th March 1935. On that date he executed a bond in the sum of Rs. 2,000 binding himself not to commit a breach of the peace or to do any act that may probably occasion a breach of the peace for a period of one year. The District Magistrate of Hoshiarpur also passed an

order under the rules framed under S. 43, Punjab Laws Act, prohibiting cow sacrifice on the occasion of Id-ul-Zuha in village Kaluwal Kotla. After the *Id* prayers had been recited, Ibrahim sacrificed a cow at a distance of about 100 yards from the abadi of Kaluwal Kotla, in the area of an adjoining village Khokhran, in an open place under a pipal tree. The place where the cow was sacrificed is visible from the abadi of Kaluwal Kotla and is near a public thoroughfare. Within a few hundred yards of the place where Ibrahim sacrificed the cow is an approved slaughter house where a cow could be sacrificed without being seen by the inhabitants of Kaluwal Kotla. Ibrahim, however, did not use the slaughter house for the purpose of sacrificing the cow.

Notices were issued to Ibrahim and Chughatta to show cause why the personal bond of Ibrahim and the surety bond of Chughatta executed by them on 14th March 1935, under S. 107, Criminal P. C., should not be forfeited. They stated that sacrificing cows at the time of Id-ul-Zuha was a religious right of the Mahomedans and that by sacrificing the cow in the area of village Khokhran they had not done any wrongful act. This contention was not accepted by the trial Court and the personal bond of Ibrahim and the security bond of Chughatta were ordered to be forfeited to the extent of Rs. 1,000. Against this decision Ibrahim and Chughatta preferred an appeal in the Court of the District Magistrate. Their appeal having been dismissed, they have preferred a petition for revision to this Court.

It was strenuously urged by the learned counsel for the petitioners that a person can be bound down under S. 107, Criminal P. C., if he is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace. It was urged that as the cow was sacrificed in area of village Khokhran, the petitioners did not do any wrongful act and the lower Courts were, therefore, not justified in forfeiting the bonds to the extent of Rs. 1,000. Reference was made in this connection to 32 All 571¹ where it was held that to justify an order under S. 107, Criminal P. C., the Magistrate must believe that the person against whom

he makes the order is about to commit a breach of the peace or to disturb the public tranquillity or to do some wrongful act that may occasion a breach of the peace. The fact that a Mahomedan in the exercise of his legal right to kill cows may perhaps give offence to his Hindu neighbours and induce them to commit a breach of the peace is no ground for binding over Mahomedans. In my view, the contention raised on behalf of the petitioners is devoid of all force. In the Allahabad case referred to above, two cows were actually sacrificed by the Mahomedans, but they were sacrificed quietly and secretly in a mosque and in a private house. The fact of the sacrifices was reported by the persons concerned to the police. The sacrifices were carried out so quietly that the Hindus did not know of them until the report was made. In these circumstances it was held that the Mahomedans concerned ought not to have been bound down under S. 107, Criminal P. C. In the present case Ibrahim sacrificed the cow within sight of the abadi of village Kaluwal Kotla in an open place and under a pipal tree. There was a slaughter house in the neighbourhood but that was not availed of by Ibrahim. The cow was killed near a public thoroughfare. Ibrahim by killing a cow at such a place and within sight of the non-Muslim inhabitants was doing an act with the deliberate intention of wounding the religious feelings of the non-Muslim inhabitants of Kaluwal Kotla. It was held in 33 All 775² that:

Persons who performed religious ceremonies in a place not set apart for the purpose and where no such ceremonies had been performed before, and who did so with the deliberate intention of triumphing over, insulting, and wounding the religious feeling of their neighbours, committed a wrongful act and one which might probably occasion a breach of or disturb the public tranquillity within the meaning of S. 107, Criminal P. C.

It is in evidence that a serious riot would have taken place, had the police and the Magistrates not arrived at the place of the sacrifice immediately. In these circumstances Ibrahim was certainly doing a wrongful act within the purview of S. 298, I. P. C., and was thus provoking a breach of the peace. For the reasons given above, I dismiss this petition for revision.

B.D./R.K.

Petition dismissed.

2. Emperor v. Murli Singh, (1911) 33 All 775= 13 I C 922=13 Cr L J 170.

1. Mahomed Yaqub v. Emperor, (1910) 32 All 571=6 I C 454=11 Cr L J 355=7 A L J 649.

A. I. R. 1937 Lahore 719

ABDUL RASHID, J.

Singh Ram—Plaintiff—Appellant.

v.

Firm Khubi Ram-Sheo Ram and others—Defendants—Respondents.

Second Appeal No. 3 of 1937, Decided on 14th June 1937, from decree of Dist. Judge, Hissar, D/. 19th August 1936.

Civil P. C. (1908), O. 3, R. 4—Vakalatnama executed in favour of Advocate P for filing appeal—P unable to file appeal—Appellant taking same vakalatnama to another pleader L who accepting same by signing it—Name of L not written in vakalatnama—Appeal presented by L held properly filed.

Where the vakil is actually intended by a party to act on his behalf and does so act, formal defects in the vakalatnama, such as keeping the name of another pleader in the vakalatnama, are of no importance. [P 719 C 2]

S engaged an Advocate P to file an appeal on his behalf. A vakalatnama had been executed in favour of P and was made over to him. P subsequently informed S that he was unable to file the appeal. S took the memorandum of appeal and the vakalatnama from P and handed it over to L, another pleader, for the purpose of filing the appeal. L accepted the same vakalatnama by signing it and presented the appeal. The name of L was not written in the body of the vakalatnama. S made a statement that he had engaged L to file the appeal and had handed over the papers to him:

Held: that the appeal was properly filed by L: A I R 1936 All 636, *Foll.*; A I R 1932 Lah 134, *Rel. on.* [P 720 C 1]

Mukand Lal Puri and Bishen Narain—for Appellant.

Shamair Chand—for Respondents.

Judgment.—On 21st December 1935 Singh Ram instituted a suit for a declaration to the effect that a house and a walled enclosure situated at village Pabra belonged to him and were not liable to attachment and sale in the decree obtained by the firm Khubi Ram-Sheo Ram, defendant 1, against Tokha and Karam Chand, defendants 2 and 3. The suit was dismissed by the trial Court. Singh Ram preferred an appeal. This appeal was filed by Lala Dev Raj, Pleader. A preliminary objection was taken before the learned District Judge that the appeal had not been properly presented as the name of L. Dev Raj did not appear in the body of the vakalatnama filed by him. This objection was accepted by the learned District Judge and the appeal was dismissed with costs. Against this decision the plaintiff has preferred a second appeal to this Court.

It appears that Babu Parkash Chandra, Advocate, had originally been engaged by Singh Ram to file an appeal on his behalf. A vakalatnama had been executed in favour of B. Parkash Chandra and was made over to him. The plaintiff then went away to his village. B. Parkash Chandra, however, wrote to the plaintiff to come back to Hissar as he could not file his appeal on account of some business that he had at Lahore. The appellant came to Hissar, took the memorandum of appeal and other documents and the vakalatnama from B. Parkash Chandra and made it over to L. Dev Raj for the purpose of filing the appeal. Lala Dev Raj accepted the same vakalatnama by signing it and presented the appeal. In the body of the vakalatnama it is stated that B. Parkash Chandra has been appointed by the plaintiff as his vakil. At the bottom of the vakalatnama the signatures of both B. Parkash Chandra and Lala Dev Raj appear. The vakalatnama is also signed by Singh Ram plaintiff. The learned District Judge recorded the statements of Singh Ram, plaintiff, and Lala Dev Raj, pleader, on oath. Lala Dev Raj stated that the plaintiff had engaged him as his vakil for filing the appeal, that he had paid him his fees and that he had been asked to sign the vakalatnama. He signed the vakalatnama as well as the grounds of appeal on the same day. Singh Ram has also stated on oath that as B. Parkash Chandra had to go to Lahore, he went and engaged Lala Dev Raj to file his appeal and handed over the papers to him. It is therefore clear that Singh Ram appointed Lala Dev Raj as his vakil and Lala Dev Raj accepted the vakalatnama and charged a fee for filing the appeal. The only defect in the vakalatnama is the omission of the name of Lala Dev Raj in the body of the vakalatnama. It was held in a Division Bench ruling of the Allahabad High Court reported in A I R 1936 All 636¹ that:

Where the vakil is actually intended by a party to act on his behalf and does so act, formal defects in the vakalatnama, such as keeping the name of another pleader in the vakalatnama, are of no importance.

The reported case is practically on all fours with the present case. I respectfully agree with the view adopted by the Allahabad High Court. In A I R 1932

1. Ram Sarup v. Bhagwati Prasad, A I R 1936 All 636=164 I C 725=58 All 912=1936 A L J 586.

Lah 134,² the counsel who presented the appeal had a power of attorney from the appellant, but owing to an oversight his name had not been entered in the body of the vakalatnama. It was held that this was merely an accidental omission, and as there was no doubt as to the authorization of the counsel and as to the party who authorized him to act on his behalf, such an omission did not invalidate the act of the counsel and the appeal must be deemed to have been properly filed. The learned District Judge has relied on 36 All 46.³ This ruling was not followed by the Allahabad High Court in 43 All 392.⁴ I am of the opinion that the appeal was properly filed by Lala Dev Raj in the Court of the District Judge in this case. I, accordingly, accept this appeal, set aside the judgment and the decree of the learned District Judge, dated 19th August 1936, and remand the case to him for the hearing of the appeal presented to him on the merits. The Court-fee levied on the memorandum of appeal in this Court shall be refunded; in other respects the parties will bear their own costs in this Court. The counsel for the parties have been directed to cause their respective clients to appear in the Court of the learned District Judge, Hissar, on 12th July 1937.

S.C./R.K. *Appeal allowed.*

2. Mangal Singh v. Babu Singh, A I R 1932 Lah 134=134 I C 114=33 P L R 74.

3. Mahomed Ali Khan v. Jasram, A I R 1914 All 536=23 I C 464=36 All 46=11 A L J 1015.

4. Shambhu Nath v. Badri Das, A I R 1921 All 210=61 I C 410=43 All 392=19 A L J 183.

A. I. R. 1937 Lahore 720

BHIDE, J.

Firm Lala Lorind Chand—Judgment-debtor — Appellant.

v.

Firm Lorind Chand-Parma Nand — Decree-holder — Respondent.

Exn. First Appeal No. 47 of 1937, Decided on 19th May 1937, from order of Senior Sub-Judge, Jhelum, D/- 9th November 1936.

Civil P. C. (1908), S. 149 — Applicability — Execution application in time — Court-fee payable in decree but no time fixed for payment — Court-fee paid late — Application is not time barred and Court can allow time.

Section 149, Civil P. C., does apply to an executing Court also. Hence where the court-fee is payable in the decree itself but no time has been fixed for its payment, the execution Court can allow time under S. 149 and the execution application cannot be time barred where it was filed in time even though the court-fee was paid late. A I R 1931 All 380, *Disting.* [P 720 C 2]

Shamair Chand — for Appellant.

Ghulam Rasul and Mohd. Amin — for Respondent.

Judgment.—The only point raised in this appeal is that the application for execution dated 9th December 1932 was time barred. The decree was passed on 9th December 1929 and the application was prima facie within time, but it is urged that court-fee was payable in the decree and this was not paid till sometime afterwards. It appears however that the decree did not fix any time for payment of court-fee. The learned counsel for the appellant admitted that his allegation to the contrary in ground No. 1 of the appeal is wrong. The court-fee was paid within the time allowed by the execution Court and hence the execution Court held that the application was within time by virtue of the provisions of S. 149, Civil P. C. The learned counsel for the appellant urged that S. 149, Civil P. C., did not apply to an executing Court but there is nothing in the wording of the section to support the contention. The learned counsel next referred to A I R 1931 All 380.¹ But the facts of that case were different. The Court had become functus officio there after passing the decree and hence the Court could not allow any extension of time. In the present instance, no time had been fixed for the payment of the court-fees in the decree itself and I see no reason why the execution Court could not allow time for the purpose when the question was raised before it for the first time. I dismiss the appeal with costs.

R.W./R.K. *Appeal dismissed.*

1. Bhullan v. Bachoha Kunbi, A I R 1931 All 380=131 I C 520=53 All 580=1931 A L J 324.

* A. I. R. 1937 Lahore 721

COLDSTREAM AND DIN MOHAMMAD, JJ.

Messrs. Ganga Ram-Balmokand —
Assessee — Petitioner.
v,

Commissioner of Income-tax —
Opposite Party.

Civil Ref. No. 4 of 1937, Decided on 30th April 1937, made by Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, Lahore, D/- 18th January 1937.

* (a) Income-tax Act (1922), Ss. 13 Proviso and 23 (3)—Proviso to S. 13 is not excluded by S. 23 (3)—Words 'method employed' in Proviso to S. 13 are used in ordinary sense which mean 'manner in which accounts are kept' — While making assessment under S. 23 (3), Income-tax Officer can invoke proviso to S. 13 if he is unconvinced as to reliability of assessee's accounts.

The Proviso to S. 13, Income-tax Act, is not excluded by S. 23 (3). On the other hand, it is always available to be utilized under S. 23 (3) whenever those circumstances arise which justify its use. There is no warrant for restricting the interpretation to be put on the words 'method employed' as used in the second alternative dealt with in the Proviso to S. 13. In ordinary parlance these words convey the idea of 'the manner in which accounts are kept' and the same sense is conveyed in the Proviso. If the accounts tendered by the assessee are found to be incorrect or incomplete, if they are 'cooked' or 'fictitious', it will not be wrong to say that the method of accounting is such that it is not possible to deduce the total income of the assessee therefrom. Therefore, while making assessment under sub-s. (3) of S. 23, it is open to the Income-tax Officer to invoke the Proviso to S. 13 if after examining the accounts produced by the assessee under S. 22 (4) or after recording the evidence led by the assessee under S. 23 (2), he still remains unconvinced as to the reliability of the assessee's accounts, and considers that they do not serve as a safe guide in calculating the assessee's taxable income. The absence of words 'assess to the best of his judgment' in sub-s. (3) of S. 23, Income-tax Act, does not take away the power vested in the Income-tax Officer by the terms of the Proviso to S. 13: *A I R 1929 Rang 102, Rel. on.* [P 724 C 1, 2; P 725 C 1]

(b) Income-tax Act (1922), Ss. 13 Proviso and 23 (3)—Evidence—No burden is imposed on income-tax authority to prove by positive evidence that accounts are unreliable—Question of unreliability of accounts is question of fact and is to be determined by Income-tax Officer alone—His finding cannot be disturbed unless it is capricious and injudicial.

No burden is imposed on the Income-tax authorities to prove by 'positive evidence' that the accounts are unreliable or that the figure at which they assess is the correct figure. In the first place, the question of unreliability of accounts is a question of fact and primarily falls for the determination of the Income-tax authorities alone. If, therefore, it is once decided by them that the accounts are fictitious or unreliable, their finding

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cannot be disturbed, unless of course it is altogether capricious and injudicial. Secondly, the Income-tax Officer cannot be fixed with the knowledge of the state of the assessee's account and cannot subsequently be expected to lead evidence to prove the assessee's transactions for the accounting year. It cannot be denied that there must be some material before the Income-tax Officer on which to base his estimate, but no hard and fast rule can be laid down by any Court to define what sort of material is required on which his estimate can be founded. The law nowhere contemplates that the Income-tax Officer is a party to the case in the sense in which an ordinary party to a civil litigation is, and he cannot be expected to be in possession of such evidence as would be required from an ordinary litigant to refute the case of his adversary: *Case law referred.* [P 725 C 2; P 726 C 1; P 730 C 2]

(c) Income-tax Act (1922), S. 66—Proceedings before Income-tax Officer are not judicial proceedings—He should only conduct himself in accordance with rules of justice, equity and good conscience—High Courts' power of control is limited.

The proceedings before the Income-tax Officer are not judicial proceedings in the sense in which this term is ordinarily used, and all that is required of him is to proceed without bias and give sufficient opportunity to the assessee to place his case before him, or in other words, to conduct himself in accordance with the rules of justice, equity and good conscience; and the control exercisable by the High Court on the Income-tax Officer in these circumstances is slight. [P 732 C 2]

(d) Income-tax Act (1922), S. 66 (3) and (5)—Sub-s. (3) does not lay down that question is to be formulated by Court issuing mandamus—Sub-s. (5) does not confine High Court to decision of question of law as formulated by Commissioner or Court issuing mandamus.

Under sub-s. (3) of S. 66, Income-tax Act, it is nowhere laid down that a question is to be formulated by the Court issuing the mandamus. Further, sub-s. (5) of the same section also does not confine the High Court to the decision of the question of law as formulated by the Commissioner or the Court issuing the mandamus. On the other hand, it confers upon it full power to decide the question of law in the form it actually arises from the statement of the case made by the Commissioner. It is therefore competent to High Court to clarify the issue of law involved in the statement of the case made by the Commissioner and to give its considered opinion on the question really at issue; not to do so would amount to a refusal to do its duty: *A I R 1929 All 819, Rel. on.* [P 732 C 2]

Kirpa Ram Bajaj — for Petitioner.

Jagan Nath Aggarwal —

for Opposite Party.

Din Mohammad, J.—This is a reference under sub-s. (3) of S. 66, Income-tax Act, and has arisen in the following circumstances: The assessee is a firm of soap manufacturers carrying on business in partnership under the style of Messrs. Ganga Ram-Balmokand, hereinafter called

'the firm', and the assessment in dispute relates to the year 1933-34. In response to a notice issued under S. 22, Income-tax Act, the firm furnished a return of its total income during the 'previous year' to which were appended trading and profit and loss accounts certified by a firm of professional accountants. On receipt of this return, the Income-tax Officer served a notice on the firm under sub.s. (4) of S. 22 and in compliance therewith, the firm produced certain books of account, mainly consisting of a rokar (day book) and purchase and sale registers. The Income-tax Officer then served a notice on the firm under sub.s. 2 of S. 23, Income-tax Act, and in pursuance thereof the firm produced the head of the family and a munim in support of its accounts. The Income-tax Officer was, however, not satisfied with the correctness or the completeness of the firm's accounts and he consequently raised the value of sales from Rs. 3,14,456 to Rs. 3,50,000. He further calculated the taxable income of the firm by discarding the rate of profit shown by the firm and applying a flat rate of Rs. 7 per cent. to the amount determined by him. From this order the firm preferred an appeal to the Assistant Commissioner and, in the first instance, he remanded the case to the Income-tax Officer for further inquiry. On receipt, however, of the report of the Income-tax Officer on remand, he declined to interfere with the order of assessment. It appears that both these officers were, among other things, mainly impressed by : (1) the absence of any stock register and vouchers ; (2) the inability of the firm to prove the total consumption of raw materials as shown in its accounts ; (3) the huge amount of sales, and the abnormally low rate of profit shown by the firm as compared with the other soap manufacturers in the locality.

The firm demurred to the action taken by these officers and applied to the Commissioner under S. 66 to refer the questions of law formulated by it to this Court. To this the Commissioner did not agree, and the firm then applied to this Court under sub.s. (3) of S. 66. The position taken by the firm was that, inasmuch as the Commissioner had expressly stated that S. 13, Income-tax Act, had not been applied in this case, the Income-tax Officer was bound under the terms of sub.s. (3) of S. 23, Income-tax Act, to assess the firm on the material placed before him

and not arbitrarily to make his own estimate of the total income that had accrued to the firm and of the profits that had arisen therefrom. Impressed by the argument advanced by the firm, a Division Bench of this Court admitted the case to a hearing and ultimately issued a mandamus to the Commissioner to state the case. The question propounded by this Court was in the following term :

Whether there was no material for the finding of the income-tax authorities arrived at under S. 23 (3) of the Act that the sales should be raised from the figure shown in the books to Rs. 3,50,000 and that the correct flat rate for the calculation of profit was Rs. 7 per cent. on the sales?

In the statement submitted by the Commissioner he has reiterated his assertion that the Proviso to S. 13 cannot be applied to such cases, that the accounts of the firm were not rejected under that proviso, that it is not necessary to reject the accounts under the Proviso before what is called a 'random assessment' can be made and that S. 23 (3) independently of the Proviso to S. 13 empowers an Income-tax Officer to make an estimate of the taxable income to the best of his judgment. He has, however, indicated at the same time that, if this Court be not prepared to agree with him, the assessment in dispute can still be maintained under S. 23 (3) read with the Proviso to S. 13.

I have given the case my most earnest consideration, in view of the importance of the question involved and the tenacity with which the Commissioner has adhered to his position and have come to the conclusion that the Commissioner's view as regards the inapplicability of the Proviso to S. 13 in such cases is not maintainable, and that he is equally wrong in suggesting that under S. 23 (3), unaffected by the Proviso to S. 13, an Income-tax Officer can make any estimate that he likes, even though it is not supported by any relevant or admissible material on the record.

It will be necessary to examine the whole scheme of the Act in this connexion. Chap. 1 deals with "Charge of Income-tax" and consists of two sections, viz. Ss. 3 and 4, the former dealing with "Charge of Income-tax" and the latter with "Application of the Act". Chap. 2 is headed "Income-tax Authorities" and comprises one section only, viz., S. 5, describing the various authorities that can be appointed under the Act. Then comes Chap. 3 dealing with "Taxable Income"

and comprising Ss. 6 to 17. S. 6 enumerates the various heads of income chargeable to income-tax, and Ss. 7 to 12 deal in detail with the six heads of income mentioned in S. 6. Of these, S. 10 relates to 'business', S. 11 to 'professional earnings' and S. 12 to 'other sources'; S. 13 is restricted in its application to Ss. 10, 11 and 12 only, and deals with the method of computation of income under these sections. The substantive part of this section lays down that taxable income, profits and gains shall be computed, for the purposes of Ss. 10, 11 and 12, in accordance with the method of accounting regularly employed by the assessee. The Proviso to this section provides for those cases in which either no method of accounting is found to have been regularly employed by the assessee or the method employed is such that in the opinion of the Income-tax Officer the income, profits and gains cannot properly be deduced therefrom. In such cases the Act confers upon the Income-tax Officer a wide authority to make a computation upon such basis and in such manner as he may determine. It may be remarked here that S. 13 does not deal with assessment itself and consequently no order of assessment can be made under this section. Ss. 14 to 16 of Ch. 3 deal with exemptions, and S. 17 empowers an Income-tax Officer to reduce a tax in certain circumstances.

Chapter 4 is headed "Deductions and Assessment," and comprises Ss. 18 to 39. It will be seen that all those sections deal with actual assessment or questions arising from or relating to such assessment. Ss. 18 to 21 concern such matters as are not before us and they may therefore be ignored. S. 22 is headed "Return of Income." Sub-ss. (1) and (2) of S. 22 enjoin the various classes of assessee to submit returns by a prescribed date. Sub.s. (3), among other things, extends the time for the submission of a return. Sub.s. (4) empowers the Income-tax Officer to serve a notice on the assessee to produce such accounts or documents as the said officer may require. S. 23 is headed "Assessment." Sub.s. (1) of this section enjoins the Income-tax Officer to assess the total income of the assessee on the basis of the return furnished by him in case the said officer is satisfied that the return made by the assessee is correct and complete. If however the said return is not found to be correct or complete, sub.s. (2) autho-

rizes the Income-tax Officer to serve a notice on the assessee either to attend at his office or to produce, or to cause to be there produced, any evidence on which such person may rely in support of the return.

Then follows sub.s. (3) which is the centre of controversy before us. This subsection lays down that:

The Income-tax Officer after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points, shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment.

Sub-section (4) empowers the Income-tax Officer "to make the assessment to the best of his judgment" in cases enumerated there. Out of the other sections in this Chapter, Ss. 27, 30 and 37 are the only sections which require consideration. S. 27 lays down that in certain cases the assessee may apply to the Income-tax Officer to cancel the assessment and empowers the Income-tax Officer to do so and to make a fresh assessment in accordance with the provisions of S. 23, if he is satisfied that the grounds urged by the assessee are sufficient. S. 30 provides for appeals against assessment in those cases, among others, in which an assessee objects to the amount or rate at which he is assessed under S. 23 or S. 27 and S. 37 confers certain powers of a civil Court for certain specified purposes on the income-tax authorities. It will thus appear that the only section under which the method of computing income for the purposes of Ss. 10, 11 and 12 is provided for is S. 13 and the only section under which an assessment can be made, or in other words, the amount or rate at which an assessee is to be assessed is S. 23 and no other. To divorce therefore S. 13 from S. 23 or to consider that they occupy detached positions, one having no connexion with the other, is to misappreciate the whole tenor of the income-tax law.

The Commissioner seems to think that the words "method employed" as used in the Proviso to S. 13 bear a restricted sense and consequently the second alternative in the Proviso can be invoked only in those cases where there is a defect in the method itself apart from the accounts. On the other hand, he places a very wide interpretation on the word "assess" as used in sub.s. (3) of S. 23, and considers that the Income-tax Officer can by virtue of this

term make a "random assessment" in all those cases where the accounts are defective apart from the method. Counsel for the firm supports the Commissioner in so far as his interpretation of the words "method employed" is concerned, and contends that as the method employed by the firm had not been objected to before by the Income-tax Department, and has not been found to be defective in the present assessment, the Proviso to S. 13 was out of the question. He however joins issue with the Commissioner on the interpretation of the word "assess" as used in S. 23 (3), and argues that as the Proviso to S. 13 could not be brought into play, the Income-tax Officer was bound to give his decision on the evidence before him and could not make an estimate of his own without placing material on the record to support his decision. He founds his argument on the absence of any such language in S. 23 (3) in relation to the power of the Income-tax Officer as is used in the Proviso to S. 13 or S. 23 (4). In my view however this argument is fundamentally wrong. As already stated, the Proviso to S. 13 is not excluded by S. 23 (3). On the other hand, it is always available to be utilized under S. 23 (3) whenever those circumstances arise which justify its use. It was not necessary for the Legislature to mention specifically in S. 23 (3) what an Income-tax Officer should do in case the assessee's evidence in support of his accounts is held to be unreliable, inasmuch as S. 13 had already made a provision for that contingency and it would have been obviously redundant to repeat in sub.s. (3) of S. 23 what had already been provided for in S. 13.

There is also no warrant for restricting the interpretation to be put on the words "method employed" as used in the second alternative dealt with in the Proviso to S. 13. In ordinary parlance these words convey the idea of 'the manner in which accounts are kept' and I see no reason to doubt that the same sense is conveyed here. If the accounts tendered by the assessee are found to be incorrect or incomplete, if they are 'cooked' or 'fictitious', it will not be wrong to say that the method of accounting is such that it is not possible to deduce the total income of the assessee therefrom. In my view therefore, while making an assessment under sub-section (3) of S. 23, it is open to the Income-tax Officer to invoke the Proviso

to S. 13, if after examining the accounts produced by the assessee under S. 22 (4) or after recording the evidence led by the assessee under S. 23 (2), he still remains unconvinced as to the reliability of the assessee's accounts, and considers that they do not serve as a safe guide in calculating the assessee's taxable income. In 3 I T C 397,¹ three Judges of the Rangoon High Court held that where the assessee's accounts were not found to be genuine, the Income-tax Officer was under no obligation either in law or in common fairness to set out to the assessee all the reasons therefor, and could proceed to make an assessment upon materials, albeit insufficient. In the course of their judgment, the learned Judges remarked :

We quite fail to see why a party who has made a false return should be in a better position than one who has failed to make any return. Mr. Cowasjee urges that S. 13 only applies to the method and does not empower the income-tax authority in any way. We cannot see any such limitation in the words of the proviso In this case, the Income-tax Officer clearly considered that the income, profits and gains could not properly be detected from respondent's statement, since he decided that that statement was not genuine. He was consequently entitled to adopt whatever method he thought best. Adapting the words of the Lord President in *Macpherson's case*^{1a} already alluded to, "if O. L. C. (the assessee) does not choose to make an honest statement of account so that the amount of profits may be strictly determined, he cannot complain if a random assessment is made upon him by the Crown".

With these observations I am in respectful agreement and consider that this judgment lays down good law and interprets the Proviso to S. 13 in the only correct manner possible. The Commissioner has in this connection referred to an English case reported in 18 Tax Cas 320² and remarked that "it expressly separates the questions of accounting method from questions whether the accounts were 'cooked'", but apart from the fact that the language and requirements of the English Act are different, that decision does not help him in the least. It rather goes against him, as it was observed in that case that if the income-tax authorities had expressly stated that the accounts were unreliable,

1. *Commr. of Income-tax v. Chan Lo Chwan*, A I R 1929 Rang 102=115 I O 897=7 Rang 281=3 I T C 397 (F B).

1a. *Macpherson & Co. v. Moore*, (1912) S O 1315=6 Tax Cas 107.

2. *Anderson v. Commr. of Inland Revenue*, (1933) 18 Tax Cas 320.

no interference with their estimate would have been called for. The Lord President remarked :

It may be they did find in fact that the books were badly kept, or that the profit and loss account had not been accurately made out; but, if that is what they meant as a reason for refusing to look at what was undoubted evidence, they should have said so. There might then have been no difficulty whatever in sustaining their conclusion, which would have been to some such effect as this: 'The books and accounts you produce are not satisfactory for one reason or another. That being so, we cannot regard them as proving your profits.'

Lord Sands added :

If the Commissioners had said that they thought the accounts were 'fictitious' or 'cooked', then that would have justified their disregarding these accounts, and in those circumstances, we might not have been justified in scrutinizing the grounds upon which they were proceeding and in considering whether they were supported by evidence which would satisfy a Court of law.

Lord Morison observed :

In this case, the Commissioners have not made a statement to the effect that they were not satisfied with the statement of the profits which the appellant delivered to them, and on that ground he agreed to the case being remitted back to the Commissioners for their further consideration. Further, even if it be assumed for the sake of argument that the word 'method' has been used in any restricted sense in the second alternative in the Proviso to S. 13, in a case like this, where an Income-tax Officer rejects the assessee's accounts on the ground that he keeps no stock registers or vouchers or that he employs an inventory system only which is not conclusive in the matter of determining the true state of affairs, it cannot be said that he does not attack the method of accounting and can therefore make no use of the Proviso to S. 13 in determining the taxable income. From whatever point of view one looks at the case, it passes one's comprehension why the Proviso to S. 13 cannot be invoked in such cases in the rejection of an assessee's accounts. It is true, as urged by the firm, that in Ch. 4 of the Act, it is sub-s. (4) of S. 23 alone that empowers an Income-tax Officer to assess to the best of his judgment and that too in case of default, but it does not follow that the absence of these words in sub-s. (3) of S. 23 takes away the power vested in the Income-tax Officer by the terms of the Proviso to S. 13. An assessment always follows the computation of income and if the computation of income for the purposes of assessment in certain

circumstances lies in the discretion of the Income-tax Officers, he can, while disposing of a case under sub-s. (3) of S. 23, compute the income in any manner that he deems best, when those circumstances exist, and assess accordingly. I am further disposed to think that the reason why the provisions of the Proviso to S. 13 were not enacted in S. 23 itself or in the Chapter relating to assessment was that S. 13 did not apply to three out of the six chargeable heads of income enumerated in S. 6, while S. 23 or for that matter the whole of Ch. 4 was of general application and as S. 13 applied only to Ss. 10, 11 and 12, it was considered by the Legislature to be a convenient arrangement to insert it immediately after those sections. If the position maintained by the firm were accepted, it would lead to anomalous results, as in that case it would be impossible for the Income-tax Officer to disregard the accounts submitted by the assessee, however unreliable they might appear to be. It is preposterous to say that even if the accounts are found to be fictitious or 'cooked', the Income-tax Officer is bound to assess the author of those accounts on those accounts alone. In 7 Rang 635,³ the assessee had not submitted full accounts and the Assistant Commissioner had made his own estimate of the assessee's income and had enhanced the assessment. Three Judges of the Rangoon High Court upheld the order, remarking at the same time that it was an order under S. 23 (4).

Counsel for the firm has strenuously contended that as the law allows the Income-tax Officer to examine evidence suo motu to test the truthfulness of the accounts, he can come to his own finding only on the basis of the evidence so examined. I am not, however, prepared to hold that any burden is imposed on the income-tax authorities to prove by 'positive evidence' that the accounts are unreliable or that the figure at which they assess is the correct figure. In the first place, the question of the unreliability of accounts is a question of fact and primarily falls for the determination of the income-tax authorities alone. If, therefore, it is once decided by them that the accounts are fictitious or unreliable, their finding can-

3. Commr. of Income-Tax v. E. M. Chettyar Firm, AIR 1930 Rang 4=122 IC 898=7 Rang 635 (S B).

not be disturbed unless, of course, it is altogether capricious and injudicial. Secondly, the Income-tax Officer cannot be fixed with the knowledge of the state of the assessee's account and cannot consequently be expected to lead evidence to prove the assessee's transactions for the accounting year. Under S. 106, Evidence Act, the onus of proving a fact always lies on the person within whose knowledge especially that fact is and it cannot be denied that it is the assessee who is the person contemplated by this section. I do not mean to say that an Income-tax Officer has a blank cheque to proceed in utter disregard of all judicial considerations. What I intend to convey is that in matters like these a very wide discretion vests in the income-tax authorities in view of the exigencies of the case, and the control exercisable on them is very meagre. What alone has to be seen in such cases is whether the discretion has been judicially exercised and if it is once found to be so exercised, no Court can interfere with the order. In other words a Court cannot replace its own discretion for the discretion already exercised by a competent tribunal.

There are numerous Indian cases where neither the finding of the income-tax authorities as to the falsity or incompleteness of the assessee's accounts was disturbed nor was the estimate of assessment made by them in consequence thereof. In 7 I T C 207,⁴ a Division Bench of the Bombay High Court in a case where the Income-tax Officer had found that the income of the assessee could not be deduced from his books and had consequently made an assessment charging the assessee a fair rate of interest on the capital shown in his books, held that the computation was properly made under the Proviso to S. 13. In 7 I T C 403,⁵ a Bench of this Court remarked that the question of rejection of the accounts as unreliable was expressly reserved to the assessing officer and consequently upheld an estimate made by him of the taxable income of the assessee. In 6 I T C 127,⁶ again a case from this

Court, an estimate of income made by the Income-tax Officer on the ground that the accounts were incomplete, was maintained and approved. In 5 I T C 302,⁷ the learned Additional Judicial Commissioner of Nagpur upheld an assessment made on the basis of the personal experience gained by the Income-tax Officer from the working of other factories and refused to issue a mandamus to the Commissioner holding that no question of law was involved.

In 9 Pat 240,⁸ which went on appeal to their Lordships of the Privy Council (12 Pat 318⁹), it had been held that the question whether the assessee's accounts do or do not disclose his real income is a question of fact as to which the finding of the Commissioner of Income-tax is binding on the High Court. It was further observed that although, on the one hand, the amount at which an assessee's income is assessed must be based on evidence, on the other hand it is the duty of the assessee to keep such accounts as will show what his real income is, and on that basis the additions to the assessee's return made by the Income-tax Officer were upheld. Their Lordships of the Privy Council do not appear to have taken any exception to these remarks. On the other hand they have supported the action of the Income-tax Officer in adopting a method of his own under the Proviso to S. 13 while discarding the assessee's method, adding only that the computation of the Income-tax Officer is not exempt from examination on appeal, and if it is found to be wrong, the assessment may be set aside. In 9 I T C 178,¹⁰ a Division Bench of this Court presided over by the Hon'ble Chief Justice and Monroe, J. observed :

The argument placed before us for the assessee is that the books, which were arithmetically correct, were produced to the Income-tax authorities and unless they could show that items in those books were incorrect, they were bound to accept the books; in other words, it was necessary for the Income-tax authorities to produce evidence or cause to be produced evidence before themselves showing that the statements in the books or some of them were false. We cannot agree

4. Narayan Atmaram v. Commr. of Income-Tax, A I R 1934 Bom 378=152 I C 972=36 Bom L R 818=7 I T C 207.

5. Jiwan Shah-Maya Shah v. Commr. of Income-Tax, A I R 1935 Lah 840=160 I C 129=7 I T C 403.

6. Rochi Ram v. Commr. of Income-Tax, Punjab & N. W. F. Provinces, (1932) 6 I T C 127.

7. Ibrahimbai Mulla Badruddin v. Commr. of Income-tax, (1931) 5 I T C 302.

8. Maharajadhiraj of Darbhanga v. Commr. of Income-Tax, A I R 1930 Pat 81=126 I C 833=9 Pat 240=11 P L T 799 (S B).

9. Commr. of Income-Tax, B. & O. v. Kameshwar Singh of Darbhanga, A I R 1933 P C 108=142 I C 437=60 I A 146=12 Pat 318 (P C).

10. Nathu Ram v. Commr. of Income-tax, Punjab, N. W. F. and Delhi Provinces, (1935) 9 I T C 178.

with the proposition advanced by the learned counsel, though we do certainly agree with his contention that the procedure of the assessing authority is a judicial one and that he ought to act upon evidence. But, in our opinion, in a case such as this he has the right to require a satisfactory explanation and in the absence of a satisfactory explanation or if he receives an explanation which he cannot believe, the assessing officer is entitled to regard the account as unsatisfactory That is all that has been done in the present case by the Income-tax Officer.

It will appear that in that case circumstantial evidence was regarded as sufficient to support the conclusion arrived at by the Income-tax Officer. In 9 I T C 256,¹¹ which again is a case from this Court, the Income-tax Officer had added a sum of Rs. 10,000 to the income shown in the books, as he had come to the conclusion that there were omissions in the accounts the total value of which could not be accurately determined and that the accounts did not represent a complete and correct version of the actual business. While remarking that the Income-tax Officer should have proceeded on judicial principles, the existence of one omission was held to be sufficient by a Division Bench of this Court to justify the action taken by the Income-tax Officer. In 103 I C 38,¹² the learned Judicial Commissioner of Nagpur held that the mere filing of a verified statement by an assessee and his statement on oath in support of it are not sufficient to discharge the onus which lies on him to prove the correctness of the return submitted by him; the onus is not under such circumstances shifted to the Income-tax authorities to disprove the correctness of the return. Counsel for the firm has in this connexion referred to 7 I T C 386¹³ and 104 I C 336,¹⁴ but with all respect I am constrained to remark that those judgments have not viewed the question from a proper angle of vision.

In 7 I T C 386,¹³ a Division Bench of this Court has held that the mere fact that a company shows a low rate of profit was no reason for the Income-tax Officer to

reject the total profits nor was the absence of a stock register, which the company had admittedly never used before, and that the use of the Proviso to S. 13 for the purpose of introducing an arbitrary manner of computing the profits was not justified. In my view, this judgment proceeds on a wrong basis when it criticises adversely the reasons of the Income-tax Officer for rejecting the accounts. Whether the account-books are reliable or not is a question of fact to be determined solely by the Income-tax Officer, and when he gives reasons for doing so, which are not apparently capricious or injudicial, it is not possible to disturb his finding merely on the ground that the material in support of those reasons is meagre or insufficient. In 104 I C 336,¹⁴ the learned Additional Judicial Commissioner of Nagpur has observed as follows :

The Income-tax Department must always bear in mind that the normal presumption is in favour of good faith and not of bad faith on the part of the assessee. The applicant was therefore entitled to ask the Crown to start with a presumption that the entry in the khata was made in the ordinary course and with no intention to conceal the income, and it was for the Crown to prove the contrary. Suffice it to say at this stage that as the learned Commissioner does not seem to have approached the case from the right point of view of burden of proof, there is likelihood of the conclusions drawn by him being vitiated for want of proper appreciation of facts or for misapplication of the law to them. This Court can always test the soundness in point of law of the conclusions drawn from proved facts.

For this view, reliance has been placed on a quotation from a judgment of their Lordships of the Privy Council [A I R 1918 P C 92] which reads as follows : "The proper legal effect of proved facts is a question of law." I may say with all respect that the learned Additional Judicial Commissioner has misapplied this quotation in so far as to justify his interference with conclusions of fact arrived at from proved facts. Such conclusions are themselves questions of fact and not questions of law. In 3 T C 289¹⁵ at pp. 290 and 291, Lord Esher observed :

It is a question of the true inference which they had to draw as a matter of evidence upon the facts which they had in evidence before them. But to draw an inference of fact from evidence before you is not a question of law at all. The inference is a question of fact just as much as the direct evidence of fact, and it would be an appeal against facts, which we are not entitled to entertain, and consequently

11. Tara Chand Pohni Mal v. Commr. of Income-tax, Punjab, N. W. F. and Delhi Provinces, A I R 1936 Lah 836=167 I C 775=9 I T C 256.

12. Bhikaji Vyankatesh v. Commr. of Income-tax, Nagpur, A I R 1927 Nag 283=103 I C 38.

13. Pioneer Sports Ltd. v. Commr. of Income-tax, Punjab and N. W. F. Provinces, A I R 1934 Lah 876=158 I C 1122=16 Lah 489=37 P L R 740=7 I T C 386.

14. Jambudas v. Income-tax Commissioner, A I R 1927 Nag 336=104 I C 336.

15. The Queen v. Special Commr. of Income-tax, (1898) 3 Tax Cas 289.

there can be no mandamus I say, if that is a question of fact, the mere question of whether they appreciated the evidence rightly or not, and whether they drew a right inference of fact, is not the subject matter of a mandamus at all. There would be an appeal if there was an appeal, but there is none.

So far as the jurisdiction of the Income-tax authorities under the provisions of the Indian Income-tax Act is concerned, the law is practically the same as in England. They are the judges of fact while this Court is a judge of law and all those matters which are barred from the jurisdiction of the Courts in England are similarly barred here. The judgments relied upon by the firm, therefore, do not render any help to the firm at all. In his statement, the Commissioner has referred to certain English decisions, among others, 4 T C 98,¹⁶ 8 T C 591,¹⁷ 14 T C 165¹⁸ and 14 T C 552.¹⁹ Counsel for the firm has urged that those decisions are not strictly in point and can be of no avail in the determination of the question now before us, as the procedure under the English Act is to some extent different from the procedure prescribed under the Indian Act. This is no doubt so, but the general principle enunciated in those judgments, in my opinion, can be of some use in deciding who is the proper person to declare whether the accounts furnished by the assessee can be relied upon or not.

In 4 T C 98,¹⁶ the Commissioners held that they were not bound to act upon the evidence produced by the assessee and fixed a valuation of their own on the lease produced by him. The Lord President remarked that it is plain that the Commissioners were not concluded by the production of that lease, and that they were entitled to rely upon other competent sources of information in order to form the best judgment they could. In the same case, Lord Adam observed :

Now the Commissioners in considering that . . . did not disregard it, but they did not treat it as conclusive, and they were entitled in terms of S. 63 to fix the assessment according to their own belief and judgment. And that is exactly what they did.

In 8 T C 591,¹⁷ the question for the opinion of the Court was whether, in the absence of evidence in support of the appeal, the Commissioners were right in con-

firmed the additional assessments. Rowlatt, J. observed :

These people have only attacked it by producing a certificate of a discredited accountant, saying it ought to be taken in spite of what had happened, and the Commissioners said : 'No, we want evidence'; and they did not get it, and therefore, they confirmed the assessments. I think they were right'.

In 14 T C 165,¹⁸ the assessee had delivered to the Inspector of Taxes balance sheets and trading and profit and loss accounts of their business and the Inspector asked that the accounts should be certified by a qualified accountant. On the assessee's refusal to comply with this requirement, an estimate was made by the Additional Commissioners which was far in excess of the return made by the assessee. Rowlatt, J. remarked :

Then what happened was that he (the Inspector of Taxes) was not satisfied. He was perfectly entitled not to be satisfied ; I cannot conceive why he should not be dissatisfied. It was not because he was raising a point of law; it was because he was saying 'I am not satisfied'. The matter goes before the Additional Commissioners and they are not satisfied I cannot possibly try that question. These are gentlemen who are entrusted with the duty of fairly administering the law and if it had been said that they were merely masquerading, that they had been pretending to do their duty but that they arbitrarily and injudiciously said : "We will not listen to you and we perversely declined"—if that was the sort of case against them, of course I cannot try it here ; it would be impossible to try it here. If you want to say anything of that sort, you should go for mandamus against them to hear a point of law.

In 14 T C 552,¹⁹ the Commissioners refused to accept the accounts submitted by the assessee as satisfactory evidence and adjourned the proceedings on the assessee undertaking to furnish accounts certified by an accountant. Such accounts were, however, not produced and the random assessment was confirmed. It was held that the question was one of fact which it was for the Commissioners to determine. Here again Rowlatt, J. made some pertinent remarks, which are reproduced below :

Somebody must decide whether the statements are wrong or not : I have no jurisdiction to do anything. Somebody must be the ultimate judge of everything in this world. Questions of fact are decided by the Commissioners, and they have decided it. It may be unfortunate for you or not ; but their decision ends the matter.

It will be obvious from the quotations reproduced above that very wide discretion vests in the Income-tax authorities to accept or not the accounts tendered by

16. *Stocks v. Sulley*, (1903) 4 Tax Cas 98.

17. *Tudor and Onions v. Ducker*, (1924) 8 Tax Cas 591.

18. *Hunt & Co. v. Joly*, (1928) 14 Tax Cas 165.

19. *Wall v. Cooper*, (1929) 14 Tax Cas 552.

the assessee and that it is only in the case of capricious and injudicial exercise of that discretion that any question of law can be said to arise; otherwise their judgment is final. This takes us to another question mooted at the Bar as to how far the proceedings before an Income-tax Officer can be called judicial proceedings and to what extent he is bound to conduct himself in the manner in which an ordinary Court of law is expected to proceed. Counsel for the firm has referred to S. 37, Income-tax Act and contended that, to all intents and purposes, all proceedings before an Income-tax Officer under S. 23 (3) are judicial proceedings and that he is bound by all the rules of evidence which bind an ordinary Court. In this connection he has mainly relied on 2 I T C 176;²⁰ 7 Lah 201;²¹ 5 I T C 159;²² 5 I T C 303;²³ A I R 1936 P C 269²⁴ and 58 All 200.²⁵ In 2 I T C 176,²⁰ the Commissioner had, in the statement of the case submitted by him, remarked that if an assessee withheld evidence that he alone could furnish and on which alone an accurate computation of his income could be based, there was no way open to the Income-tax Officer but to make an estimate of his income and to base his assessment on such materials as were available to him. On this, a very brief judgment was delivered by a Division Bench of this Court composed of LeRossignol and Martineau, JJ. upholding the assessment. In the course of the judgment, however, the following observation was made:

We agree with the petitioner that the Income-tax Officer should be governed in his procedure by judicial considerations. He should base the assessment on legal and not mere hearsay evidence,

20. Brijnath v. Commr. of Income-tax Lahore, A I R 1926 Lah 283=94 I C 156=2 I T C 176.

21. Duni Chand Dhani Ram v. Commr. of Income-tax, A I R 1926 Lah 161=94 I C 614=7 Lah 201=27 P L R 836.

22. Muhammad Hayat Haji Muhammad v. Commr. of Income-tax, Punjab and N. W. F. Provinces, A I R 1931 Lah 87=131 I C 81=12 Lah 129=32 P L R 563=5 I T C 159 (F B).

23. Binraj Hukumchand v. Commr. of Income-tax, A I R 1931 Cal 683=134 I C 933=58 Cal 1446=35 C W N 589=54 C L J 550=5 I T C 303.

24. Commr. of Income-tax, Bombay Presidency and Aden v. Bombay Trust Corporation Ltd., A I R 1936 P C 269=164 I C 18=63 I A 408=60 Bom 900 (P C).

25. Gopinath Naik v. Commr. of Income-tax, U. P., A I R 1936 All 286=162 I C 103=58 All 200=1935 A L J 1342.

which may be the evidence of his officers or of members of the public, but without evidence that items which do not appear in an account should find a place therein, he is not entitled to assume on mere general hearsay that those items should appear in the account.

The case in 7 Lah 201²¹ was decided by the same Division Bench about the same time when the previous case was decided. There also the learned Judges observed that the proceedings of an Income-tax Officer were of a judicial nature and that the Proviso to S. 13 did not justify him in estimating the income of the assessee arbitrarily, by guess work, or without indicating the basis of his assessment. They further remarked that the evidence produced by the assessee should be accepted unless rebutted by other admissible evidence and not by mere hearsay. The case in 5 I T C 159²² was decided by five Judges of this Court and the principal judgment was delivered by Sir Shadi Lal, C. J. In the course of his judgment the learned Judge made the following remarks which, in my view, shake the authority of both the cases discussed above:

The proceedings taken by him (the Income-tax Officer) are not regulated by strict judicial principles, and he has sometimes to depend on materials which would be wholly inadmissible in a Court of law. At the same time he cannot act in a purely arbitrary manner... It is true that a finding of fact recorded by him cannot be impeached even when it is not based upon any material, nor is it open to the High Court to say with respect to a particular case that the assessment has been made contrary to the rules of justice and good conscience. The High Court is, however, entitled to make a pronouncement upon the meaning of S. 23 (4) and to lay down that the Income-tax Officer cannot be said to make an assessment to the best of his judgment, if he is not guided by the dictates of justice and fair play. An assessment resting upon the whim and caprice of the Income-tax Officer cannot be elevated to the dignity of an assessment made to the best of his judgment.

It would be obvious from this quotation that the discretion vested in an Income-tax Officer in cases where he is entitled by law to make an estimate to the best of his judgment is fettered only by this consideration: that it should be exercised in accordance with the dictates of natural justice. It is true that the same learned Judge in reference to S. 23 (3) observed:

After he (the Income-tax Officer) has received the evidence produced by the assessee and also the evidence, if any, which he has himself called for on the points specified by him, he must assess the income on the material produced before him and has no right to make an assessment to the best of his judgment,

but this remark, in my view, was not intended to apply to those cases where the Proviso to S. 13 had come into play. In 5 I T C 303,²³ Sir George Rankin, C. J. observed:

When as in this case an assessee produces his books for the year of account and complies with any other requirements as to specific documents so that he is assessed in the ordinary way under S. 23 (3) and not as being in default, the Income-tax authorities cannot assess him upon any figure of profits not warranted by evidence which they have before them.

These observations, too, like those made in 5 I T C 159,²² take no account of the Proviso to S. 13. In A I R 1936 P C 269,²⁴ the following observations were made by their Lordships of the Privy Council which have been relied on by the firm:

However sceptical the attitude which the Income-tax Authorities may think fit to adopt towards the declarations offered and the entries made in the Bombay company's books, it is necessary, if the assessment made is to be supported, that there shall be some evidence to show that. . . . The only rule of evidence to be discovered in the Evidence Act having any bearing upon this question would appear to be Illus. (d) to S. 114, Evidence Act. . . . This rule cannot in the present case supply the want of evidence.

These observations of their Lordships of the Privy Council however are not relevant to the present case, as their Lordships were not considering a case of unreliable accounts. Their Lordships have, in continuation of this passage, observed as follows:

Their Lordships are not considering a case in which by reason of the entries in an assessee's books of account being inconsistent, or by reason of positive evidence showing that certain entries in his books are erroneous or fraudulent, the value of the books as evidence can be considered as overthrown.

This quotation clearly indicates that, in cases of unreliable, inconsistent or fictitious accounts, an Income-tax Officer can disregard the books of account tendered by the assessee and proceed in any manner that he deems best. In 58 All 200,²⁵ two Judges had differed and the case was then referred to Sir Shah Muhammad Sulaiman, C. J. Niamatullah, J., while discussing sub-s. (3) of S. 23, observed as follows:

It seems to me that where the Income-tax Officer acts under S. 23 (3), the assessment must be based on 'evidence'. The obligation to hear evidence which may be produced by the assessee or may be called for by the Income-tax Officer himself is a clear index to the further obligation to 'determine' the sum payable by the assessee on the basis of the evidence adduced in the case. Where the assessee himself does not produce any

evidence, the Income-tax Officer cannot be at a loss to make the assessment, because the law has given him ample powers to call for evidence. . . . Where the assessee himself does not produce any evidence, comparatively slight evidence, coupled with the inference drawn from the conduct of the assessee, will be enough for compliance with the requirements of S. 23 (3).

Bajpai, J. disagreed with Niamatullah, J. in the conclusions arrived at by him and the case was placed before Sir Shah Muhammad Sulaiman, C. J. He agreed with Niamatullah, J., but observed:

I see no objection in the Income-tax Officer or the Assistant Commissioner acting upon the assessment for the previous year if no better evidence is forthcoming. An Income-tax Officer, and for the matter of that an Assistant Commissioner, is not bound to accept either the correctness of the return or the genuineness and completeness of the account books produced before him or the truth of the evidence produced by the assessee. If he has ground for believing that such evidence is untrustworthy, he can certainly reject it. Having rejected such evidence, it is open to him to pursue the inquiry further and take more evidence which he considers necessary; but he is not bound to do so. In the absence of any better evidence, he is certainly entitled to fall back on the assessment of income made during the previous year, even though that assessment might have been the 'best judgment estimate'.

The above discussion of the authorities relied on by the firm would show that there is no warrant for urging that in spite of the unreliability of the books of account produced by the assessee, the Income-tax Officer is bound to base the assessment on those accounts in the absence of any positive evidence to the contrary. It cannot be denied that there must be some material before the Income-tax Officer on which to base his estimate, but no hard and fast rule can be laid down by any Court to define what sort of material is required on which his estimate can be founded. The law nowhere contemplates that the Income-tax Officer is a party to the case in the sense in which an ordinary party to a civil litigation is, and he cannot be expected to be in possession of such evidence as would be required from an ordinary litigant to refute the case of his adversary. The following authorities may with advantage be referred to in this connexion in order to have a clear conception of the rights and obligations of the income-tax authorities, and the true nature of the proceedings conducted before them. In 3 I T C 48,²⁶ the assessee produced evidence in support of his return which was rejected by the

26. In re Baghat Halwai, (1928) 3 I T C 48.

Income-tax Officer and the assessment was consequently based on estimate from inspection of the shop conducted either personally or vicariously. The same objection as here was raised to the assessment made and the case was taken before a Division Bench of the Allahabad High Court. The learned Judges refuted the argument advanced by the assessee and observed as follows:

They (the assessment of proceedings) are judicial proceedings in the colloquial sense, because the Income-tax authorities have to make up their minds judicially, with fairness to the public and to the assessee, between whom they stand, after taking all the facts, or such facts as they can, into account, but they are not judicial proceedings in the strictly scientific sense of the term, so as to raise questions in appeal to some higher tribunal as to whether the gentleman making the assessment has decided against the weight of evidence, or decided a fact of which there is no evidence, or has disregarded evidence which he ought to have taken into account. To open the door for one moment to such a contention would turn this Court into a Court of Appeal of fact with regard to every assessment in which the assessee was dissatisfied with the decision. . . . He (the Income-tax Officer), and he alone, is to determine the amount of the assessment and the sum payable. It is a question of fact of which he is the sole judge, and he must use his best judgment first to obtain, and secondly to weigh, the available evidence. It is to some extent a private inquisition; it is confidential, it is not supposed to be disclosed to the public, and it is certainly not open to review, especially because frequently the Income-tax Officer is compelled to draw inferences and to consider evidence which might not be justified by the Evidence Act. . . . If an assessee wants to be treated fairly, the least he can do is to treat the Income-tax Officer fairly and lay the facts fully before him. . . . The sooner it is understood that these are questions of fact, and questions of fact only and that the slightest attempt to open the door to appeals to this Courts on what are alleged to be mixed questions of law and fact but are really only questions of a fair figure of assessment, must be discouraged, the better.

In 12 Pat 318,⁹ their Lordships of the Privy Council upheld the action of the High Court in maintaining an assessment based on guess work. The remarks made by the learned Chief Justice of the Patna High Court with which their Lordships agreed are quoted in the judgment and are contained in 9 Pat 240⁸ at pp. 270 and 271. The learned Chief Justice no doubt remarked that the Income-tax Officer was not entitled to make a guess without evidence, but the evidence that was considered sufficient in that connection was the state of affairs in the previous years coupled with the fact that the assessee had a large mortgage loan busi-

ness. This received the approval of their Lordships, who further observed :

If the assessee wished to displace the Taxing Officer's estimate, it was open to him to adduce evidence on all the purchase transactions during the year and of the financial results thereof which he apparently made no attempt to do.

In 56 Cal 39,²⁷ Sir George Rankin, C. J. observed as follows :

It has been said that the Income-tax officer must proceed in a judicial manner and S. 37 has been mentioned in this connection. Fundamentally, no doubt, the Income-tax Officer must proceed in a judicial spirit and come to a judicial conclusion upon properly ascertained facts; though I would point out that the Income-tax Officer is not a Court, he has not the procedure of a Court, and he is to some extent a party or judge in his own case. . . . It is idle and absurd for a person who has books of account and deliberately withholds them to complain of not being treated in a judicial manner. The judicial manner is a manner which proceeds upon evidence, and the basis of the statute is to see that available evidence is produced. It is then and only then that the assessment is to be made upon a judicial consideration of the evidence. Otherwise it is to be made 'to the best of his judgment' and *brevi manu*.

It may be remarked that in the present case too, the Income-tax Officer had reason to believe that the firm had not produced certain account books which they possessed and this circumstance was used as one of the reasons for not placing reliance on the accounts submitted by the firm. In 52 T L R 143,²⁸ it was held that in making assessments and in dealing with appeals, the Commissioners are not in the position of Judges deciding an issue inter partes but are exercising a statutory authority and a statutory duty which is to assess or estimate the amount on which, to the best of their judgments, the subject ought to be taxed. The Master of the Rolls observed :

They are not in the position of Judges deciding an issue between two particular parties. Their obligation is wider than that. It is to exercise their judgment on such material as comes before them and to obtain any material which they think is necessary and which they ought to have, and on that material to make the assessment or the estimate which the law requires them to make.

In (1915) A C 120²⁹ at p. 132, Viscount Haldane, L. C., defined the expres-

27. In *The matter of Harmukh Rai Dulichand*, A I R 1928 Cal 587=114 I C 90=56 Cal 39=32 C W N 710 (S B).

28. *Rex v. Income-Tax Special Commissioners; Ex Parte, Elmhirst*, (1935) 52 T L R 143.

29. *Local Government Board v. Arlidge*. (1915) A C 120=84 L J K B 72=111 L T 905=79 J P 97=30 T L R 672=12 L G R 1109.

sion 'acting judicially' in the following manner :

They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same.

In the same judgment at p. 137 Lord Shaw observed :

The judgments of the majority of the Court below appear to me, if I may say so with respect, to be dominated by the idea that the analogy of judicial methods or procedure should apply to departmental action. Judicial methods may, in many points of administration, be entirely unsuitable, and produce delays, expense, and public and private injury. The department must obey the statute and if administration is to be beneficial and effective, it must be the master of its own procedure.

At p. 138 his Lordship added :

But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are *ex necessitate* those of Courts of justice is wholly unfounded.

It is unnecessary for me to dwell further on the subject or to try to formulate the principles deducible from the judgments discussed above, as they come out clearly in the quotations themselves. Suffice it to say that an Income-tax Officer is invested with plenary powers in the matter of assessment, and drastic though at first sight these powers may appear to be, they are designed to impress upon the minds of the assesseees that if they expect equity from the Income-tax authorities, they must do equity themselves and come with clean hands before them.

My conclusions therefore are : (1) that both the Commissioner and the firm are wrong in thinking that the Proviso to S. 13 is not meant to be applied to the rejection of accounts in a case like this where accounts are found to be unreliable or fictitious; (2) that the Proviso to S. 13 can be utilized in computing the income of the assessee when on weighing the evidence produced under S. 23 (3), the finding of the Income-tax Officer is adverse to the assessee; (3) that under the terms of the Proviso, the Income-tax Officer is the only proper person to decide whether the accounts are such as reflect the true income of the assessee, and if he holds the contrary, he is at liberty to compute the taxable income of the assessee upon such

basis and in such manner as he may determine; (4) that the proceedings before the Income-tax Officer are not judicial proceedings in the sense in which this term is ordinarily used, and that all that is required of him is to proceed without bias and give sufficient opportunity to the assessee to place his case before him, or in other words, to conduct himself in accordance with the rules of justice, equity and good conscience; and (5) that the control exercisable by the High Court on the Income-tax Officer in these circumstances is slight.

Counsel for the firm has finally urged that in view of the fact that the question as formulated by the Court issuing the mandamus leaves us no choice to determine any other aspect of the case but that envisaged in the question, we are bound to give a reply to the question put within the terms of the question. I may say at once that I do not consider that the proposition advanced by the counsel is legally sound. Under sub-s. (3) of S. 66, the High Court, if not satisfied of the correctness of the Commissioner's decision, is empowered to require the Commissioner to state the case and to refer it. It is nowhere laid down that a question is to be formulated by the Court issuing the mandamus. Further, sub-s. (5) of the same section lays down that upon the hearing of any such case, the High Court is empowered to decide the questions of law raised thereby. This sub-section also does not confine the High Court to the decision of the question of law as formulated by the Commissioner or the Court issuing the mandamus. On the other hand, it confers upon it full power to decide the question of law in the form it actually arises from the statement of the case made by the Commissioner. If any authority is needed for this proposition, reference may be made to 3 I T C 406.³⁰ In my view, therefore, it is competent to this Court to clarify the issue of law involved in the statement of the case made by the Commissioner and to give its considered opinion on the question really at issue. Not to do so would amount to a refusal to do its duty.

The principal point for consideration before us is, whether the present assessment based on estimate is justified, and

30. Shiva Prasad v. Commr. of Income-tax, U. P., A I R 1929 All 819=124 I O 467=3 I T C 406.

although the Commissioner has defended it on grounds other than the Proviso to S. 13, it is open to us to justify it on the basis of the said Proviso. I have already expressed an opinion that the said Proviso can be applied to a case like this and would consequently hold that the Income-tax Officer was justified in law in making an estimate of his own. It only remains to consider whether the estimate is fair. In doing so, we have to examine the basis on which and the manner in which this estimate has been made. The Income-tax Officer has taken into consideration the state of affairs in general and the fact that the firm has a large business. The firm was given ample opportunity to support its version but it failed to produce any material on the record to enable the Income-tax Officer to arrive at a definite figure. In these circumstances, as remarked by their Lordships of the Privy Council in 12 Pat 318,⁹ the onus lay on the firm to displace the estimate. Not having made any attempt to do so, it should suffer. I would therefore uphold the estimate. This being so, the question of the flat rate need not detain us long. The Income-tax Officer had enough material before him to fix the amount and it cannot be said that the amount fixed by him is unfair. Keeping in view the real question at issue and the discussion made above, I would answer the question in the negative. I would, however, make no order as to costs as the position adhered to by the Commissioner was obviously wrong.

Coldstream, J.—I agree.

S.C./D.S. *Answered in negative.*

A. I. R. 1937 Lahore 733

COLDSTREAM AND DIN MOHAMMAD, JJ.

Amin Chand — Decree-holder — Appellant.

v.

Firm Chuni Lal-Tulsi Ram, Judgment-debtor and others — Respondents.

Letters Patent Appeal No. 154 of 1936, Decided on 23rd June 1937, from judgment of Jai Lal, J., D/- 16th October 1936.

(a) Execution—Completion of—Application for execution of money decree with interest and cost—Decree-holder stating that decree would be satisfied fully, if amount deposited by judgment-debtor in Court was paid, but

reserving his right to recover costs of High Court by separate execution application—Court ordering payment and noting 'satisfied' on order—Fresh application subsequently by decree-holder for balance due—Application held maintainable, as decree not fully satisfied on payment of deposit.

A decree-holder applied for execution of his money decree with interest and costs. After prolonged proceedings, the decree-holder stated that in case the amount deposited by the judgment-debtor in the Court for the payment of his decree was paid to him, his decree would be fully satisfied, leaving the costs of the High Court to be recovered by separate execution proceedings. The deposited amount was paid to the decree-holder and the executing Court passed the order 'satisfied'. Subsequently the decree holder submitted a fresh application for the payment of interest on the decretal amount up to the time of realization:

Held: that by the payment of the amount deposited in the Court, the decree had not been completely discharged. Therefore the executing Court had not become functus officio and a fresh application for realization of the balance due to the decree-holder was maintainable: 15 All 84 (F B); 17 All 106 (P C); A I R 1915 Mad 811 and A I R 1926 Cal 1019, Rel. on; 10 Cal 538 and A I R 1929 Cal 670, Disting. [P 736 C 1]

(b) Civil P. C. (1908), O. 24—Deposit conditional on furnishing security—Interest does not cease to run.

Where conditional deposit is made and the decree-holder is under the necessity, if he desires to withdraw the amount, of furnishing security, interest does not cease to run even after the date of deposit: A I R 1927 Cal 72, Rel. on; A I R 1935 Mad 342, Ref. [P 736 C 2]

J. N. Aggarwal and Yashpal Gandhi
— for Appellant.

Mehr Chand Sud — for Respondent
(Judgment-debtor).

Din Mohammad, J. — This appeal has arisen in the following circumstances: On 13th June 1925, the firm Chuni Lal-Tulsi Ram through Tulsi Ram instituted a suit for rendition of accounts and recovery of the amount due against Amin Chand, son of Mast Ram, and Mast Ram. The suit of the plaintiffs was however dismissed and on the other hand they were called upon to pay to the defendants Rs. 16,835 with proportionate costs. They were further required to pay to the defendants future interest on the decretal amount from the date of the suit till the date of realization at 6 per cent. per annum. In addition to this, they were burdened with costs assessed at Rupees 2,159-10-0. This judgment was pronounced on 3rd February 1928.

On 20th December 1928, the defendants, who were then treated as decree-holders, took out execution proceedings for the first time. In pursuance thereof, war-

rants for attachment and arrest were issued. In the meantime, the plaintiffs judgment-debtors filed an appeal in the High Court and on 18th July 1929 obtained an order directing the decree-holders to furnish security for restitution before realizing the decretal amount. On 26th August 1929 the judgment-debtors paid into Court Rs. 19,001-10-0. On 1st March 1930, Rs. 3,560 more were put in and on 1st August 1930, Rs. 684-4-0 were added to the sums mentioned above. The decree-holders made an attempt to furnish security in accordance with the order of the High Court but their sureties were ultimately rejected by this Court on 11th March 1931. On 3rd July 1931, the decree-holders were again called upon to furnish proper security. On 14th August 1931, an order was made that pending investigation into the substantial nature of the security offered, the money should remain deposited in the Co-operative Bank by consent of the parties. This investigation took very long; in fact arguments in that matter were completed on 1st July 1932. Evidence started on 16th October 1931 and on that day Tulsi Ram again applied to the Court not to deliver money to the decree-holders until proper security was furnished. On 12th August 1932, money was ordered to be deposited in the Imperial Bank and it was so deposited on 28th October 1932. On 14th November 1932, the execution file was consigned to the record room. On 1st December 1932, the plaintiffs judgment-debtors' appeal to the High Court failed and, on 19th December 1932, the decree-holders again made an application for payment of decretal amount along with interest on the above amount and costs. On 5th January 1933, the judgment-debtors once more applied to the executing Court for time to move the High Court for leave to appeal to the Privy Council. Some time was spent in waiting for further orders from the High Court and, on 19th June 1933, it appears that the decree-holders' counsel made a statement to the effect that if money deposited in the Imperial Bank was paid, the decree would be satisfied fully, leaving costs of the High Court behind, for which separate application for execution would be made. On 28th July 1933, the amount already in deposit was paid to the decree-holders and though in the vernacular record the only order made was that the file should be consigned to the record room, the Subordi-

nate Judge himself wrote a brief order saying: "The decree is satisfied: the file will be consigned to record room".

On 25th October 1934, the decree-holders made a fresh application for execution claiming interest on the decretal amount up to the time of realization. On 31st May 1935, the papers were consigned to the record room as incomplete. Another application was made on 24th June 1935, which was resisted by the judgment-debtors but ultimately decided in favour of the decree-holders on 4th February 1936. On 23rd April 1936, the judgment-debtors appealed to this Court against the order of the executing Court. The appeal came on for hearing before Jai Lal, J. who allowed the appeal and set aside the order of the executing Court mainly on the ground that the Court had become functus officio after 28th July 1933, when the decree had been recorded as satisfied. It is against that order that the present Letters Patent appeal has been made.

The two questions that fall for determination in this case are: (1) whether a fresh application for execution was competent after the order of 28th July 1933 consigning the papers to the record room in view of the decree having been satisfied and (2) whether the judgment-debtors are liable to pay interest on the decretal amount despite the fact that they had made the deposit in Court as stated above.

On behalf of the appellants it is contended that the application for execution was not finally disposed of on 28th July 1933 and consequently the executing Court did not become functus officio. The statement of the counsel for the decree-holders made on 19th June 1933 clearly reserved a right to take out execution proceedings in respect of costs and in these circumstances the hasty order made by the Senior Subordinate Judge in English was not in accordance with the facts of the case and the order really made in the case was the one which was recorded in vernacular. In support of this contention reliance has been placed on 15 All 84;¹ 17 All 106;² 38 Mad 199³ and 53 Cal 582.⁴

1. Dhonkal Singh v. Phakker Singh, (1893) 15 All 84=1893 A W N 36 (F B).

2. Thakur Prasad v. Fakirullah, (1895) 17 All 106=22 I A 44=6 Sar 526 (P C).

3. Balasubramania Chetti v. Sivanammal, A I R 1915 Mad 811=21 I O 32=38 Mad 199=25 M L J 367.

4. Upendra Nath Bose v. K. B. Dutt, A I R 1926 Cal 1019=53 Cal 582=43 C L J 596.

In 15 All 84,¹ six Judges of the Allahabad High Court considered the question whether a fresh application for execution was competent after a previous application for execution had been struck off the file. After discussing the various authorities on the subject, it was held:

When an order is made striking an execution case off the file of pending cases, or dismissing it on grounds other than a distinct finding that the decree is incapable of execution, that the decree-holder's right to get the decree executed is barred by limitation, or by any other rule of law, or on some similar ground on which the application has clearly been dismissed on the merits, whether the word "dismissed" or the words "struck off the file" or any other similar words have been used in the order, the decree-holder is not barred by the force of any such order from presenting and prosecuting a fresh application for the execution of his decree.

In 17 All 106,² their Lordships of the Privy Council came to the conclusion that it was clear, both from the Code of Civil Procedure itself and from the provisions of the Limitation Act of 1877, that a succession of applications for execution was contemplated. It was further held by their Lordships that S. 647, Civil P. C., (which now corresponds to S. 141, Civil P. C.) did not apply to execution proceedings. In that case a first application for execution of a decree had been on the decree-holder's petition struck off the list of cases pending for hearing and a second application had been made within the period of limitation and that second application was held to be sustainable.

In 38 Mad 199,³ a decree-holder made an application for execution to recover mesne profits for three years only subsequent to the plaint and not for the full period for which they were due. On a second application made for realizing the balance due, an objection was raised on behalf of the judgment-debtors that the subsequent application was barred under O. 2, R. 2, Civil P. C., by virtue of S. 141, Civil P. C. Following the Privy Council judgment alluded to above, a Division Bench of the Madras High Court held that the second application was not barred inasmuch as there was nothing in the Code of Civil Procedure to prevent a decree-holder from presenting successive applications for realizing different portions of his decree.

In 53 Cal 582,⁴ an appellate decree of the High Court made the judgment-debtors liable for payment of costs of the trial Court as well as those of the High Court. In an

application for execution of that decree, the decree-holder sought to execute the decree for costs of the High Court only and obtained a partial satisfaction. In a subsequent application for execution, the decree-holder applied for execution of the balance of the costs allowed in the High Court as also of the costs of the lower Court. It was held that the last application for execution was competent.

On behalf of the judgment-debtors, reliance is placed on 10 Cal 538⁵ and A I R 1929 Cal 670,⁶ but in my view those decisions are of no avail to the judgment-debtors as they proceed on different circumstances.

In 10 Cal 538,⁵ a judgment-debtor pending the execution proceedings was granted permission to examine the state of the accounts but failed to do so. He then made a fresh application to the Court for the same purpose after the execution proceedings had been struck off and the decree declared to be satisfied. It was held that the question must be determined with reference to the provisions of S. 647, Civil P. C., and the only course open to the judgment-debtor would have been to apply for a review of the order which declared the decree to be satisfied and struck off the execution proceedings. It was further observed that the words "the following questions shall be determined by order of the Court executing the decree", of S. 244, Civil P. C., did not include the Court which had executed the decree and had therefore become functus officio. It may be remarked that in the Privy Council judgment referred to above, it has been expressly laid down that S. 647, Civil P. C., is not applicable to execution proceedings and that that case was decided 11 years after 10 Cal 538.⁵

In A I R 1929 Cal 670,⁶ the decree-holder had made a mistake in calculating the amount due to him under the decree and in stating in a petition put in by him that the decree had been satisfied on a certain date on payment of a certain sum of money by the judgment-debtors on that date. He subsequently realized his mistake and took out execution proceedings in respect of the amount still due to

5. Fakamddin Mahomed Ahsan v. Official Trustee of Bengal, (1884) 10 Cal 538.

6. Dwijendra Krishna Dutt v. Kedar Nath, A I R 1929 Cal 670=124 I C 79=33 C W N 739.

him. The judgment-debtors contended that the Court had become functus officio and that their case was covered by 10 Cal 538,⁵ a Division Bench of the Calcutta High Court upheld the contention remarking as follows :

It has not been pointed out that taking the decree-holder's figure as given in the petition for execution the calculation would be wrong. However that may be, the sole ground upon which the decree-holder sought for reopening the proceedings was that there was a mistake which must have been due to his own negligence or to the negligence of his own agents. This cannot be a ground for re-opening the proceedings. It would be against all fundamental rules of relief on the ground of mistake to say that mistake due to the negligence of one of the parties is sufficient to relieve him of his own agreement.

As indicated above, the facts of the case before us are quite different from those dealt with in the two judgments reviewed above. Here, in spite of the use of the word 'satisfied' by the executing Court, it could never be said that the execution proceedings had terminated for good or that the decree had been fully satisfied. In their application dated 19th December 1932, the decree-holders had unequivocally stated that they claimed not only the decretal amount but interest too on the said amount as well as costs. Some sort of reservation, although not to that extent, was even made by the counsel for the decree-holders on 19th June 1933 and it cannot therefore be said that by payment of the money deposited in the Imperial Bank to the decree-holders the decree had been completely discharged.

I would therefore hold that the executing Court had not become functus officio and that a fresh application for realization of the balance due to the decree-holders was maintainable.

The only question that remains to be decided therefore is whether on account of the deposit having been made by the judgment-debtors on the dates mentioned above, the decree-holders were not entitled to realize interest at the rate decreed. The judgment-debtors rely on a remark made in A I R 1935 Mad 342⁷ to the effect that interest was not chargeable as the plaintiff could have withdrawn the money by giving security. On the other hand, the decree-holders refer to A I R 1927 Cal 72,⁸ where it is laid down that as no uncondi-

tional deposit had been made and the decree-holder was under the necessity, if he desired to withdraw the amount of furnishing security, interest did not cease to run.

The Madras case dealt with O. 24, R. 2, Civil P. C., which provides for payment into Court by a defendant of the money sued for during the pendency of the suit, while the Calcutta case deals directly with a matter arising out of execution proceedings and further says that O. 24 does not apply to proceedings in execution. The current of authority therefore is in favour of the appellants. The result may work hardship on the judgment-debtors but for this they are themselves to blame. They tried to put all sorts of obstruction in the way of the decree-holders realizing the amount and the decree-holders were consequently deprived of the use of this money. The rate of interest allowed by the executing Court is not heavy and in these circumstances I do not consider that any interference with its order was called for. I would therefore decide this point too in favour of the decree-holders. The result is that I would allow this appeal, set aside the order of the learned Judge of this Court and restore the order of the executing Court. The decree-holders would get their costs from the judgment-debtors throughout.

Coldstream, J.—I agree.

V.B.B./R.K.

Appeal allowed.

A. I. R. 1937 Lahore 736

JAI LAL, J.

Davindar Singh — Decree-holder — Appellant.

v.

Court of Wards of the Estate of Lachhmi Devi — Judgment-debtor — Respondent.

Exn. First Appeal No. 291 of 1936, Decided on 17th December 1936, from order of Senior Sub-Judge, Lyallpur, D/- 29th June 1936.

Punjab Court of Wards Act (2 of 1903), Ss. 26 and 31 (2) — Certificate regarding preference of claim — Certificate signed by decree-holder is sufficient—Even intimation by Deputy Commissioner is sufficient certificate.

Section 31 (2), Punjab Court of Wards Act, provides for the production of a certificate that the claim has been preferred as required by S. 26; it does not say that the certificate should be

7. Satyanandan v. P. Mangayya, A I R 1935 Mad 342=159 I C 843.

8. K. M. Bose & Co. v. Allen Brothers, A I R 1927 Cal 72=97 I C 479.

from any particular official or that it should not be by the decree-holder himself. The section is wide enough to cover the case of a certificate signed by the decree-holder and produced in Court to the effect that the claim has been submitted to the Deputy Commissioner as required by S. 26 of the Act. However, sub-s. (2) read alone does not lay down that a certificate should be from the Court of Wards. The law does not provide for any form of a certificate and the mere intimation by the Deputy Commissioner given to the Court in which the execution proceedings are pending is a sufficient compliance with the provisions of S. 31, sub-s. (2), if a certificate from the Deputy Commissioner is contemplated by that sub-section. [P 737 C 2 ; P 738 C 1]

Mehr Chand Mahajan — for Appellant.

Achhru Ram — for Respondent.

Judgment. — The appellant Sardar Davindar Singh has a decree against Sardarni Lachhmi Devi of Vahali. He applied for execution of that decree but in the meantime superintendence of the estate of the Sardarni was taken over by the Court of Wards under the provisions of the Punjab Court of Wards Act (1903). The execution proceedings were consequently stayed. Subsequently however, on 2nd September 1935 the decree-holder made an application to the execution Court praying that the execution proceedings be continued because he had notified his claim as required by S. 26, Punjab Court of Wards Act, to the Deputy Commissioner. A certificate to this effect was filed along with this application. An objection to the resumption of the execution proceedings was raised on behalf of the Court of Wards on the ground that the proceedings could not be continued in the absence of a certificate from the Deputy Commissioner that the claim had been notified in accordance with S. 26, Punjab Court of Wards Act.

Section 26 provides that after a notification relating to the assumption of the estate of a person by the Court of Wards has been published, the Deputy Commissioner shall publish a notice calling upon all persons having claimed against the ward or against the property under the superintendence of the Court of Wards to notify the same in writing to such Deputy Commissioner within six months from the date of the publication of the notice. Subsequent to the presentation of the claims, under S. 28, the Deputy Commissioner is empowered to admit or to disallow them. S. 31 must be quoted in extenso : It reads :

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(1) Nothing contained in this Chapter shall be deemed to empower the Deputy Commissioner to disallow any claim, notified under S. 26, which is based upon a decree passed by any competent Court, and any such decree may be proved by the production of a certified copy of the same accompanied by a certificate from the proper Court that such decree remains unsatisfied.

(2) On the publication of a notice under S. 26, all suits and all proceedings in execution of any decree against a ward or as affecting any property under the superintendence of the Court of Wards then pending in any Civil Court shall be stayed until the plaintiff or the decree-holder files a certificate that the claim has been notified in accordance with S. 26.

It is not necessary to quote sub-s. (3) because it relates to a fresh application for execution and has no bearing on the question involved in this case. The learned Senior Subordinate Judge has allowed the objection of the Court of Wards that the execution proceedings cannot proceed because the provisions of S. 31, Cl. (2) have not been complied with in this case. Before him, in addition to the certificate filed by the decree-holder himself along with his application of 2nd September 1935, reliance was placed on two documents : One is a postcard addressed to the decree-holder purporting to be issued by the Court of Wards admitting his claim ; the amount admitted is specified in the postcard : the other is a letter addressed by the Deputy Commissioner to the Senior Subordinate Judge. In that letter he has notified to the Senior Subordinate Judge that he has admitted the claim of appellant for the figure mentioned by him. There is no dispute about the figure but the learned Judge below is of opinion that a formal certificate from the Deputy Commissioner should have been produced and filed with the application to continue the execution proceedings.

In my opinion, the view of the learned Senior Subordinate Judge cannot be sustained. It is true that in practically all the cases which have been cited, it has been assumed that a certificate under S. 31 (2) must be from the Deputy Commissioner but the point has never been judicially adjudicated upon. The section itself merely provides for the production of a certificate that the claim has been preferred as required by S. 26 ; it does not say that the certificate should be from any particular official or that it should not be by the decree-holder himself. In my opinion, the section is wide enough to cover the case of a certificate signed by the de-

decree-holder and produced in Court to the effect that the claim has been submitted to the Deputy Commissioner as required by S. 26, Punjab Court of Wards Act.

The learned counsel for the appellant has advanced another argument in support of his contention that a certificate of the Court of Wards or of the Deputy Commissioner is not legally necessary. That argument is based on a reading of S. 31, sub-s. (1) which provides that in the case of a decree the Deputy Commissioner must recognize a claim of the decree-holder if it is supported by a certified copy of the decree and certificate from the proper Court that such decree remains unsatisfied. The contention of the learned counsel is that if the intention of the Legislature had been that the certificate should be from the Deputy Commissioner or from any specified official, provision would have been made in sub-s. (2) in the same manner as it has been made in S. 31, sub-s. (1), that a certificate that the decree has not been satisfied should be from the proper Court. There appears to be force in this contention also. But I am unable to hold that sub-s. (2) read alone lays down that a certificate should be from the Court of Wards.

In the present case the Deputy Commissioner has written to the Subordinate Judge that the claim has been preferred to him and it has been recognized by him. The law does not provide for any form of a certificate and the mere intimation by the Deputy Commissioner given to the Court in which the execution proceedings are pending, is a sufficient compliance with the provisions of S. 31, sub-s. (2), if a certificate from the Deputy Commissioner is contemplated by that sub-section. On both these points therefore I am of opinion that the view of the learned Subordinate Judge is incorrect. I hold that a certificate filed by the decree-holder himself is sufficient compliance with the provisions of S. 31, sub-s. (2), and in this case there is a certificate by the Deputy Commissioner that the claim has been preferred to him as required by S. 26, Punjab Court of Wards Act. No other point was raised before me. I accept this appeal with costs and set aside the order of the Subordinate Judge and send the case back to him with the direction to proceed with the execution of the decree in accordance with law. The parties have been directed to appear

before the Senior Subordinate Judge on 11th January 1937.

B.D./R.K.

Case remanded.

A. I. R. 1937 Lahore 738

COLDSTREAM, J.

Gopal Das — Judgment-debtor —

Appellant.

v.

Devi Das, Decree-holder and *another* —
Respondents.

Exn. Second Appeal No. 127 of 1937, Decided on 10th June 1937, from order of Dist. Judge, Sargodha, D/- 11th November 1936.

Civil P. C. (1908), S. 51 (d) ; O. 40, R. 1 — S. 51 should be read with O. 40, R. 1—Occupancy holding subject to prohibition of attachment and sale in execution contained in S. 18, Colonization of Government Lands (Punjab) Act — Order appointing receiver of such property for seven years under S. 51 (d) is proper.

Section 51, Civil P. C., is to be read with R. 1 of O. 40 and an order appointing a receiver is to be regarded as made under the latter rule and can be passed only if the order appears to the Court to be just and convenient. While a decree-holder may not as of right and as a matter of course apply for execution by the appointment of a receiver, the law allows the appointment, by way of equitable or indirect execution, of a receiver to take charge of property immune from attachment and sale under the provisions of the Code of Civil Procedure. [P 739 C 2]

Where therefore a decree-holder in execution of money decree applied under S. 51 (d), Civil P. C., for a receiver to be appointed to recover the income of an occupancy holding, to which the provisions of S. 18, Colonization of Government Lands (Punjab) Act prohibiting the attachment and sale in execution were applicable :

Held : that the order appointing a receiver for seven years, the period for which the property in suit could be leased, was just : *A I R 1929 Pat 700, Disting.* ; *A I R 1937 Lah 433* and *A I R 1932 Cal 189, Rel. on.* [P 739 C 2]

Achhru Ram — for Appellant.

Shamair Chand — for Respondents.

Judgment.—*Devi Das*, the respondent to this appeal, having obtained a money decree against the appellant *Gopal Das*, applied to the executing Court for a receiver to be appointed under S. 51 (d), Civil P. C., to recover the income of an occupancy holding in Chak 72 S. B. in Shahpur district to which the provisions of S. 18, Colonization of Government Lands (Punjab) Act of 1912 were applicable. That section runs :

None of the rights or interests vested in a tenant from Government of land to which this Act

applies shall be attached or sold in execution of a decree or order of any Court or in any insolvency proceedings.

The executing Court being of the opinion that the appointment of a receiver was in no way different from the attachment of the judgment-debtor's land, dismissed the application. The decree-holder appealed and the District Judge holding that the decision of the lower Court was erroneous in view of the distinction made in S. 51, Civil P. C., between attachment and the appointment of a receiver and the fact that under S. 19, Colonization of Government Lands (Punjab) Act, the judgment-debtor was competent to transfer his land by lease for a period of seven years, accepted the appeal and appointed a receiver to act until the decreed amount was paid off, or until a period of seven years had elapsed. Against this order Gopal Das has appealed and it is contended on his behalf that the executing Court's view was correct, reliance being placed on the judgment in A I R 1929 Pat 700.¹

For the respondent it is urged that the prohibition in S. 18, Colonization of Government Lands Act, cannot be extended to cover the appointment of a receiver, a procedure authorized in Cl. (d) of S. 51, Civil P. C., in distinct addition to the procedure by attachment and sale authorized in Cl. (b), and that if the intention of the Legislature in enacting S. 18, Colonization of Lands Act, had been to forbid execution of decrees by appointing a receiver, this would have been expressly stated in the section. A number of rulings have been cited in support of this argument. It is not necessary to refer to them all here, for the most important of them had been referred to and relied upon in the recent Division Bench judgment of this Court in L. P. A. No. 103 of 1936² which appears to me to be conclusive in favour of the respondent.

The Patna case on which the executing Court relies was not on all fours with the present one, the essential difference being that in that case the judgment-debtor was prohibited by S. 27 of Regulation 3 of 1872 from effecting even a temporary alienation of his land and had no power to alienate by lease or any other contract.

It was held that the judgment-debtor could not under law be dispossessed by an involuntary alienation, having no power to alienate voluntarily. In the course of his judgment Das, J. with whom the other Judge concurred, remarked that if they had been satisfied that S. 27, Regn. 3 of 1872, did not prohibit a temporary alienation they would have been prepared to accede to the argument that a receiver might legally be appointed. The decision in that case does not help the appellant.

In L. P. A. No. 103 of 1936,² to which case I have referred above, Addison and Din Mohammad, JJ. accepting the principles laid in 59 Cal 205³, held that while a decree-holder may not as of right and as a matter of course apply for execution by the appointment of a receiver, the law allowed the appointment by way of equitable or indirect execution of a receiver to take charge of property immune from attachment and sale under the provisions of the Code of Civil Procedure. It is true that in that case the property concerned was not protected from attachment and sale by a provision such as S. 18, Colonization of Government Lands Act, but I see no justification for not regarding the decision as applicable to a case where immunity from attachment is given by a special and local law. It was pointed out in that judgment that S. 51, Procedure Code, is to be read with R. 1 of O. 40, that an order appointing a receiver is to be regarded as made under the latter Rule and can be passed only if the order appears to the Court to be just and convenient. Appellant's counsel has not attacked the order against which his client appeals on any other ground than that it is illegal in view of the provisions of S. 18, Colonization of Government Lands Act, but it is clear that the order is just, because attachment being impossible the only other mode of execution would be by arrest and imprisonment. The judgment-debtor had power to lease the property concerned for a period not exceeding seven years and the period for which the receiver is appointed is limited to this period. I note that the order of the learned District Judge defines the duties of the receiver appointed. He is to collect the rents of the land and profits and to pay

1. Surendra Prosad Singh v. Tekait Singh, A I R 1929 Pat 700=118 I C 721=9 Pat 368=10 P L T 846 (F B).

2. Tika Sant Singh v. Sain Das Chawla, Reported in A I R 1937 Lah 433.

3. Hemendra Nath v. Prokash Chandra, A I R 1932 Cal 189=137 I C 98=59 Cal 205 = 35 C W N 1066.

for the proper expenses of the agriculture (if any) and other dues. He will of course act under such orders as the District Judge may from time to time pass to enable him to carry out his duties. For the reasons given, the appeal fails and is dismissed with costs.

V.B.B./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 740

COLDSTREAM AND DIN MOHAMMAD, JJ.
Sidhu Ram and others—Decree-holders
—Appellants.

v.

Nur Mohammad and others—Judgment-debtors—Respondents.

Letters Patent Appeal No. 52 of 1937, Decided on 29th June 1937, from judgment of Skemp, J., reported in *A I R 1937 Lah 506*.

(a) Punjab Debtors' Protection Act (2 of 1936), S. 5—Exemption in S. 5 is not mere matter of procedure—S. 5 has no retrospective effect : *A I R 1937 Lah 506, Reversed*.

The exemption contained in S. 5, in so far as it creates a new right in favour of the judgment-debtor so as to protect a part of his land from his decree-holder or attaches a disability to a decree-holder in so far as to debar him from proceeding against a part of his judgment-debtor's land, deals with something more than a mere procedure. The section brings into existence a right which the judgment-debtor can claim and as such the new provision of law creating that right cannot have a retrospective effect unless an express provision had been made therefor : *A I R 1937 Lah 506, Reversed; Case law referred.* [P 741 C 1]

(b) Punjab Debtors' Protection Act (2 of 1936), Ss. 4 and 5—Applicability—In execution of decree Court sanctioning temporary alienation of judgment-debtors' land in 1935—Appeal from this order not heard till June 1936—Debtors' Protection Act coming into force in meantime—Order of execution made before passing of Act held not wrong : *A I R 1937 Lah 506, Reversed*.

In general when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights. An appeal may for certain purposes be a continuation of the original proceeding; but an Appellate Court is not justified in setting aside the judgment of a trial Court which when delivered was not open to any objection on the ground on which the Appellate Court seeks to set it aside. [P 741 C 2; P 742 C 1]

In execution of a certain decree a temporary alienation of the judgment-debtors' lands was sanctioned by the executing Court in favour of the decree-holder in December 1935. An appeal was preferred against this order which was not heard till June 1936. In the meantime the Punjab Debtors' Protection Act came into force

and the Appellate Court relying upon Ss. 4 and 5 of the Act remanded the case for disposal according to provisions of the new Act :

Held : that Ss. 4 and 5 of the Punjab Debtors' Protection Act did not provide mere matters of procedure and had no retrospective effect; and even if they related to mere matter of procedure, the order made by the executing Court when no such law existed could not be held to be wrong on the subsequent enactment of the Act : *A I R 1937 Lah 506, Reversed; A I R 1930 Lah 1004 and A I R 1928 Mad 1194, Foll.; Case law referred.* [P 742 C 2]

Hazara Singh — for Appellants.

B. H. Ali — for Respondents.

Din Mohammad, J.—In execution of a decree held by a Hindu joint family consisting of Chandar Bhan and others against Nur Muhammad and others, a temporary alienation of the judgment-debtors' lands was sanctioned by the executing Court in favour of the decree-holders on the 20th December 1935. Against this order the judgment-debtors preferred an appeal to the District Judge, which, however, could not be heard until the 29th June 1936. In the meantime the Punjab Debtors' Protection Act, 1936 came into force. By the terms of S. 4 of this Act, a Civil Court was enjoined to transfer the proceedings . . . of attachment and alienation to the Collector whenever it made an order that the land be attached and alienated temporarily in the execution of a decree. By S. 5, such portion of the judgment-debtor's land was exempted from temporary alienation as in the opinion of the Collector was required to provide for the maintenance of the judgment-debtor and the members of his family who were dependent on him. The District Judge relying upon these two provisions of law set aside the order of the executing Court and remanded the case for disposal in accordance with those provisions. From that order the decree-holders preferred an appeal to this Court which came on for hearing before Skemp, J. Relying on a judgment of this Court reported in *A I R 1937 Lah 52*,¹ the learned Judge maintained the order of the District Judge and dismissed the appeal. Hence this Letters Patent Appeal.

After hearing counsel on both sides at length, I have come to the conclusion that this appeal must succeed. It is true that enactments relating to procedure have a retrospective effect, if not expressly stated

1. *Bishen Chand v. Bakhshish Singh*, *A I R 1937 Lah 52*=169 I O 656=18 Lah 291.

otherwise ; but I am not convinced, in the first instance, that the exemption provided for in S. 5 of the Act is a mere matter of procedure and secondly I am satisfied that, even if it were so, the stage at which the new provision of law was applied by the District Judge was not the stage at which it could be applied. I am aware of the fact that in the judgment relied upon by Skemp, J., Bhide, J. has remarked that Ss. 4 and 5 relate to procedure only and that Skemp, J. has agreed with him, but with all respect, I am disposed to think that the exemption contained in S. 5 in so far as it creates a new right in favour of the judgment-debtor so as to protect a part of his land from his decree-holder or attaches a disability to a decree-holder in so far as to debar him from proceeding against a part of his judgment-debtor's land, deals with something more than a mere procedure. In my view, it brings into existence a right which the judgment-debtor can claim henceforth and as such the new provision of law creating that right cannot have a retrospective effect unless an express provision had been made therefor. There is abundant authority in support of the proposition that such enactments are not retrospective in their effect. Reference in this connexion may be made to 58 All 63,² A I R 1930 All 706,³ A I R 1934 Lah 1013,⁴ 139 I C 589⁵ and 55 Cal 67.⁶

In 58 All 63² a question arose whether a new proviso added to a section of the Agra Pre-emption Act governed pending cases. A majority of the Full Bench of the Allahabad High Court held that the proviso added to S. 19, Agra Pre-emption Act by the Amending Act of 1929, which came into force after the deed of gift in favour of the defendant vendee, did not prevent him from defeating the plaintiff's claim by virtue of having obtained that deed of gift prior to the passing of the decree. The learned Judges further remarked that it was a well established rule of construction

that a retrospective operation was not to be given to a statute so as to impair an existing right or obligation otherwise than as regards the matter of procedure, unless that effect could not be avoided without doing violence to the language of the enactment. If the new Act touched a right in existence at the passing of the Act, then it should not be held to be applicable to a pending action concerning that right. Reliance was placed on a quotation from Maxwell on the Interpretation of Statutes and on another from Craies on Statute Law. The first quotation runs as follows:

In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights.

The latter quotation is as follows:

In the absence of anything in an Act to show that it is to have a retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act is passed.

In A I R 1930 All 706,³ a Division Bench of the Allahabad High Court observed that a new enactment or amendment of already existing enactment passed during the pendency of an action has not a retrospective effect unless either it expressly says so or it lays down a mere rule of procedure which it is the duty of Courts to follow.

In A I R 1934 Lah 1013,⁴ a Division Bench of this Court observed that provisions which touch a right in existence at the passing of the statute were not to be applied retrospectively in the absence of express enactment or necessary intentment. This quotation was taken from a judgment of their Lordships of the Privy Council as reported in A I R 1927 P C 242.⁷ In 139 I C 589⁵ and 55 Cal 67⁶, similar principles were enunciated.

In my opinion the question that was involved in these execution proceedings was whether the decree-holder had or had not a right to proceed against the whole of the judgment-debtor's land without making any reservation for his maintenance or, in other words, whether a judgment-debtor could claim as a matter of right an exemption for a part of his land for his maintenance, and as this matter had been decided by the executing Court

2. Haider Husain v. Puran Mal, A I R 1935 All 706=157 I C 157=58 All 63 = 1935 A L J 895 (F B).

3. Sheopujan Rai v. Bishnath Rai, A I R 1930 All 706=128 I C 390=52 All 886=1930 A L J 842.

4. Ata-ur-Rahman v. Income-tax Commissioner, Lahore, A I R 1934 Lah 1013.

5. Gurmukhdas v. Hassomal, A I R 1932 Sind 71=139 I C 589=26 S L R 204.

6. Nepra v. Sajer Pramanik, A I R 1927 Cal 763 =103 I C 662=55 Cal 67.

7. Delhi Cloth and General Mills Co., Ltd. v. Income-tax Commissioner, Delhi, A I R 1927 P C 242=106 I C 156=54 I A 421=9 Lah 284 (P C).

in December 1935, any change of law effected subsequent to that order could not alter the conditions as they existed at the time the order was made.

Even if it were possible to hold that this view of the matter is open to doubt and that the provisions contained in Ss. 4 and 5, Debtors' Protection Act, relate to a mere matter of procedure, I am further of opinion that it was not open to the District Judge to have reversed the order of the executing Court merely on the ground that since then a new enactment had been passed which effected a change in the existing law. As observed by their Lordships of the Privy Council in *A I R 1927 P C 242* :

Provisions which, if applied retrospectively, would deprive of their existing finality orders which, when the statute came into force, were final, are provisions which touch existing rights and as such they cannot have a retrospective effect unless it is clearly so provided. The only thing that is contended on behalf of the respondents is that as the matter was still pending in the Appellate Court, it had not been finally decided and that therefore it could be treated as a pending proceeding liable to be affected by any change made in the law. In my view, there is no force in this contention. An appeal may for certain purposes be a continuation of the original proceeding; but it cannot be reasonably urged that an Appellate Court will be justified in setting aside the judgment of a trial Court which, when delivered, was not open to any objection on the ground on which the Appellate Court seeks to set it aside. In *A I R 1930 Lah 1004*,⁸ it was remarked by a Division Bench of this Court :

An alteration in procedure may have retrospective effect and while proof is a part of procedure, the stage of proof has been passed in the present case and it does not exist except under particular and special circumstances during appeal. In short a change in procedure cannot retrospectively affect a decided matter.

A similar question came before a Division Bench of the Madras High Court in a case reported in *A I R 1928 Mad 1194*⁹ and the learned Judges had arrived at the same conclusion as has been arrived at by a Bench of this Court in the case referred to above. The following quotation is to the point :

8. *R. H. Skinner v. V. Skinner*, *A I R 1930 Lah 1004*=129 I C 6=12 Lah 172=32 P L R 110.

9. *Satrucherla Sivaskandharaju v. Maharaja of Jeypore*, *A I R 1928 Mad 1194*=114 I C 823.

The argument that because this appeal may be regarded for certain purposes as a continuation of the lower Court's proceedings and that we must therefore apply to it the amended procedure now in force, does not seem to us tenable. It would involve this result that on every alteration of processual law, all proceedings taken under the previous law within a period allowing of an appeal when the new law came into force, would be contrary to law. The mere statement of this result is sufficient to demonstrate that the argument cannot be sustained.

I am in respectful agreement with the remarks quoted above, and would hold that even if the exemption claimed in these proceedings were a mere matter of procedure, the order made by the executing Court at a time when no such exemption existed could not be held to be wrong on the subsequent enactment of that exemption. I would therefore allow this appeal, set aside the order of the learned Judge of this Court as well as that of the District Judge and restore the order of the executing Court. In view of the fact however that none of the authorities mentioned above was cited by counsel for the appellants and that he failed to present his case in a proper manner, I would not allow the appellants any costs against the respondents.

Coldstream, J.—I agree.

S.C./R.K.

Appeal allowed.

A. I. R. 1937 Lahore 742

TEK CHAND AND ABDUL RASHID, JJ.

Thakar Gurdial Singh — Appellant.

v.

Mt. Tej Kaur and others —

Respondents.

Second Appeal No. 1511 of 1936, Decided on 11th June 1937, from decree of Dist. Judge, Gurdaspur, D/- 21st August 1936.

(a) Custom (Punjab)—Customary law silent on particular matter, personal law may be invoked—If personal law too is silent, matter may be decided according to justice, equity and good conscience.

Among parties ostensibly governed by customary law, if on a particular matter no definite rule of custom is proved to exist, the parties are entitled to fall back on their 'personal' law. If the 'personal' law also does not contain any definite rule applicable to the case, it must be decided according to justice 'equity, and good conscience' : *110 P R 1906 (F B)*, *Rel. on.*

[P 743 C 2 ; P 744 C 1]

(b) Custom (Punjab) — Maintenance — *K* dying leaving three sons, *A* by predeceased wife and *B* and *C* by his wife *T* who survived him along with sons—Property of *K* partitioned between sons without consulting *T* or

making any provision for her maintenance—*A* receiving one-half and *B* and *C* one-fourth each as parties governed by rule of Chundawand—Held *T* had charge for maintenance on every part of her husband's estate including step son *A*'s share and maintenance must be realized in the proportion in which sons had divided property among themselves.

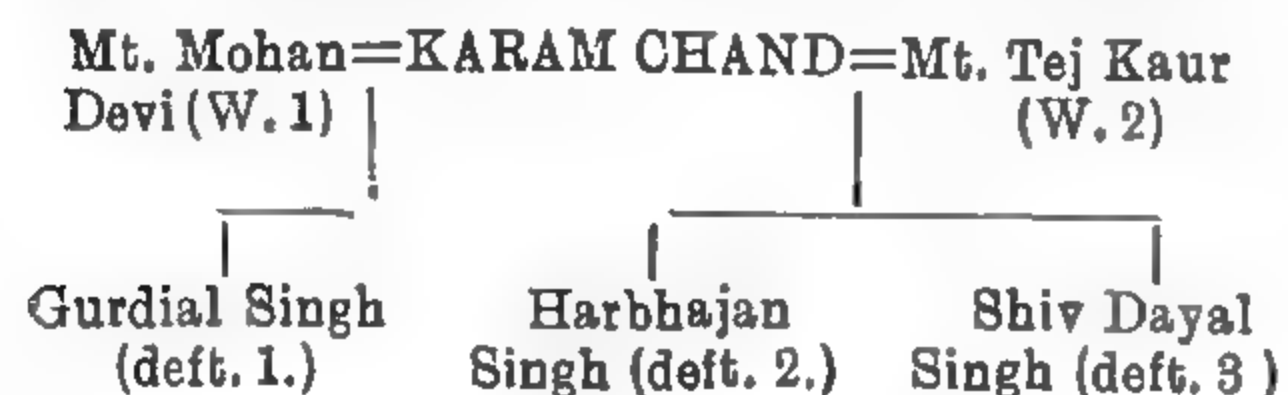
K died leaving behind him three sons *A*, *B* and *C*—*A* by his first wife, who predeceased him and *B* and *C* by his second wife *T*, who survived him along with the sons. The property of the deceased was partitioned and as the parties were governed by the Chundawand rule, *A* received one-half as his share and *B* and *C* together received the other half, each thus receiving one-fourth. The partition made no provision for the maintenance of *T* nor was she consulted. The latter instituted a suit claiming her maintenance from the three sons. *A* resisted the suit claiming that he was the step son of *T* and so was not liable for her maintenance and she must look to the share allotted to her sons for it :

Held: that the partition, which was the act of the sons to which she was not a party, did not destroy the charge, which she had on the whole and every part of her husband's estate. Hence the charge attached to portion allotted to each son and must be realized in the proportion in which the sons had divided the property among themselves : 16 Cal 758 (P C), *Expl. and Disting.* ; A I R 1914 Lah 486, *Dissent.* ; A I R 1925 Lah 568 and 35 Mad 147, *Ref.* [P 744 C 2]

Mehr Chand Mahajan and Yashpal Gandhi — for Appellant.

J. N. Aggarwal, Vishnu Datta and Balkishan Mehra — for Respondents.

Tek Chand, J.—The parties to this litigation are Rajputs of Mauza Shahpur Jajan, Batala Tahsil, District Gurdaspur, and are related to each other as follows :



Mt. Mohan Devi died many years ago in the lifetime of Karam Chand, leaving a son Gurdial Singh defendant 1. He then married Mt. Tej Kaur from whom he had two sons, Harbhajan Singh and Shiv Dayal Singh, defendants 2 and 3. Karam Chand himself died on 21st November 1931, leaving over 650 ghumaons of land. On his death the land was mutated in the names of his three sons jointly. Some years later it was divided by them according to the Chundawand rule; Gurdial Singh getting one-half and Harbhajan Singh and Shiv Dayal Singh one-fourth each. At the time of partition between the sons, no

provision was made for the maintenance of Mt. Tej Kaur. Accordingly, she instituted the suit, which has given rise to this appeal, for recovery of Rs. 20 per mensem as maintenance from the three defendants.

The suit was resisted by Gurdial Singh defendant 1, who pleaded that he, being the step-son of the plaintiff, was not liable for her maintenance, and that the property having been divided according to the Chundawand rule, she must look to the share allotted to her sons for maintenance. The trial Judge repelled this plea, and held that all the defendants were liable for the maintenance of the plaintiff in the proportion in which they had succeeded to the property of their father. He found that having regard to the extent of the property and the station in life of the parties, the proper amount of maintenance for the plaintiff was Rs. 20 per mensem. He accordingly passed a decree to the above effect, directing the defendants to pay this amount out of the estate of their father, defendant 1 to pay Rs. 10 and defendants 2 and 3 Rs. 10 per mensem. He further ordered that this sum of Rs. 20 per mensem shall be a charge upon the estate and the defendants shall not alienate or encumber so much of the estate as is sufficient to provide for the above maintenance to the plaintiff. Defendant 1 appealed to the District Judge, but was unsuccessful. He has preferred a second appeal in this Court.

As stated already, the parties are Rajputs of Batala Tahsil of Gurdaspur District, and it is common ground between them that in matters of inheritance they are governed by custom and not by Hindu law. This is clear from the fact that succession to Karam Chand's estate has been according to the Chundawand rule, which is not recognized by the Mitakshara School of Hindu law. In the Riwijs prepared in the last two settlements it is stated that the rule of Chundawand prevails among the Rajputs of Batala Tahsil. The question of maintenance of Mt. Tej Kaur must therefore be primarily determined by custom, if one is found to exist. There is however no entry in the Riwijs dealing with this matter. Nor have the parties been able to prove by other evidence the existence of any custom bearing on the point. It is settled law that among parties ostensibly governed by

Customary law, if on a particular matter no definite rule of custom is proved to exist, the parties are entitled to fall back on their 'personal' law: 110 P R 1906.¹ If the 'personal' law also does not contain any definite rule applicable to the case, it must be decided according to "equity, justice and good conscience": S. 6, Punjab Laws Act. It is conceded by both counsel that the Mitakshara (which governs Hindus residing in the Punjab) does not contain any express provision governing a case of this kind. Under that system of law, on the death of a male proprietor, his property devolves on his sons in equal shares, whether born of one or several wives, and they are entitled to hold it jointly until they decide to partition. During this period, the widow or widows of the last male owner are entitled to be maintained out of the estate. If however the sons wish to divide the property among themselves, they are entitled to do so without consulting the widows of the father, but in that event, each of the widows gets a share equal to that of a son. This share she holds till her death. She is thus independently well provided for, and naturally the Mitakshara contains no provision covering a case like the one before us. The 'personal' law therefore is of no assistance in the matter. Consequently, the question must be decided in accordance with equity, justice and good conscience.

It is common ground between the parties that under custom the widow of a male proprietor is entitled to suitable maintenance out of his estate in the hands of his sons, whether they be the issue of the surviving widow or widows or of a pre-deceased wife. It is also conceded, as pointed out in Para. 17 of Rattigan's Digest, that such maintenance is a charge against the whole and every part of the husband's estate and, subject to certain provisos (which are not relevant for our purposes) it is enforceable against the heir or heirs in possession, or those claiming under them. Mt. Tej Kaur accordingly had a right to be maintained by her own sons as well as by her step-son out of the estate which they had inherited from Karam Chand, so long as the estate was joint. These sons have now chosen to divide the estate among themselves without reference to her, nor have they

made any suitable arrangement for her maintenance. Obviously, the partition which is the act of the sons and to which she is not a party, cannot destroy the charge for her maintenance which, as already stated, she had on the whole and every part of her husband's estate. It follows therefore that on such partition, the charge attaches to the portion which has been allotted to each son, and must be realized in the proportion in which they have divided the property among themselves. It is conceded that this is the just and equitable view, and that if there is no rule of custom or Hindu law to the contrary, all the defendants must be held liable for the plaintiff's maintenance.

The learned counsel for the appellant however relies on 47 P R 1914,² a case decided by a Division Bench of the Chief Court of the Punjab, among parties governed by the Hindu law of Mitakshara School. In that case it was held that after partition between two sons, the plaintiff being the real mother of one only, she could not claim maintenance from her step-son, although, as long as the estate remained joint, her maintenance would have been a charge upon the whole estate. The learned Judges in that case followed a decision of their Lordships of the Privy Council in 16 Cal 758³ the parties to which were Bengalis Hindus, governed by the Dayabhaga School of Hindu law. A perusal of their Lordships' judgment leaves no doubt that the decision proceeded on certain texts of the Dayabhaga which are quoted therein: see pages 764-65. One of the texts lays down that on partition between sons of one man by different wives, partition is made "by allotment of shares to the mothers", and while each mother lives, "her sons have no power to make partition among themselves without her consent". Another text of Jimutavahana is cited as laying down that when partition takes place among sons of different mothers with the consent of these mothers, each mother receives from sons born of her an equal share with them, and she cannot receive a share from the children of another wife; therefore she can only receive a share from her own sons (Colebrooke's Digest, Vol. II, Book V, Ch. II. V. 89).

2. Bishen Das v. Mt. Mansa Devi, A I R 1914 Lah 486=23 I C 536=47 P R 1914=60 P L R 1914.

3. Hemangini Dasi v. Kedar Nath Kundu, (1889) 16 Cal 758=16 I A 115=5 Sar 374 (P O).

1. Daya Ram v. Sahel Singh, (1906), 110 P R 1906 =31 P L R 1907=59 P W R 1907 (F B).

On these texts of the Dayabhaga, their Lordships ruled that under that system of law where partition takes place among sons of different mothers, each widow is entitled to maintenance only out of the share or shares allotted to the son or sons of whom she is the mother. Admittedly the Mitakshara contains no such texts and it is clear that on every one of the points dealt with in the Privy Council judgment the position under that system of law is fundamentally different from the Dayabhaga. Under the Mitakshara, partition among sons of different wives is not made by allotment of shares to the mothers, but each son takes his share independently for himself. Nor is the consent of the mother necessary for a partition among her sons inter se. The mode of allotment is also materially different under the two systems. As already stated, in a Mitakshara family, on partition among sons of different mothers, each son and surviving mother takes an equal share. This is not so under the Dayabhaga. The difference may be illustrated by the following instance. *A* dies leaving a widow *B*, three sons by her, named *D*, *E* and *F*, and a son *C* from a pre-deceased wife. Under the Mitakshara the sons can divide the father's property inter se without the consent of *B*, but on partition the share allotted to each son (*C*, *D*, *E* and *F*) will be $\frac{1}{5}$, and the widow (*B*) will take the remaining $\frac{1}{5}$. Under the Dayabhaga however the property will first be divided into as many shares as there are sons, i.e. four shares in the illustration; one of these shares (i.e. $\frac{1}{4}$) will be allotted to *C* and the remaining $\frac{3}{4}$ to *D*, *E* and *F* jointly. After this partition, the widow *B* will be maintained by her sons alone. If subsequently *D*, *E* and *F* wish to divide the property inter se, they must do so with the consent of their mother *B*, who on this partition, will take an equal share with them, that is to say, the $\frac{3}{4}$ share which was allotted in the original partition to this branch of the family will be sub-divided equally between her and her sons. *B*'s share will thus be $\frac{1}{4}$ of $\frac{3}{4}$ or $\frac{3}{16}$: see 17 Bom 271⁴ and Rama Krishna's Hindu Law, Vol. II, p. 99.

None of these matters was considered by the learned Judges of the Chief Court in the case cited. Their attention was

directed to one point only, on which the law under both systems is the same, namely that a step-mother is not an heir to a step-son. From this they concluded that there was no difference between the Dayabhaga and the Mitakshara as to the position and right of a step-mother in all matters and they applied to a Mitakshara family the rule laid down by the Privy Council in 16 Cal 758³ in regard to parties governed by the Dayabhaga. With the utmost respect I feel bound to say that this conclusion of the learned Judges was unjustified, and that 47 P R 1914² does not lay down the law correctly. In this connection reference may be made to 6 Lah 457⁵ at p. 459 where the broad proposition enunciated in 47 P R 1914² was expressly dissented from by a Division Bench of this Court (Shadi Lal, C. J. and Addison, J.): see also 35 Mad 147,⁶ where the learned Judges of the Madras High Court, after referring to the Privy Council decision in 16 Cal 758,³ pointed out that:

The provisions of the Dayabhaga under which that case was decided, were different from those of the Mitakshara and that the rule laid down therein could not be made applicable in provinces governed by the Mitakshara School of Hindu law.

I hold therefore that the Courts below came to a correct conclusion in holding that on partition of Karam Chand's estate between the defendants they are liable for the maintenance of the plaintiff in the proportion in which they have divided the estate among themselves. No objection was taken to the amount fixed which does not seem to be unreasonable in the circumstances. For the foregoing reasons I would dismiss this appeal, but having regard to all the circumstances would leave the parties to bear their own costs in this Court.

Abdul Rashid, J.—I agree.

V.B.B./R.K.

Appeal dismissed.

5. Tegg Indar Singh v. Hurnam Singh, A I R 1925 Lah 568=90 I C 1035=6 Lah 457=26 P L R 680.

6. Subrayudu Chetty v. K. Thayaramma, (1912) 35 Mad 147=10 I C 347=21 M L J 493.

4. Damodar Das Maneklal v. Uttamram Maneklal, (1893) 17 Bom 271.

A. I. R. 1937 Lahore 746

DALIP SINGH, J.

Amar Singh and another
Convicts — Appellants.

v.

Emperor.

Criminal Appeal No. 1090 of 1936,
Decided on 14th January 1937, from order
of Magistrate, First Class, Amritsar, D/-
15th August 1936.

(a) Evidence Act (1872), S. 8 — Magistrate
not acting under S. 164 or S. 364, Criminal
P. C., giving evidence that accused pointed
out certain shop alleging that he purchased
crackers from it — Whether even gesture of
pointing out shop is inadmissible (*Quære*).

Quære.—Where a Magistrate not acting under
S. 164 or S. 364, Criminal P. C. gives evidence that
the accused pointed out a certain shop alleging
that he had purchased crackers from that shop,
whether only the statement or even the gesture
of pointing out the shop is excluded from evi-
dence : *A I R 1936 P C 253, Ref. [P 746 C 1, 2]*

(b) Criminal Trial—Confession—Directions
to be observed at time of recording stated.

The confessional statements should be recorded
in the Court room, and if for some reason they are
not so recorded during the ordinary Court hours,
some explanation should be furnished by the
prosecution. [P 747 C 1]

Indar Dev for *Dr. S. D. Kitchlu* —
for Appellants.

Mohammad Monir for *Govt. Advocate*
—for the Crown.

Judgment.—The appellants before me
have been convicted under S. 5, Explosive
Substances Act, and sentenced to five years'
rigorous imprisonment each. The evi-
dence against Amar Singh, appellant, con-
sists of the following : he purchased an
amritdani in company with Hazara Singh
from Lachhman Das and another from
Gurbakhsh Singh, P. Ws. No reason is
advanced as to why the evidence of these
two witnesses as to the purchase of amrit-
danis by Amar Singh should not be accep-
ted. I see no reason to reject it. There
is also the statement of Karim Bakhsh
and Zahur-ud-Din that Amar Singh was
accompanying Hazara Singh when Hazara
Singh purchased certain crackers from
Karim Bakhsh and a long bamboo pole
about 22 feet in length from Zahur-ud-
Din. The evidence of Karim Bakhsh
would not have been accepted by the
learned Magistrate had it stood by itself.
He has however accepted it on the ground
that the evidence is supported by the evi-
dence of a learned Magistrate to the
extent that the Magistrate says that

Hazara Singh pointed out this shop alleg-
ing that he had purchased certain crackers
(golas) from this shop. Their Lordships
of the Privy Council in *A I R 1936 P C*
*253*¹ would at the first sight appear to have
ruled all such evidence as inadmissible.
Mr. Monir has contended that only the
statements have been excluded and that
the gesture of pointing out would still be
relevant under S. 8, Evidence Act. He
very frankly concedes that the point is not
free from doubt. I am myself not clear
at present as to how far the ruling of
their Lordships excludes conduct under
S. 8, Evidence Act. I am inclined to
think that it would so exclude the evi-
dence, but I am not expressing any final
opinion on that point. It is clear how-
ever that the evidence of Karim Bakhsh,
who, according to himself has falsified his
register, is not that of a reliable wit-
ness and in so serious a matter I am not
prepared to accept his statement, even if
corroborated by the alleged pointing out of
his shop by Hazara Singh. I therefore
reject the evidence of Karim Bakhsh
against both the appellants.

The case of Zahur-ud-Din stands on a
different footing. Beyond the fact that
he has forgotten at what time the pur-
chase was made, I see no reason to doubt
his evidence against Hazara Singh.

The next piece of evidence against
Amar Singh is the production by his son
Balwant Singh at his i. e. Amar Singh's
instigation of a reti. The amritdanis
which were found in the Kirti Office bore
signs of having had a reti used on them
and the reti produced by Balwant Singh,
son of Amar Singh, appellant, had brass
particles on it suggesting that it had been
used on the amritdanis in question.

The next piece of evidence against Amar
Singh is that he was seen going out of his
house between the hours of 2 and 3 A. M.
on the day of the search of the Kirti office
and certain communist literature and cer-
tain amritdanis formed into bombs were
recovered from the office of the paper
known as Kirti. There is also the evi-
dence of Hazara Singh, milk seller, that
he saw Amar Singh and Hazara Singh
proceeding towards the Kirti office bet-
ween 2 and 3 A. M. on that day and that
Hazara Singh had a long pole in his hand.

1. *Nazir Ahmad v. Emperor*, *A I R 1936 P C 253*
=1936 Cr C 752=163 I O 891=63 I A 372=
17 Lah 629 (P C).

Now, the case for the prosecution is that Amar Singh and Hazara Singh in conspiracy with each other for various motives, into which it is not necessary to enter, planted communist literature and the bombs on the Kirti office, and that this Amar Singh informed the Police Sub-Inspector, S. Bishen Singh, whereupon a search was made of the Kirti office and the proscribed literature and bombs recovered.

The next piece of evidence against Amar Singh is his own confession recorded by M. Ala-ud-Din Arshad, a Magistrate of the First Class with S. 30 powers. I point out again here that the High Court instructions are, ordinarily speaking, that these confessional statements should be recorded in the Court room, and if for some reason they are not so recorded during the ordinary Court hours, some explanation should be furnished by the prosecution, but the prosecution, and I regret to observe that this seems usual, has not furnished any such explanation. I may point out that so far as I am concerned, I reserve to myself the right to disbelieve any confession whatsoever where I find that the High Court instructions on the point of recording them have not been followed, without giving any more reasons for so rejecting the confession. In this case however, from the nature of the statement made, I have no doubt whatsoever that the statement was not extorted from Amar Singh. The statement indeed is an exculpatory one so far as the present offence is concerned. What Amar Singh really admits in that statement is a conspiracy by Hazara Singh to plant proscribed literature on the Kirti office and his own somewhat reluctant help in the matter by conveying the information to the police that a search of the Kirti office might be desirable. According to himself, he never knew anything about the planting of the bombs. I must here point out that I do not know why the appellants were not charged under S. 193, I. P. C. as well as the offence with which they have been charged. Evidently, the prosecuting agency considered that whoever had fabricated the false evidence against the Kirti office must necessarily have been in possession of the bombs. It is true of course that one of the persons, if there were more than one who planted that evidence, must have been in possession of the bombs. It by no means follows that all

the persons who took part were in possession of the bombs and this is the difficulty in the present case. So far, however, as Amar Singh is concerned, taking into account his own statement that he had knowledge of the planting of the proscribed literature on the Kirti office, that he informed the police so as to bring about a search, that he purchased the amritdanis which were used as bombs and that he had a reti which had obviously been used on the amritdanis coupled with the fact that he was seen in company with Hazara Singh on the night in question near the office of the Kirti, Hazara Singh being armed with a long pole which was capable of depositing these goods through the open windows of the Kirti office, leaves no doubt in my mind that he was at sometime or other in possession of the bombs, the offence for which he has been charged. It is obvious that it was not a lawful object. Indeed it is obvious that the object was a very nefarious one of saddling a perfectly innocent person or persons with the possession of these bombs. I therefore do not consider that the sentence passed is severe and I would dismiss the appeal of Amar Singh.

As regards Hazara Singh, there can be little doubt that he participated in the conspiracy of planting communist literature on the Kirti office. Earlier in time on the 10th May he had given information to the police suggesting a search of the Kirti office. It is proved that he had some motive to try and reinstate himself in the Kirti office. It is also proved that he took part in the purchase of the amritdanis which were discovered and he was seen along with Amar Singh near the Kirti office at about 2 or 3 A. M. in the morning armed with a long pole which it is proved that he had purchased from Zahur-ud-Din. Morally speaking, there might be little doubt of his possession of the bombs; still it is possible and not highly improbable that he was innocent so far as the bombs were concerned though he joined in the conspiracy to plant communist literature. If I had accepted the evidence of Karim Bakhsh, it might have been proved that he had taken part in the manufacture of the bombs. But this evidence is the weakest in the whole case and on the whole I am not prepared to find that it is proved that Hazara Singh was at some time or other in possession of the bombs. I can only say that

the evidence led raised the gravest suspicion against him, but that it did not amount to such a proof as would leave no reasonable doubt of his guilt. I therefore somewhat reluctantly accept his appeal and acquit him.

D.S./R.K.

Order accordingly.

*** A. I. R. 1937 Lahore 748**

ADDISON AND DIN MOHAMMAD, JJ.

Amar Singh—Plaintiff—Appellant.

v.

Deputy Commissioner, Gujranwala and
others — Defendants — Respondents.

First Appeal No. 180 of 1936, Decided on 9th December 1936, from decree of Senior Sub-Judge, Ferozepore, D/. 27th January 1936.

(a) Cattle Trespass Act (1871), S. 21—Limitation—Magistrate enjoined to summon person complained against—Non-compliance does not affect merits of case—Suit for compensation is governed by Art. 2, Limitation Act.

It is true that under S. 21, Cattle Trespass Act, the District Magistrate is enjoined to summon the person complained against and make an inquiry into the case; but non-compliance with provisions of this section does not affect the merits of the case. If the non-compliance with the provisions of S. 21 has the effect of making the order of District Magistrate illegal, any suit for compensation on that account would clearly be governed by Art. 2, Limitation Act. If on the other hand it does not affect the legality of the District Magistrate's order, no suit would be competent. [P 750 C 1]

* (b) Limitation Act (1908), Art. 2—Person taking advantage of shorter period should have assumed to act honestly under statutory power—Public allegation of statutory power while acting is not necessary.

The words "alleged to be in pursuance of any enactment" in Art. 2 of the Act must be reasonably construed and the person who seeks to take advantage of the shorter period of limitation must show that he had reasonable grounds for justifying his action under the particular enactment which he then relied upon, and not simply that he arbitrarily asserted or thought so. He must, in short, have assumed to act in the honest exercise of a supposed statutory power. However, it is not necessary that at the time of the doing of the act complained of, the doer of the act should expressly or publicly allege that he was doing the act under a certain statute: *A I R 1927 P C 72, Disting.; 124 P R 1881, Partly approved; 72 P R 1909, Rel. on; A I R 1935 All 538, Ref.*

[P 750 C 2]

Lala Badri Dass and *Shadi Lal*—
for Appellant.

Malik Barkat Ali and *Kamal Din*—
for Respondents.

Judgment.—The suit giving rise to this appeal was instituted on 29th April 1935, by Amar Singh against Mr. Lincoln, B. Gurkirpal Singh, Secretary to the District Board, Ferozepore, and the District Board, Ferozepore, for recovery of Rupees 5,250. The plaintiff alleged that he was a pound keeper in charge of the cattle pound established by the District Board, Ferozepore, at Gholian Kalan, and that on 27th August 1933, about four thousand sheep and goats were brought to the pound by an Assistant Sub-Inspector of Police and the members of the Pound Sub-Committee and placed in his charge. On 5th September 1933, the Secretary, District Board, went to Gholian Kalan and under the orders of Mr. Lincoln who was then Deputy Commissioner of Ferozepore and ex officio Chairman of the District Board, secured the release of the said cattle without making any payment to him on account of the feeding charges which he was entitled to receive under the rules made by the District Board. He contended that the act of both Mr. Lincoln and the Secretary, District Board, was illegal, that it had caused him a loss of about five thousand rupees, and that he was consequently entitled to recover the sum mentioned above as compensation for feeding charges, supervision and care of the said cattle, together with interest thereon at the rate of six per cent. per mensem. The total sum thus calculated by him amounted to Rs. 5,375, but after remitting Rs. 125 he claimed a decree for Rs. 5,250 only. Mr. Lincoln contended that no suit lay against him in his personal capacity as whatever he did was done in his capacity as Deputy Commissioner and Chairman of the District Board. B. Gurkirpal Singh pleaded among other things that Mr. Lincoln, as District Magistrate, was competent to pass an order releasing the cattle which had been impounded in the Gholian Kalan cattle pound, that consequently the plaintiff had no cause of action against the defendants and that, under any circumstances, the plaintiff's suit was barred by time inasmuch as the act complained of was done in pursuance of the Cattle Trespass Act.

In his statement, dated 14th July 1935, Counsel for the plaintiff clarified his position by saying that his suit was for compensation under the Law of Torts and also under the provisions of the District Boards Act; and in a subsequent statement made

on 3rd September 1935, he added that the suit was governed by Art. 36, Limitation Act. On the other hand, counsel for the defendants urged that the suit was governed by Art. 2, Limitation Act, and not by Art. 36 and was consequently barred by time, having been brought long after the limitation had expired. The Senior Subordinate Judge has dismissed the suit mainly on the plea of limitation and from that decision the plaintiff has preferred this appeal. The sole question that falls to be judged in this case is whether Art. 2, Limitation Act, governs this case or Art. 36. Art. 2 runs as follows :

For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India.	Ninety days.	When the act or omission takes place.
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Article 36 reads as follows:

For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for.	Two years.	When the malfeasance, misfeasance or non-feasance takes place.
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It will be necessary therefore to determine whether the suit was for compensation for any act or omission in pursuance of any act of the Legislature or for compensation for any malfeasance, misfeasance, etc., not otherwise specially provided for.

It cannot be denied that the cattle pound at Gholian Kalan was established under the Cattle Trespass Act, 1871. S. 31, Cattle Trespass Act, empowers the Local Government to transfer to any local authority within any part of the territories under its administration, in which this Act is in operation, all or any of the functions of the Local Government or the Magistrate of the District under this Act, within the local area subject to the jurisdiction of the local authority. Similarly it is provided in Cl. (n) of sub-s. (1) of S. 20, District Boards Act, 1883, that the establishment and management of pounds including, where the Cattle Trespass Act, 1871 is in force, such functions of the Local Government and the Magistrate of the District under that Act as may be transferred to the Board by the Local Government, shall, subject to such exceptions and conditions as it may make and impose, be under the control and adminis-

tration of each District Board within the area subject to its authority.

It is common ground that the Cattle Trespass Act of 1871 is in force in the Punjab and that the pounds in the District of Ferozepore have been placed under the control and administration of the District Board, Ferozepore. Evidently therefore any proceedings that were taken by the Secretary, District Board, were taken under the Cattle Trespass Act and even if he had forwarded any papers for disposal to the Deputy Commissioner Ferozepore, he had done it under the provisions of the Cattle Trespass Act. In whatever position the Deputy Commissioner may have exercised his functions, he had done it by virtue of the powers vested in him under the Cattle Trespass Act. If any functions of the District Magistrate have been transferred to the District Board by any notification of the Local Government, Mr. Lincoln as Chairman of the District Board could exercise those powers on behalf of the District Board, and if those functions, with which we are at present concerned, have not been so transferred, he could by virtue of being District Magistrate take such action as was permissible under the Act.

It appears that on 30th August 1933, Mt. Fatima made an application to the Deputy Commissioner, Ferozepore, praying for the release of her cattle that had been impounded in the Gholian Kalan cattle pound in a high-handed manner. Mr. Lincoln forwarded this application to the Secretary, District Board, for necessary action. In pursuance of his order a report was submitted to Mr. Lincoln on which on 2nd September 1933, he ordered that all cattle except one hundred, which were to be detained as security for fine, should be released. On 4th September 1933, he again directed the Secretary, District Board, to visit the place and settle the matter finally. Now, a reference to Ss. 20, 21 and 22, Cattle Trespass Act, will make it clear that the action taken by the District Magistrate was within his powers. Ss. 20 and 21 authorize any person, whose cattle have been seized under the Act, to make a complaint to the District Magistrate which may either be in writing or verbal; and S. 22 empowers the District Magistrate not only to order the release of the cattle but to award to the complainant for the loss caused by the seizure or

detention reasonable compensation to be paid by the person who made the seizure or detained the cattle, together with all fines paid and expenses incurred by the complainant in procuring their release. It is true that under S. 21 the District Magistrate is enjoined to summon the person complained against and make an inquiry into the case; but non-compliance with the provisions of this section does not affect the merits of this case. If the non-compliance with the provisions of S. 21 has the effect of making the order of the District Magistrate illegal, any suit for compensation on that account would clearly be governed by Art. 2, Lim. Act. If on the other hand it does not affect the legality of the District Magistrate's order, no suit would be competent. In this connexion the following observations made in para. 654 of Vol. 23 of Halsbury's Laws of England may be referred to with advantage:

If the Legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful. The Statute usually provides that if damage results, compensation shall be made for it; but in the absence of such a provision, no action will lie at common law for such damage, whether the act is authorized for a public purpose or for private profit, because it is *damnum sine injuria*. The statutory authority covers every act reasonably necessary for the doing of the thing authorized.

Counsel for the appellant contended that Art. 2, Lim. Act, applied only to those cases where either the defendant performed an act under authority conferred on him by any statute or the defendant at the time of doing the act for which compensation was claimed alleged that he was acting in pursuance of a particular enactment; and in support of this proposition relied on 10 Lah 161¹ and 124 P R 1881.² In 10 Lah 161,¹ the Government who had constructed a vast set of irrigation canals in the neighbourhood of a river, cut three cuts through the canal with the result that water was let down from one side of the canal to the other leading to a great accumulation of water lower down. They again cut two other cuts fearing that if this accumulation went on, the railway embankment and the railway might be injured. The result was that the plaintiff's mills were injured. No finding had been arrived at in that case

that such action was necessary to avoid an accident to the canal. In the circumstances of that case their Lordships of the Privy Council came to the conclusion that as it did not appear that the action was done for any purpose of protecting the canal, a determination of the case depending on Art. 2 could not stand. They remanded the case but remarked at the same time that if the High Court on taking up the facts of the case considered that it was proved as a matter of fact that the operation was really for the protection of the canal, the plea of limitation would apply. This authority, in our view, does not in any way support the case for the appellant; it rather helps the respondents inasmuch as it lays down that if it is once found that the act complained of is done under the provisions of any enactment, Art. 2 does come into operation.

In 124 P R 1881,² it was held by a Division Bench of the Chief Court that

The words 'alleged to be in pursuance of any enactment' in Art. 2 must be reasonably construed and that the person who seeks to take advantage of the shorter period of limitation must show that he had reasonable grounds for justifying his action under the particular enactment which he then relied upon, and not simply that he arbitrarily asserted or thought so. He must in short have assumed to act in the honest exercise of a supposed statutory power.

One of the learned Judges constituting the Bench further remarked as follows :

Moreover I am inclined to think (though not without some hesitation) that Art. 2 only applies to those cases where the defendant at the time of doing the act for which compensation is claimed alleged that he was acting in pursuance of a particular enactment. This seems to be natural construction of the words 'for compensation for doing an act alleged to be in pursuance', which certainly indicate to my mind that the statutory power must have been relied upon when the act was done; for the Article in question only contemplates a suit based upon such an express allegation.

With the principle enunciated in that judgment we are in complete agreement, but if we may say so with all respect, the remark quoted above does not lay down good law. In our view, it is not necessary that at the time of the doing of the act complained of the doer of the act should expressly or publicly allege that he was doing the act under a certain statute. In fact, it was so laid down in a later case by another Division Bench of the Chief Court in 72 P R 1909.³ The learned Judges

1. Punjab Cotton Press Co. v. Secy. of State, A I R 1927 P C 72=103 I C 1=10 Lah 161 (P C).

2. Ganesh Das v. Elliott, (1881) 124 P R 1881.

3. Richard Watson v. Municipal Corporation of Simla, (1909) 72 P R 1909=2 I O 819=108 P L R 1909=112 P W R 1909.

discussed the legality of that remark in their judgment and came to the conclusion that they could not find any justification in the wording of Art. 2, Lim. Act, for the proposition that it could apply only to those cases in which the defendant at the time of doing the act informed the other party in so many words that he was acting under such and such a provision of law. In a recent case decided by a Full Bench of the Allahabad High Court reported as A I R 1935 All 538,⁴ it has been laid down that where a person honestly believes that he is acting under some enactment, he is protected and his case is covered by Art. 2, Lim. Act.

We have clearly indicated above that the act complained of was obviously done under the provisions of the Cattle Trespass Act and in these circumstances, the plaintiff, if aggrieved by the act, was bound to seek the recourse of law within ninety days of that Act. Not having done so, his suit is clearly time barred. In this view of the case, it is unnecessary to discuss the provisions of law contained in Art. 36, Lim. Act. We accordingly affirm the decision of the Court below and dismiss this appeal with costs.

B.D./R.K. *Appeal dismissed.*

⁴ Shiam Lal v. Abdul Raof, A I R 1935 All 538 = 1935 Cr C 560 = 155 I O 131 = 57 All 935 = 1935 A L J 459 (F B).

A. I. R. 1937 Lahore 751

TEK CHAND, J.

General Relief Association Ltd., Lahore
— Plaintiff—Petitioner.

v.

Ganpat Ram Hira Lal Bhojwalla —
Defendant—Opposite Party.

Civil Revn. No. 311 of 1936, Decided on 20th January 1937, from decree of Sub-Judge, First Class, Lahore, D/- 10th February 1936.

Company—Suit filed by secretary—Secretary authorized to file suit by chief officer holding management of limited company — Suit held was properly instituted.

Where a chief officer of a limited company had power under the articles of association to appoint a secretary for the purposes of management of the affairs of company and he gave to a secretary so appointed the power for filing and defending suits for and on behalf of the company and such secre-

tary filed suits on behalf of the company describing himself as secretary of that company:

Held : the suits were properly instituted : 58 P R 1886; A I R 1936 Lah 321 and A I R 1927 Sind 263, *Disting.*; A I R 1935 Cal 770, *Ref.*

[P 752 C 1]

Vishnu Datta — for Petitioner.

Order.—The General Relief Association Limited, Lahore, through its Secretary Muhammad Akbar, instituted three suits against Ganpat Ram-Hira Lal for recovery of certain sums of money. The defendant raised a preliminary objection in each case that the Secretary was not authorized to institute suits on behalf of the company and therefore the suit had not been properly filed. The preliminary objection prevailed, and the three suits have been dismissed on this ground.

The plaintiff is a limited company, incorporated under the Companies Act. From the memorandum and articles of association it appears that Mr. C. R. Huja is the chief officer of the Company and has been given extensive powers to manage and conduct its affairs and business. In Art. 7 of the schedule to the memorandum of association it is provided that, subject to the control and supervision of the directors, Mr. Huja shall have the general conduct and management of business and affairs of the Association and shall exercise all the powers vested and to be vested in him either by the Association or by the directors. He shall have power and authority on behalf of the Association, subject to such control and supervision of the directors, to appoint and employ in or for the purposes of the transaction and management of the affairs and business of the Association, a secretary or secretaries, with such powers and duties and upon such terms as he shall think fit. In accordance with the authority so conferred on Mr. Huja, he appointed Muhammad Akbar as the Secretary, and on 4th August 1934 gave him a letter expressly authorizing him to conduct and defend suits on behalf of and against the Company. The plaints in the suits are duly signed and verified by Mohammad Akbar, as Secretary of the Company, in accordance with the provisions of O. 29, R. 1, Civil P. C. In these circumstances I fail to see how the Court below could have held that the suits were not properly instituted.

The rulings cited by the lower Court do not appear to have any bearing. 58 P R 1886¹ is not the case of a limited company but of a Trades Association. In 37 P L R 446,² the articles of association contained a provision that the manager was authorized to institute suits with the previous sanction of the executive board, specially and generally obtained. No such condition exists in the present case. In 100 I C 450³ the suit was instituted by an attorney of the secretary of the company who had not authorized him to institute suits. In A I R 1935 Cal 770,⁴ the suit instituted by a registered company on a plaint, verified by its secretary, was held valid, where the articles of association empowered the secretary to do all acts necessary for the conduct of suits and there was averment in the plaint to that effect. In my opinion the suits were properly instituted and the decisions of the lower Courts dismissing the suits cannot be sustained. I accept the petitions for revision, set aside the orders dismissing the suits and remit them to the Court below for disposal in accordance with law. As the respondent has not appeared to contest these petitions, there will be no order as to costs. The petitioner's counsel has been directed to cause his client to appear before the Judge, Small Cause Court, Lahore on 15th February 1937 when further steps in the suits will be taken.

B.D./R.K.

Petitions accepted.

1. Northern India Trades Association v. Mathews, (1886) 58 P R 1886.
2. Punjab Zamindars Bank Ltd., Lyallpur v. Madan Mohan Singh, A I R 1936 Lah 321 = 161 I C 957 = 37 P L R 446.
3. Osborne Garrett & Co. v. Raisi Jothabhoy, A I R 1927 Sind 263 = 100 I C 450.
4. Laxmi Bhandar Ltd. v. Purna Chandra, AIR 1935 Cal 770 = 160 I C 84 = 62 C L J 477 = 40 C W N 930.

A. I. R. 1937 Lahore 752

SKEMP, J.

Kanshi Ram and another — Appellants.

v.

*Official Receiver, Campbellpur —**Respondent.*

First Appeal No. 152 of 1936, Decided on 21st December 1936, from order of Dist. Judge, Campbellpur, D/- 16th March 1936.

Insolvency—Discharge—Application for—
Unscheduled creditors — Failure to give
talbana or bring representatives of such
deceased creditor on record does not affect
proceedings for discharge.

Unscheduled creditors are not necessary parties to an application for discharge and hence the failure to give talbana for such a creditor or to bring the representatives of such a deceased creditor on the record does not affect the proceedings and should not result in the annulment of adjudication. [P 752 C 2]

Shamair Chand and Arjan Dass —
for Appellants.

Judgment.—This is an appeal against an order of the learned District Judge of Campbellpur annulling the adjudication of Kanshi Ram and his son Kundan Lal as insolvents. The order of adjudication was annulled on the grounds that the insolvents had not put in any talbana for Ishar Das creditor and had not brought on the record any representative of Bhagwan Das, a deceased creditor, although ordered to do so. The application for discharge was dismissed under O. 9, R. 2, Civil P. C., and there being no application, the adjudication was annulled. The main ground urged in appeal is that neither Ishar Das in question (Ishar Das son of Ram Chand) nor Bhagwan Das had proved their debts and been entered in the schedule of creditors.

In my judgment, creditors who have not proved their debts are not necessary parties to an application for discharge. I do not pronounce any opinion on the point whether it is desirable when an application for discharge is being considered to notify all the creditors or only the scheduled creditors, but in my opinion, ~~unscheduled creditors are not necessary parties.~~ Therefore, the failure to give talbana for such a creditor or to bring the representatives of such a deceased creditor on the record does not affect the proceedings. For these reasons I set aside the order under appeal and direct the learned District Judge to proceed with the application in accordance with law. No order as to costs.

R.W./R.K.

Order set aside.

A. I. R. 1937 Lahore 753

ADDISON AND DIN MOHAMMAD, JJ.

Sant Singh and another — Objectors—
Appellants.

v.

Ram Gopal and others, Petitioners and
others, Pro forma Respondents.

First Appeal No. 16 of 1936, Decided on 30th October 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 30th August 1935.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), S. 16 (2) (i), (ii) and (iii) — Baradari forming insignificant part of Namdev institution — Founder Namdev not Sikh but Bhagat—Some of his sayings incorporated in Granth Sahib—Granth Sahib kept in baradari and read and worshipped by followers of Namdev, as well as by Sikhs—No evidence proving baradari established for use by Sikhs for public worship and used as such—Baradari held was not Sikh Gurdwara.

There was a large and well-known institution founded in honour of Baba Namdev, who was not a Sikh but a Bhagat of some fame and some of his sayings were included in the Granth Sahib of the Sikhs. In an insignificant portion called the baradari the Granth Sahib was kept and read from time to time and worshipped by the followers of Namdev as well as Sikhs who respected the Namdev institution. There was a petition claiming the baradari as a Sikh gurdwara. There was no evidence proving that the baradari was established in memory of any of the ten Sikh Gurus or in commemoration of any incident in the life of any of the ten Gurus or for use by Sikhs for the purpose of public worship and used as such before and after the petition :

Held : that the fact that the Granth Sahib was read there from time to time did not necessarily bring the institution within the provisions of S. 16 (2) (i), (ii) or (iii), Sikh Gurdwaras Act. Unless it had been made out that the baradari was a separate institution and established as such, it could not be held to be a Sikh Gurdwara; for if the baradari was merely a part of the institution of Namdev, it must be held to be a minor or subsidiary part thereof. [P 754 C 1, 2]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), S. 16 (2) (ii)—Namdev sect is cosmopolitan and not Sikh—Its usages include reading of Granth Sahib, wherein sayings of its founder are incorporated—Nama Bansis institution forming corporate part of large institution of followers of Namdevji—Sikhs with leanings towards Namdev sect visiting institution—Nature of institution which is Nama Bansi is not altered.

The Namdev sect, which is not a Sikh sect, is a very cosmopolitan one and amongst its usages is the reading and worship of the Granth Sahib in which many of the sayings of its founder are incorporated. [P 755 C 2]

If many Sikhs go to a baradari which is a Nama Bansi institution and a corporate part of one large institution of the followers of Baba Namdevji, they are Sikhs, who are not strict Sikhs but with leanings towards the Namdev sect.

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The Nama Bansis venerate the Granth Sahib and there is no reason to hold that they worship the Granth Sahib at baradari owing to some tradition connected with one of the ten Gurus. They do so because Granth Sahib is one of the books they venerate. If some Sikhs do go there, that would not alter the nature of the institution, which is a Nama Bansi institution. [P 755 C 2]

Harnam Singh — for Appellants.*Achhru Ram, Mela Ram and F. H. Shah* — for Petitioners Nos. 1 to 29.

Addison, J. — There was a petition under S. 7, Sikh Gurdwaras Act, claiming a certain institution at Ghuman named Baba Namdevji as a Sikh Gurdwara. When this petition was gazetted, two petitions were put in under S. 8 of the Act by two sets of worshippers, praying that this institution should be declared not to be a Sikh Gurdwara. These petitions were consolidated and an issue framed as to whether the institution should be declared to be a Sikh Gurdwara. In the original petition under S. 7 no map or plan of the institution was given nor were the boundaries of the gurdwara building shown. There is at Ghuman a well-known institution comprising a mandar of Baba Namdev, a smadh of Bawa Bohr Das, a mandar of Shivji, a mandar of Krishna and a fifth place called by some witnesses baradari and by others tehdari, along with other buildings, all being inside the same enclosure. Inside this large enclosure there is another enclosure, containing the smadh or mandar of Baba Namdev and many other smadhs. The baradari or tehdari can only be approached by entering first the large enclosure and then the smaller enclosure. According to the petition under S. 7, the whole of this large institution was claimed as the Sikh Gurdwara of Baba Namdevji; but when the petitions under S. 8 came on for trial, the petitioners had to admit that they could lay no claim to the institution as a whole and they confined their claim to the baradari or tehdari marked A on the plan, alleging that to be a Sikh Gurdwara, although it obviously forms part of the one large building, enclosed, as already described. Baba Namdevji, by whom or in whose honour this institution was founded, was not a Sikh. He died in 1350 A. D. before even the birth of the first Guru, Nanak. This Namdevji was a Bhagat of some fame and some of his sayings were included in the Granth Sahib of the Sikhs, although he was not a Sikh.

Bohr Das, whose smadh is also one of the places where worship takes place in this institution, was the chela of Namdevji, and the petitioners in Petition No. 924, known as Bawas, are his descendants. A committee of these Bawas manages the institution as a whole. The Chhimbas (originally tailors and washermen) of the Punjab count themselves as his followers and the petitioners in Petition No. 925 are representatives of these Chhimbas who also claim to be managers of the institution. There is thus a controversy between the petitioners in the two petitions, namely between the Bawas and the Chhimbas on the subject of management. Many of the persons, who signed the petition under S. 8 presented by the Chhimbas, are obviously Sikhs or persons with Sikh leanings, and when evidence was led by the Chhimbas, some of their witnesses with these leanings did state that the baradari A was founded in memory of a visit paid by the sixth Guru, Hargobind, to this institution.

The Sikh Gurdwaras Tribunal held that it had not been established that the portion of this institution marked A was a Sikh Gurdwara and an order was made in both petitions to the effect that the institution described as Gurdwara Baba Namdevji at Ghuman should not be declared to be a Sikh Gurdwara. Against these two orders or decrees some of the S. 7 petitioners have preferred two appeals, which have been heard together.

It cannot be contended, and it was not contended before us that the followers of Namdev, who was not a Sikh, come within the Sikh fold; yet many of his followers reverence the Granth Sahib and in numerous respects resemble the Sikhs in their usages; in particular, they pay great respect to the Granth Sahib of the Sikhs, and there is no doubt that the Granth Sahib was kept in the baradari marked A and worshipped there for many years by the followers of Namdevji as well as by Sikhs who go to pay respect to the Namdev institution. Reading of the Granth Sahib from beginning to end, called Akhand path, has taken place there from time to time from 1869 onwards. This, however, does not necessarily bring the baradari A within the provisions of S. 16 (2) (i), (ii) or (iii), Sikh Gurdwaras Act, these being the sections relied upon by the objectors. Unless it has been made out that this

baradari A is a separate institution and established as such, it cannot be held to be a Sikh Gurdwara; for if the baradari is merely a part of the institution of Namdev, it must be held to be a minor or subsidiary part thereof.

The Bawa petitioners contended that they kept the Granth Sahib in the baradari along with other sacred Hindu scriptures and that they only used it for reading the verses of Namdev, which are undoubtedly incorporated therein. This is not correct and there is no doubt that the Granth Sahib as a whole has been read there. The objectors, on the other hand, asserted that the baradari was a separate institution, in spite of its forming part of the building of Namdevji, established in memory of a visit paid by the sixth Guru to the Namdev institution at Ghuman. The sixth Guru did pay such a visit as he was apparently impressed with the sanctity of the institution; but even after that visit, the institution remained as it was and did not become a Sikh institution unless it be that the baradari A was then founded in memory of his visit.

There are many general considerations which go against the establishment of this baradari A as a separate institution. The whole institution, including everything contained within the enclosure, has always been managed by the committee of the Namdevji institution and the baradari A has never had a separate management or separate accounts. Apart from that, the petitioners under S. 7 of the Act first claimed the whole institution to be Sikh and then had to confine themselves to this insignificant portion A which undoubtedly is part of the building of a very large institution which they had to admit they had wrongly claimed in the first instance. The very name Gurdwara Baba Namdevji goes to indicate that it is a gurdwara of a non-Sikh body. Obviously the petitioners under S. 7 were wise in giving up the claim that the whole institution was a Sikh Gurdwara as that petition was un-maintainable. Their original claim, therefore, as first put forward in the petition under S. 7, was false.

The burden is therefore heavy upon them to prove that this small portion of a large building was established as a Sikh Gurdwara and comes within S. 16 (2) (i), (ii) or (iii) of the Act. It appears that this baradari was rebuilt in 1911; but

there is no doubt that it existed in some form at an earlier date. This is clear from P. W. 7/7 which is dated 1898. There is a book, P. W. 9/2, published in 1931 by one Gyani Khazan Singh. He stated there that a memorial was erected where the Guru's horse had been tethered. He was examined as a witness and could not show any authority for this statement and it is significant that no such tradition was mentioned in the earlier edition of the same work.

P. W. 7/7 was also relied upon by the objectors. This was a poem written by Puran Das in 1898. He was mahant of the institution. In his poem, which is written in very flowery language, the visit of the sixth Guru is mentioned. After that is mentioned the fine baradari structure where the Granth Sahib was installed. The building is described as most magnificent. There is, however, no link even in the poem connecting the baradari with the visit of the sixth Guru. Taking the evidence as a whole, therefore, it cannot be regarded as proving that the baradari was established in memory of Guru Hargobind's visit, especially when it is undoubted that Namdev was a bhagat and that his followers have, therefore, a direct interest in the Guru Granth Sahib and the sayings of Namdev which are incorporated in it. It also follows that it cannot be said that it has been proved that this baradari was established for public worship by the Sikhs rather than the followers of Namdev. In fact, it was not seriously contended before us that S. 16 (2) (i) of the Act applied, that is, that the baradari A was established by, or in memory of, any of the ten Sikh Gurus or in commemoration of any incident in the life of any of the ten Sikh Gurus and was used for public worship by Sikhs. Similarly the evidence is far from proving that the baradari A was established for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs before and at the time of the presentation of the petition under sub-s. (1) of S. 7. This means that S. 16 (2) (iii) is also of no avail to the objectors.

More stress was laid upon S. 16 (2) (ii) of the Act, namely that the baradari A, owing to some tradition connected with one of the ten Sikh Gurus, was used for public worship predominantly by Sikhs before and at the time of the presumption of the petition under sub-s. (1) of S. 7. Here again the objectors must fail. The

Namdev sect, which is not a Sikh sect, is a very cosmopolitan one and amongst its usages is the reading and worship of the Granth Sahib in which many of the sayings of its founder are incorporated. It may be the case that the Sikhs go there because the Granth Sahib is there; but these must be Sikhs, who are not strict Sikhs but with leanings towards the Namdev sect, as in the same institution there are smadhs, which are worshipped, and Hindu temples where worship takes place. Nama Bansis venerate the Granth Sahib and there is no reason to hold that they worship at baradari A, as they undoubtedly do, owing to some tradition connected with one of the ten Sikh Gurus. They do so because the Granth Sahib is one of the books they venerate. If some Sikhs do go there, that would not alter the nature of the institution which is a Nama Bansi institution and a corporate part of one large institution of the followers of Baba Namdevji. In fact, an attempt has been made in this case to turn a friendly visit of the sixth Guru to an institution belonging to another sect, into a source of gain to the followers of the Guru who paid this friendly visit. The attempt set up is one without merit and has been made merely with a view to obtain possession of a portion of an institution which is not a Sikh institution and at which large offerings are made. We dismiss both appeals with costs.

V.B.E./A.L.

Appeals dismissed.

A. I. R. 1937 Lahore 755

JAI LAL, J.

Hardit Singh — Plaintiff — Appellant.

v.

Mohindar Singh and others —

Defendants — Respondents.

Second Appeal No. 506 of 1936, Decided on 9th November 1936, from order of Dist. Judge, Rawalpindi, D/- 4th February 1936.

Punjab Pre-emption Act (1 of 1913), S. 3— Land lying waste and used for no specific purpose—Land not proved to have been used for grazing purposes or grass in it regularly cut and sold for profit—Such land is not agricultural land.

Where the land has been lying as waste land and is not used for any specific purpose and it is not proved that such land is used for grazing purposes or grass in it has been regularly cut and

sold for profit, such land is not agricultural land within the meaning of the definition as given in S. 3, Punjab Pre-emption Act. [P 756 C 1]

Achhru Ram — for Appellant.

Nawal Kishore and Gurbachan Singh
— for Respondents.

Judgment. — These are six second appeals. They all arise out of suits for pre-emption and their determination depends upon the question whether the land in dispute is agricultural land as that expression is defined in S. 3, Punjab Pre-emption Act. That section adopts the definition of the expression as given in the Punjab Alienation of Land Act with the exception of any right of occupancy acquired or existing under the Punjab Tenancy Act, 1887, or under any earlier law. The definition of the expression in the Punjab Alienation of Land Act is land which is not occupied as the site of any building in a town or village and is occupied or left for agricultural purposes or for purposes subservient to agriculture or for pasture.

It is claimed on behalf of the appellant that the land in dispute is covered by this definition because it is occupied or left for purposes of pasture. The learned District Judge has found that the area in dispute has been lying as waste land and used for no specific purpose but because in the course of nature grass has grown thereon at certain seasons of the year, anybody who so wished could help himself thereto.

He has also held

Nobody has proved that the land has been used for grazing purposes or grass in the area in dispute has been regularly cut and sold for profit.

I consider that on this finding of the learned District Judge the land in dispute is clearly not agricultural land as that expression is defined in the Punjab Pre-emption Act. Accordingly I dismiss all these appeals with costs.

W.D./A.L. *Appeals dismissed.*

A. I. R. 1937 Lahore 756

TEK CHAND, J.

Shiam Singh — Plaintiff — Petitioner.
v.

Kundan Singh — Defendant —
Opposite Party.

Civil Revn. Petn. No. 358 of 1936, Decided on 15th December 1936, against decree of Judge, Sm. C. C., Simla, D/- 22nd April 1936.

Punjab Regulation of Accounts Act (1 of 1930), S. 4—Suit in respect of loan advanced to contractor—S. 4 does not apply.

A suit in respect of loan advanced to a contractor does not relate to a 'loan' as defined in S. 2 (vii), Punjab Regulation of Accounts Act. The provisions of S. 4 are therefore inapplicable to such a case and hence interest and costs cannot be disallowed by reason of the creditor's failure to comply with provisions of S. 3. [P 757 C 1]

Krishna Swarup — for Petitioner.

Order. — The plaintiff brought a suit against the defendant for the recovery of Rs. 250 principal and Rs. 35-4-0 interest, alleged to be due on loans advanced as evidenced by entries in the plaintiff's *bahi* duly signed by the defendant. The defendant pleaded that the suit was premature, as it had been agreed that the defendant could repay the amount due at any time in three years. He also prayed for instalments. The Judge, Small Cause Court, decided the first point against the defendant as he produced no convincing evidence to prove the alleged agreement to re-pay at any time in three years. He also found that there was no adequate ground for allowing instalments. He however held that the plaintiff was a "money-lender" and as he kept no accounts, he was not entitled to interest and costs under the Punjab Regulation of Accounts Act. He accordingly passed a decree for Rs. 250, the principal amount advanced plus annas four cost of notice, or Rs. 250-4-0 in all. The plaintiff has filed a petition for revision in this Court, urging that the interest and costs should have been allowed, as the Punjab Regulation of Accounts Act did not apply to this case. The respondent has been served but is not present.

The defendant in this case is admittedly a contractor. The lower Court purported to act under S. 4, Punjab Regulation of Accounts Act, which provides that notwithstanding anything contained in any other enactment in force for the time being in any suit or proceeding relating to a "loan," the Court shall disallow the whole or a portion of the interest and shall disallow costs, if the plaintiff is a "creditor" as defined in the Act and has not complied with the duty cast on him to maintain and furnish accounts as laid down in S. 3 of the Act. S. 2 (vii) of the Act defines a 'loan,' and specifically provides that it shall not include, inter alia, a loan advanced to a trader. 'Trader' is defined in Cl. (ix) as including a contractor. The defendant is admittedly a contractor. In these circumstances it is clear that the present suit did not relate to a 'loan' as

defined in the Act. The provisions of S. 4 therefore were inapplicable and interest and costs could not have been disallowed by reason of the plaintiff's failure to comply with the provisions of S. 3.

The rate of interest is clearly mentioned in the various writings in the plaintiff's *bahi* signed by the defendant himself in his own hand. The defence on the merits put forward by the defendant was not substantiated. There are no grounds why the plaintiffs should not get interest and costs. I accept the petition for revision and in a modification of the decree of the Court below, pass a decree for Rs. 285-4-0 with costs in both Courts against the defendant.

D.S./R.K.

Petition accepted.

A. I. R. 1937 Lahore 757

JAI LAL, J.

Ganda Ram — Appellant.

v.

Shiva Nand-Ganesh Das and others —
Respondents.

Second Appeal No. 15 of 1936, Decided on 8th October 1936.

(a) Provincial Insolvency Act (1920), Ss. 4, 68, 75 (1), Proviso 2—Official Receiver taking possession of certain property—Objection raised under S. 68 to action of Official Receiver by person claiming property as his own—Insolvency Court framing issue and deciding in favour of claimant and releasing property—Appeal lies from order releasing property under Proviso 2 to S. 75 (1).

Where a person makes an application under S. 68, objecting to the conduct of the Official Receiver in taking possession of property belonging to him and not to the insolvent, and the Insolvency Court frames an issue on the point and decides that the property belongs to the person claiming it, an appeal lies against the order releasing the property, under the 2nd proviso to sub-s. (1) of S. 75 as the Insolvency Court must be deemed to have investigated the claims of the claimant under S. 4, having framed issues, recorded the evidence and then disposed of the objection. He cannot be said to have merely heard an appeal from the action of the Official Receiver.

[P 757 C 2]

(b) Provincial Insolvency Act (1920), S. 75—Creditor is entitled to appeal against order which affects him along with other creditors—It is not necessary that he alone should be affected by order appealed against.

A creditor is entitled to appeal against an order by the Insolvency Court which affects him along with other creditors and it is not necessary under S. 75, Provincial Insolvency Act, that he alone should be affected by the order appealed against and not jointly with other creditors: *A I R 1933 Lah 856* and *A I R 1934 Lah 968*, *Rel. on.* [P 757 C 2]

Nand Lal — for Appellant.

Shambu Lal Puri — for Respondents.

Judgment.—The respondent Shiva Nand applied to the Insolvency Judge under S. 68, Provincial Insolvency Act, objecting to the conduct of the Official Receiver in taking possession of the property which Shiva Nand claimed was his own and not that of the insolvent. On receipt of the application, the Insolvency Judge framed an issue whether the property belonged to the insolvent or to Shiva Nand and decided in favour of the latter. One of the creditors who it appears had moved the Official Receiver to take possession of the property in dispute, appealed to the Additional District Judge against the order of the Insolvency Judge releasing the property on the application of Shiva Nand. His appeal has been dismissed on the ground that under S. 75, Provincial Insolvency Act, a creditor is not entitled to appeal from an order of this description but that the Official Receiver is the only competent person to appeal. The creditor in question has consequently presented a second appeal in this Court and a preliminary objection is taken on behalf of the respondent that no appeal lies. In my opinion however an appeal lies under the second Proviso to sub-s. 1 of S. 75. It is true that an application was made to the Insolvency Judge under S. 68, Provincial Insolvency Act, but the learned Judge must be deemed to have investigated the claim of Shiva Nand under S. 4 of the Act because he framed an issue, recorded evidence and then disposed of the objection. It is not that he merely heard an appeal from the action of the Official Receiver.

On the merits of the appeal, the view of the learned Additional District Judge cannot be sustained. The matter has been before this Court on several occasions and it has now been held that a creditor is entitled to appeal against an order which affects him along with other creditors and therefore the contention of the learned counsel for the respondent that S. 75 of the Act gives a right to a creditor to appeal only if he alone is affected by the order appealed against and not jointly with other creditors, has no force. *A I R 1933 Lah 856*¹ and *A I R 1934 Lah 968*²

1. *Radhe Kishan Tirath Ram v. Fateh Mahomed*, *A I R 1933 Lah 856*=147 *I C 262*=35 *P L R 171*.

2. *Barkat Rai v. Jewanmal*, *A I R 1934 Lah 968*=154 *I C 708*.

are authorities in support of the contention of the appellant that he is entitled to appeal to the learned Additional District Judge. I consequently accept this appeal, set aside the order of the Additional District Judge and send the case back to him with direction to hear the appeal on the merits. The costs of this appeal shall abide the result. Parties to appear in the Additional District Judge's Court on 9th November 1936.

R.M./R.K.

Appeal allowed.

A. I. R. 1937 Lahore 758

TEK CHAND AND SKEMP, JJ.

Ahmad Mukhtar and others —

Plaintiffs — Petitioners.

v.

Hari Ram and others — Defendants —
Opposite Party.

Civil Misc. Petition No. 393 of 1936, Decided on 28th October 1936, for leave to appeal to His Majesty in Council, from judgment of Tek Chand and Dalip Singh, JJ., D/. 9th April 1936, reported in *A I R 1937 Lah 370*.

Civil P. C. (1908), S. 110—Questions sought to be agitated before Privy Council, subject of consideration by Courts for period over 70 years—Courts arriving at uniformly one decision—Petitioner's predecessor-in-interest party to several cases — Titles created on strength of those decisions—No substantial question of law is involved nor is case otherwise fit for appeal to Privy Council.

Under S. 110, Civil P.O., it is incumbent upon the Court in a case where the appellate decree affirmed the decree of the lower Court to be satisfied, before it burdens the Judicial Committee of the Privy Council with the hearing of the appeal, that a question fairly open to argument, and not merely an alleged question of law, is involved in the appeal. [P 759 C 1]

Where the questions sought to be agitated before His Majesty in Council have been the subject of consideration by the Courts in the Punjab for a period of over 70 years and the Courts have uniformly arrived at one decision on them and the predecessor-in-interest of the petitioner was a party in several of the cases in which those questions arose and on the strength of those decisions titles have been created for a long time, no substantial question of law is involved in the appeal nor is the case otherwise fit for appeal to His Majesty in Council: *A I R 1936 Rang 125*; *A I R 1929 Lah 55* and *A I R 1926 Oudh 381*, Rel. on. [P 758 C 2; P 759 C 1]

Manohar Lal — for Petitioners.

Vishnu Dutta and Shamsher Bahadur — for Opposite Party.

Order.—This is a petition under Ss. 109 and 110, Civil P. C., for leave to appeal to

His Majesty in Council from the judgment and decree of this Court in First Appeal No. 1283, of 1930 decided on 9th April 1936. The value of the subject matter in dispute is Rs. 10,000, but the decree of this Court affirmed the decision of the Court of first instance. We have therefore to see whether the proposed appeal involves some substantial question of law. The questions which the petitioners seek to agitate before His Majesty in Council are: (1) The effect of the "attachment" of the property of private individuals (including that of the predecessor-in-interest of the petitioners) in 1857; (2) the meaning and purport of the Proclamation of 29th September 1858 creating building tenancies on the land "attached," and (3) whether the "restoration" of the "attached" properties to the original owners was subject to the rights of the tenants who had constructed buildings in the meantime in accordance with the terms of the proclamation.

These questions have been the subject of consideration by the Courts in the Punjab for a period of over 70 years and except in one case, the decision of which was admittedly based on a mistranslation of the Proclamation, it has been uniformly held that the "attachment" or seizure of private property at Delhi in 1857, when a state of war prevailed there, was an "Act of State" which could not be called in question in Municipal Courts, that by the "attachment" the title of Government had become complete and that the subsequent restoration of the property seized to the original owners conferred a new title on them. It has also been held that the building tenancies created in the meantime under the Proclamation were of a permanent nature. To several of the cases in which these questions were decided, Karim Bakhsh, the predecessor-in-interest of the plaintiff-petitioners, was a party. It is also clear from the evidence on the record that the plaintiffs' ancestors had accepted the re-grant from Government, subject to the rights of the predecessors of the defendant-respondents as permanent tenants.

On the facts concurrently found by the trial Court and this Court, no substantial questions of law really arise, and in view of the long course of decisions in this Court and the Chief Court and the fact that on the strength of these decisions titles have been created for a long time,

we do not think that this is a fit case in which leave to appeal to His Majesty in Council should be granted. As observed by Page, C. J. in 13 Rang 744¹:

Under S. 110, Civil P. O., it is incumbent upon the Court in a case where the appellate decree affirmed the decree of the lower Court to be satisfied, before it burdens the Judicial Committee of the Privy Council with the hearing of the appeal, that a question of law fairly open to argument, and not merely an alleged question of law, is involved in the appeal.

See to the same effect 9 Lah 581² and 1 Luck 265.³

Mr. Manohar Lal also stressed the point that the tenancy in this case could not be a permanent one as the rent had been raised twice. But as has been pointed out in the judgment of this Court, this was done by consent of parties and therefore this circumstance does not militate against the tenancy being a permanent one. In our opinion no "substantial question of law" is involved, nor is the case "otherwise fit" for appeal to His Majesty in Council and we dismiss the petition with costs.

R.M./R.K.

Petition dismissed.

1. M. O. Patail v. Hoosain Goolam Ariff, A I R 1936 Rang 125=161 I C 383=13 Rang 744.
2. Feroze Din Khan v. Nawab Khan, A I R 1929 Lah 55=110 I C 258=9 Lah 591=29 P L R 529.
3. Sartaj Kuar v. Mahadeo Bakheh, A I R 1926 Oudh 381=95 I C 193=29 O C 215=1 Luck 265=3 O W N 557 (F B).

A. I. R. 1937 Lahore 759

TEK CHAND, J.

Mt. Saidan — Plaintiff — Appellant.
v.

Sharaf — Defendant — Respondent.

Second Appeal No. 590 of 1936, Decided on 18th December 1936, from decree of Dist. Judge, Jhelum, D/- 23rd April 1936.

Mahomedan Law—Marriage—Dissolution—Renunciation of Islam by one of spouses dissolves marriage — Renunciation must be proved—Motive of renunciation is immaterial.

Renunciation of Islam by one of the spouses results ipso facto in the dissolution of the marriage and it is immaterial whether the motive for the renunciation was a genuine conversion or a mere device to have the marriage dissolved. The factum of renunciation however must be proved all the same: A I R 1924 Lah 397; A I R 1934 Lah 976 and A I R 1936 Lah 666, *Rel. on.*

[P 760 C 1]

Brij Lal — for Appellant.

L. M. Datta — for Respondent.

Judgment. — On 9th December 1935, the plaintiff, Mt. Saidan, instituted a suit in the Court of the Subordinate Judge, Chakwal, for a declaration that her marriage with defendant Sharaf had been dissolved on 23rd October 1935, when she renounced Islam and embraced Christianity. The defendant denied the factum of the plaintiff's renunciation of Islam or conversion to Christianity, and stated that she was still a Mahomedan and had been abducted by one Sadar-ud-din with whom she was living. The defendant had instituted criminal proceedings on 19th November 1935 against Sadar-ud-din and in order to furnish a defence in that case, a false story had been concocted as to her alleged conversion to Christianity. The trial Judge decreed the suit. On appeal by the defendant, the learned District Judge came to the conclusion and held that the plaintiff had failed to prove the genuineness of her alleged apostasy from Islam or conversion to Christianity. He accordingly accepted the appeal and dismissed the suit.

In support of her allegation as to her conversion, the plaintiff had produced in the trial Court a baptismal certificate purporting to have been issued by one J. M. Paul of Lyallpur, bearing date 23rd October 1935. The trial Judge considered that this certificate furnished strong corroboration of the statement of the plaintiff, and relying on it he held that the plaintiff was converted to Christianity on 23rd October 1935. The learned District Judge, however, considered the document to be highly suspicious and felt that it had been ante-dated from 23rd November 1935 to 23rd October 1935, in order to furnish a defence in the criminal case under S. 498, I. P. C., which had been instituted by the defendant against Sadar-ud-din, the alleged abductor of the plaintiff. The learned Judge also stressed the fact that the padre J. M. Paul had not been produced.

The case came up for hearing before me on 20th November 1936 and after hearing both counsel, I considered it necessary to examine J. M. Paul in this Court. He was accordingly summoned as a witness and has been examined to-day. His statement leaves no doubt whatever that the so-called baptismal certificate was written on 23rd November 1935 and that the date was subsequently changed to 23rd October 1935. In his examination-in-chief the

witness stated that the alteration had been made by him at the time when the certificate was written, as he had inadvertently given the month as "11" instead of "10" and that he corrected the mistake immediately. He also stated that before converting her and issuing the certificate, she had given him an application in writing stating that she wanted to be converted. He produced this application Ex. P-1. The application bears the date 23rd November 1935. It is, therefore, quite clear that the statement made by the witness in the examination-in-chief as to how the alteration in the date was made is untrue, and it also establishes beyond doubt that the so-called baptismal certificate was written on 23rd November 1935.

As already stated, the criminal case had been instituted on 19th November 1935. It will thus appear that the suspicions of the learned District Judge as to the genuineness of Ex. P-1 which had been deliberately ante-dated so as to make out that the so-called conversion took place before the criminal complaint was filed, were fully justified. The statement of J. M. Paul is unsatisfactory in several other particulars also. The evidence, taken as a whole, leaves no doubt in my mind that the learned District Judge has correctly found that the alleged apostasy of the plaintiff from Islam and her conversion to Christianity were not genuine.

It is no doubt the law that renunciation of Islam by one of the spouses results ipso facto in the dissolution of the marriage and it is immaterial whether the motive for the renunciation was a genuine conversion or a mere device to have the marriage dissolved: see A I R 1924 Lah 397;¹ A I R 1928 Lah 954;² A I R 1934 Lah 976³ and A I R 1936 Lah 666,⁴ but the factum of renunciation must be proved all the same. In this particular case the finding of the learned District Judge is that there was no such renunciation on 23rd October 1935, as alleged in the plaint. This finding is one of fact, and the evidence now taken leaves no doubt as to its correctness. On this finding the plaintiff's suit was rightly

dismissed. The appeal fails and is dismissed with costs.

B.D./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 760

JAI LAL, J.

Mt. Widya Wati and others —

Defendants — Appellants.
v.

Nand Lal and others — Plaintiffs —
Respondents.

Second Appeal No. 815 of 1936, Decided on 17th December 1936, from order of Dist. Judge, Multan, D/- 25th May 1936.

Limitation Act (1908), Art. 125—Alienation—Property sold by widow and mother of last male holder jointly—Suit by reversioner for declaring sale void against him—Art. 125 applies.

Where a certain property was actually sold by a widow jointly with the mother of the late last male holder and a reversioner brought a suit to declare the sale void as against him :

Held : that as the mother jointly with the widow actually transferred the land, she was estopped from claiming possession of the land as against the purchaser and Art. 125 was applicable to the case. [P 761 O 1].

Vishnu Datta for Nawal Kishore —
for Appellants.

Mukand Lal Puri and Bishan Narain —
for Respondents.

Judgment. — This second appeal is by the vendee or the representative-in-interest of the vendee. The property was sold by two widows, the widow and the mother respectively of the last male holder. The parties are governed by the Hindu law. The sale was for Rs. 1,000 by means of a sale deed executed by both the widows as vendors on 7th June 1927. The respondent who is admittedly the next male heir to the estate instituted a suit on 9th August 1933 for a declaration that the sale shall not affect his reversionary rights. The learned Additional District Judge has on appeal held that necessity for Rs. 464 has been established but not for the balance. On this appeal three questions are raised : firstly, that the suit was barred by time, secondly that the plaintiff was estopped from maintaining the suit, and thirdly that the learned Additional District Judge has on insufficient and illegal grounds refused to hold the balance of consideration to be for necessity.

With regard to the limitation, it is contended that Art. 125, Lim. Act, applied by

1. Bakho v. Lal, A I R 1924 Lah 397=71 I O 830.

2. Rahmate v. Nikka, A I R 1928 Lah 954=111 I O 160=29 P L R 570.

3. Sardaran v. Allah Bakhsh, A I R 1934 Lah 976.

4. Sardar Mohammad v. Maryam Bibi, A I R 1936 Lah 666=165 I O 383.

the learned Additional District Judge to this case is not really applicable. That Article lays down limitation of 12 years from the date of the alienation for a suit during the lifetime of a Hindu or Mahomedan female by a Hindu or Mahomedan who, if the female had died at the time of the institution of the suit, would be entitled to the possession of the land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage. The one ground on which it is contended that this Article does not apply to this case is that if the alienation be deemed to be by the widow, then there is the mother who would at the time of the institution of the suit be entitled to take possession of the land in dispute. Secondly that though this second lady, the mother, has joined in the sale, the sale of her expectancy by her is void under the provisions of S. 6, T. P. Act. It is therefore urged that the sale by the mother should not be deemed to be a sale of the land as expressly stated in the sale deed, but it must be deemed to be a sale of her future right and thus void. This argument, however, in my opinion, is not open to the appellant who according to the deed is clearly a purchaser of the land from the mother jointly with the widow and he cannot therefore deny the right of his own vendor to sell the land. Moreover the question whether the mother is or is not entitled to sell the land does not affect the applicability of Art. 125 considering that she actually did transfer the land and as against the vendee would be estopped from claiming possession of the land. The argument therefore of the appellants' counsel that Art. 125 does not apply for the reasons stated above is fallacious. In my opinion, the learned Additional District Judge has rightly applied that Article to this case.

With regard to the question of estoppel, it is said that after the sale to the appellant, the plaintiff-respondent received the rent of the property sold from the appellant and also paid his share of some repairs done to the property by the appellant. In the first instance it has not been shown that after the payment and receipt of these two items respectively the appellant spent any money or acted to his detriment with regard to the property in dispute relying upon the so-called representation of the respondent; but another

ground against the appellants' case is that the respondent immediately after the sale of the property to the appellant instituted a suit for recovery of his share of rent and in the plaint he clearly stated that the suit had been instituted against the appellant without prejudice to the right of the plaintiff to have the sale set aside which was clearly stated in the plaint to be void. It appears that the respondent is a share-holder in the property and the widow and the mother, the vendors of the appellant, had sold to the appellant only their share in the property. Under the circumstances, in my opinion, it is obvious that the respondent cannot be held to be estopped by anything done by him as contended by the appellant.

With regard to the question of consideration, the question is really one of fact and nothing has been stated to show that the conclusion of the learned Additional District Judge is in any way opposed to law. He has considered the evidence and has held it to be insufficient to prove necessity. I dismiss this appeal with costs.

Cross-objections have been filed by the respondents claiming that the whole consideration should have been declared to be taken for necessity. There again, the conclusion of the Additional District Judge is one of fact and the cross-objections have not been pressed. I dismiss them with costs.

S.C./D.S. *Appeal and cross-objections dismissed.*

A. I. R. 1937 Lahore 761

JAI LAL AND ABDUL RASHID, JJ.

Mt. Shahzadi Bi — Defendant —
Petitioner.

v.

Mt. Rahmat Bi and others, Plaintiffs
and others, Defendants — Opposite
Party.

Civil Misc. Petn. No. 416 of 1936,
Decided on 9th November 1936, for appeal
to His Majesty in Council, from decree of
Jai Lal and Dalip Singh, JJ., D/. 19th May
1936, reported in *A I R 1936 Lah 879*.

(a) Administration — Suit for — Suit is of
representative nature — All creditors need
not be arrayed as parties — Creditors how-
ever must be called on to prove their debts
after decree is passed.

In an administration suit, the object of which always is to obtain an order for the administration of the estate of a deceased person under the supervision of the Court which must necessitate the payments of all the debts from the estate and therefore essentially a representative suit, it is not necessary that all the creditors should be arrayed as parties. All that is necessary in such cases is to call upon all the creditors after the decree has been passed to prove their debts and to pay such debts as have been proved before distribution of the estate to the heirs. [P 763 C 1]

(b) Civil P. C. (1908), S. 110 — Substantial question of law—Administration suit — Non-joinder of all creditors is not substantial question of law.

The question of non-joinder of all the creditors in an administration suit cannot be held to be a substantial question of law involved in the appeal sought to be presented to His Majesty in Council. [P 763 C 1]

(c) Civil P. C. (1908), S. 110 — Leave to appeal—High Court modifying lower Court's decree in applicant's favour — Decree partially confirming lower Court's decree—Leave cannot be granted to agitate the confirmed portion of the decree.

It would be anomalous to grant leave to appeal to His Majesty in Council to an applicant on matters in which a High Court has concurred with the trial Court on the mere ground that on other matters High Court has modified the decree of the trial Court but in favour of the applicant: *A I R 1935 Cal 146* and *A I R 1923 Mad 30*, *Rel. on.* [P 764 C 1]

Abdul Rahman and Bishan Narain —
for Petitioner.

Kirpa Narain and Bhagwat Dial —
for Opposite Party (Plaintiffs).

Jai Lal, J.—This is an application for leave to appeal to His Majesty in Council from a decree passed by this Court on 19th May 1936. Two appeals were presented by the applicant to this Court against a decree passed by the Subordinate Judge of Delhi in two suits which were consolidated and tried together. Both the suits were for the administration of the estate of the late Haji Bakhsh Ilahi: one was by the respondent Mohammad Rafi and the other by the applicant Mt. Shahzadi Bi, the son and widow respectively of the deceased.

The main dispute, so far as it is relevant to this application in those suits, was whether certain properties which were claimed by Mt. Shahzadi Bi were her properties or whether they were part of the estate of the deceased. The Subordinate Judge held that out of the 11 properties which were claimed by Mt. Shahzadi Bi, only three were hers and the remain-

ing eight formed part of the estate of Haji Bakhsh Ilahi. Mt. Shahzadi Bi being dissatisfied with this decree, presented two appeals to this Court while Mohammad Rafi filed cross-objections. The main contention, both in the appeals and in the cross-objections, was as to the ownership of the eight and three properties respectively. By the judgment and decree of this Court mentioned above, the cross-objections were dismissed. The appeals of the applicant were partially accepted and out of the remaining eight properties claimed by her on appeal this Court held that four belonged to Mt. Shahzadi Bi and the remaining four to the estate of the late Haji Bakhsh Ilahi. The object of the appeal to His Majesty in Council is to contest the decree of this Court which affirmed the decree of the trial Court so far as the remaining four properties have been held to be part of the estate of Haji Bakhsh Ilahi.

A preliminary objection is raised on behalf of the respondent that the applicant is not entitled to appeal to His Majesty in Council because the decree of the trial Court was affirmed by this Court so far as the four properties are concerned. It is urged that though the decree of the trial Court was varied by this Court, this was done in favour of the applicant and no part of the decree was varied against her. Now, there is no dispute that the value of the properties now in dispute is more than Rs. 10,000. Therefore the first requirement of S. 110, Civil P. C., that the amount or value of the subject matter of the suit in the Court of the first instance and the amount or value of the subject matter in dispute to His Majesty in Council must be Rupees 10,000 or above, is satisfied. But there is a further condition imposed by S. 110, before leave to appeal can be granted and it is that where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law. A half-hearted attempt was made by the learned counsel for the applicant to show that the appeal involves a substantial question of law, but we are not satisfied that any such question is involved in this case. It was contended that the substantial question of law involved in appeal is that an administration suit must always be of a representative character

and in order that such a suit can be held to be of a representative character the plaintiff must formally implead those whom he seeks to represent.

In urging this objection, the learned counsel ignores the fact that the applicant herself was the plaintiff in one of the suits. No authority, however, has been cited to show that in an administration suit, the object of which always is to obtain an order for the administration of the estate of a deceased person under the supervision of the Court which must necessitate the payments of all the debts from the estate and is therefore essentially a representative suit, it is necessary that all the creditors should be arrayed as parties. In our opinion all that is necessary in such cases is to call upon all the creditors after the decree has been passed to prove their debts and to pay such debts as have been proved before distribution of the estate to the heirs. In any case, in both the suits in question, decrees having been passed and administration having been directed in accordance with law, the question of non-joinder of all the creditors cannot be held to be a substantial question of law involved in the appeal.

The main contention of the learned counsel for the applicant was that the decree of this Court did not affirm the decision of the Subordinate Judge. We are however of opinion that this contention of the learned counsel is devoid of force. In deciding this question we must look not to the form of the decree but to the substance. It is no doubt true that this Court accepted the appeal of the applicant and varied the decree of the trial Court in her favour. But so far as the matter which is sought to be agitated in appeal to His Majesty in Council is concerned, the decision of the Court below was confirmed. The dispute about each item of property was independent of the dispute about the other items and history of each property had to be gone into to decide whether it belonged to Haji Bakhsh Ilahi at the time of his death or whether it belonged to Mt. Shahzadi Bi. Therefore, there is a clear distinction between this case and a suit for accounts in which the determination of the amount depends upon examination of the same account and for this reason some of the cases cited on behalf of the applicant are distinguishable, as for instance 51 Cal

969,¹ 54 All 146,² A I R 1935 Cal 250,³ A I R 1933 Pat 262⁴ and A I R 1935 Oudh 489.⁶

In 11 Lah 465⁶ some observations occur which support the contention of the respondent that the decree in this case must be deemed to have been affirmed by this Court so far as the properties now in dispute are concerned. A I R 1923 Mad 30⁷ is a clear authority in favour of the respondents' contention. The matter has recently been exhaustively discussed by a Division Bench of the Calcutta High Court in 38 C W N 1174.⁸ In that case the suit was for partition of certain properties. The plaintiffs claimed a half share therein and also for accounts. The Subordinate Judge made a decree declaring in effect the plaintiffs' share to be one-third, after excluding certain properties which he found had already been partitioned and also ordering accounts for a certain period. Of the properties in respect of which he decreed partition, he ordered a few items to be kept joint and the others he ordered to be partitioned by metes and bounds. On appeal by plaintiff 1 and a cross-objection by plaintiff 2, the High Court of Calcutta varied the decree of the trial Court by dismissing the appeal save and except that it ordered a partition by metes and bounds of all the properties found to be joint. Plaintiff 1 thereupon applied for leave to appeal to His Majesty in Council. The learned Judges held that under such circumstances the plaintiff was not entitled to appeal to the King in Council because of the modification made by the High Court on other points on which the Courts had concurred without showing that some substantial question of law was involved. With the conclusion and the reasons

1. Annapurnabai v. Ruprao, A I R 1925 P C 60 = 86 I O 504 = 51 Cal 969 = 51 I A 319 (P O).
2. Nathu Lal v. Raghubir Singh, A I R 1932 All 65 = 135 I C 234 = 54 All 146 = 1931 A L J 968 (S B).
3. B. N. Ry. Co. Ltd. v. Ruttanji Ramji, A I R 1935 Cal 250 = 155 I O 727 = 39 O W N 52.
4. Homeshwar Singh v. Kameshwar Singh, AIR 1933 Pat 262 = 144 I O 320.
5. Bisheshwar Bakhsh Singh v. Biswanath Singh, A I R 1935 Oudh 489 = 156 I O 10 = 1935 O W N 947 = 11 Luck 320.
6. Asa Ram v. Kishen Chand, A I R 1930 Lah 554 = 123 I O 523 = 11 Lah 465 = 31 PLR 236.
7. Vadivelammal v. Rajaratnam Mudaliar, AIR 1923 Mad 30.
8. Bibhuti Bhusan Dutta v. Sreepati Dutta, A I R 1935 Cal 146 = 154 I O 1072 = 62 Cal 257 = 38 C W N 1174.

therefor given in the judgment, we venture respectfully to agree. In our opinion it would be anomalous to grant leave to appeal to the applicant on matters in which this Court has concurred with the trial Court on the mere ground that on other matters this Court has modified the decree of the trial Court but in favour of the applicant.

The learned counsel for the applicant has asked us to allow him to amend his grounds of appeal in case we granted him leave to appeal to His Majesty in Council. He stated that when the judgment of this Court was announced, one item of property out of the four in which the judgment of the trial Court has been affirmed was adjudged to be the property of the applicant; but in the judgment as finally recorded that property has been found to belong to the estate. This in our opinion would not be a ground of appeal to His Majesty in Council and if the applicant has any grievance in the matter, she has her remedy by moving this Court to correct its judgment on an application for review or by such other procedure as the applicant may indicate. We dismiss this application with costs.

B.D./D.S. *Application dismissed.*

A. I. R. 1937 Lahore 764

ADDISON AND DIN MOHAMMAD, JJ.

Kartar Singh Bedi — Defendant

— Appellant.

v.

Dinga Singh — Plaintiff — Respondent.

First Appeal No. 125 of 1936, Decided on 15th December 1936, from decree of Senior Sub.Judge, Montgomery, D/- 18th December 1935.

Practice—Stay of trial—Punjab — Suit for recovery of mortgage-debt—Defendant raising defence that plaintiff contracted with him to purchase part of mortgaged property in consideration of wiping out mortgage debt — Pending decision, suit for specific performance of contract against plaintiff—Best course held was to stay mortgage suit till decision in suit for specific performance.

A suit was brought for the recovery of the mortgage debt. The defendant raised the defence that the plaintiff had entered into contract with the defendant for the purchase of a part of the mortgaged property, the consideration of which would have wiped the mortgage debt and that the plaintiff failed to abide by such contract. Pending the decision of such suit by the trial Court, the defendant filed a suit for specific performance of the contract against the plaintiff :

Held : that as the Transfer of Property Act did not apply to Punjab but only its principles were applied, it was doubtful whether principles of S. 54, T. P. Act, could be applied to the case in view of S. 13, Specific Relief Act. The best course was therefore to stay the mortgage suit till the decision of the appellant's suit for specific performance: *A I R 1934 P C 235; A I R 1931 P C 79 and A I R 1933 P C 29, Ref.* [P 765 C 2; P 766 C 1]

Jagan Nath Aggarwal — for Appellant.
Mehr Chand Mahajan and Qabul Chand for *Dev Raj Sawhney* — for Respondent.

Addison, J.—The plaintiff brought a suit against the defendant for the recovery of Rs. 2,32,296.12-0 on the footing of two mortgages, dated 30th July 1928 and 11th February 1931, respectively. The execution of the deed was admitted and so were the terms except that it was pleaded that the condition relating to the payment of compound interest in default was penal and unenforceable. The main plea taken by the defendant was that the plaintiff by a letter, dated 21st August 1931, entered into an agreement with him for the purchase of a part of the mortgaged property, the consideration of which would have wiped out the mortgage debt, and as he had failed to abide by the contract he could not maintain the present suit. The plaintiff denied the authorship of this letter and in the alternative contended that even if it were admitted that he had written it, it was inadmissible in evidence as it was unregistered and offended against the provisions of Proviso 4 of S. 92, Evidence Act. The trial Court held that the letter was inadmissible and decreed the suit. There was an appeal to this Court which was decided on 1st June 1934. The learned Judges who composed the Division Bench found that the letter was admissible in evidence, and accepting the appeal, sent the case back for trial on the merits. The case has now been tried. The trial Court has found that the letter was written by the plaintiff but that as it was only an agreement to purchase and not an out-and-out sale, it had no effect upon the mortgage suit. The suit has accordingly been again decreed and the defendant has appealed.

The learned counsel appearing for the appellant has asked us to stay or adjourn the hearing of the appeal for the following reasons: On 11th April 1933 the defendant brought a suit for specific performance of the contract. This suit was instituted while the first appeal was pend-

ing in this Court. It was properly stayed pending the decision of the first appeal. When however the mortgage suit was remanded for trial on the merits, the trial Judge ordered that the suit for specific performance should be stayed as the issue involved in it was the same as the issue involved in the mortgage suit. When, however, he came to give his decision in the mortgage suit, after finding that the contract to purchase was established, he held that this did not affect the result of the mortgage suit. This means, if his decision is correct, that the same issue will have to be tried in the second suit; and it was urged that we should not, therefore, express any opinion on the merits as to the execution of the document in question until the second suit has been tried on the merits and decided.

Under S. 54, T. P. Act, which was enacted in 1882, a contract for the sale of immoveable property does not by itself create any interest in or charge on such property. Where the Transfer of Property Act, therefore, applies, it would seem to be correct that, until the suit for specific performance is decreed, the defence cannot be raised in the mortgage suit that it should be dismissed on the ground that there was an agreement for the sale of part of the immoveable property which would wipe out the mortgage-debt. But the Transfer of Property Act is not in force in the Punjab and the defence raised in the mortgage suit was really based on this circumstance. According to S. 13, Specific Relief Act, which was enacted in 1877, five years before the Transfer of Property Act was passed, it is laid down that notwithstanding anything contained in S. 56, Contract Act, a contract is not wholly impossible of performance because a portion of its subject matter, existing at its date, has ceased to exist at the time of the performance. Illus. (a) of the section is as follows:

A contracts to sell a house to B for a lakh of rupees. The day after the contract is made the house is destroyed by a cyclone. B may be compelled to perform his part of the contract by paying the purchase money.

In Pollock and Mulla's Contract and Specific Relief Act, Edn. 6, there is a commentary to the following effect:

Illustration (a) assumes that a contract for the sale of a house does, of itself, transfer the beneficial interest in the house to the purchaser, and make him owner in equity in the English phrase. This was also the law in India before the Trans-

fer of Property Act 1882 came into force. By S. 54 of that Act is provided that a contract for the sale of immoveable property does not, of itself, create any interest in or charge on such property. By S. 55 (5) it is enacted that the risk of destruction is borne by the purchaser only from the date when the ownership passes to him and the ownership appears to pass on execution of a proper conveyance by the vendor: see S. 55 (1) (d). It would therefore seem that the Illustration cannot now be applied where the Transfer of Property Act is in force.

It is thus apparent that when the Specific Relief Act was passed in 1877, the English law was taken as the standard, under which a contract for sale made the purchaser owner in equity but, when in 1882 the Transfer of Property Act was passed, the English rule was departed from and it was enacted that a contract for sale of immoveable property did not of itself create any interest in or charge on such property. Here in the Punjab the question is even more complicated because the Transfer of Property Act is not in force in it. Its principles are usually applied though there are decisions to the effect that the broad principles of equity and good conscience should be followed in the Punjab in preference to rules laid down in the Transfer of Property Act. In this state of doubt, there is no question but that the best course will be to stay the hearing of this appeal or to adjourn it until the suit for specific performance is decided. In fact it was this suit which should have been decided first. This is clear from three decisions of their Lordships of the Privy Council. In 58 Bom 650¹ it was stated as follows [*in headnote*]:

In a suit for ejectment instituted in 1921 by the registered proprietor of the land, which was over Rs. 100 in value, it was not a relevant defence that the plaintiff had agreed to sell the land in suit to the defendant, even if it was alleged that the defendant was in possession under the contract. By S. 54, T. P. Act, a transfer by sale could only be made by a registered instrument and the contract by itself does not create any interest in or charge on the property. If the contract is still enforceable, the defendant may found upon it to have the suit stayed, and by suing for specific performance obtain a title which would protect him from ejectment, but if it is no longer enforceable, its part performance will not avail him to any effect.

Similarly the same principle was laid down in 58 Cal 1235² on pages 1245-46;

1. Pir Bux v. Mahomed Tahar, A I R 1934 P C 235=151 I O 326=58 Bom 650=61 I A 388 (P C).
2. G. H. C. Ariff v. Jadunath Majumdar, A I R 1931 P O 79=131 I C 762=58 Cal 1235=58 I A 91 (P C).

see also 60 Cal 980.³ The right course for the trial Court to have adopted, therefore, was, when the suit for specific performance was lodged, to stay the hearing of the mortgage suit, pending the decision of the suit for specific performance. If that suit is decreed and the property passed to the plaintiff, it will be a good defence in the mortgage suit whether the Transfer of Property Act applies or does not apply. We, therefore, accede to the request of the appellant's counsel and direct that the hearing of this appeal be stayed till the suit for specific performance is decided. If there is an appeal from that decision, the two appeals can be heard at the same time. We further direct that the hearing of the suit for specific performance be expedited and that that suit should be decided on the merits, even if the question of *res judicata* is raised by the plaintiff in it. Of course, if that defence is raised, it must also be decided by the trial Court. We also direct that a quarterly report be sent to the Registrar by the trial Court, stating how far the case has advanced. This is done merely to ensure the expedition of the trial.

W.D./A.L.

- Appeal stayed.

3. *Currimbhoy & Co. Ltd. v. L. A. Creet*, A I R 1933 P C 29=141 I C 209=60 Cal 980=60 I A 297 (P C).

A. I. R. 1937 Lahore 766

TEK CHAND, J.

Mubariz — Plaintiff — Appellant.

v.

Mt. Sattan and another — Defendants
— Respondents.

Second Appeal No. 427 of 1936, Decided on 9th December 1936, from decree of Senior Sub-Judge, Jhelum, D/. 27th February 1936.

Custom (Punjab)—Gift—Daughter—Ancestral land—Bhatti Rais of Jhelum District are Rajputs—Custom amongst them is same as that of Mahomedan tribes in Jhelum District—Gift by sonless proprietor of whole or portion of his ancestral estate to his daughter is valid, though brother is alive.

Bhatti Rais of the Jhelum District are Rajputs and the custom prevailing amongst them is the same as that of the other Mahomedan tribes in the Jhelum District. Among the Mahomedan tribes of the Jhelum District a sonless proprietor has the power to gift or bequeath the whole or a portion of his ancestral estate to his daughter, or daughter's son in presence of near collaterals. Such gift made in presence of brother is therefore valid amongst the tribe of Bhatti Rais: *Case law referred.*

[P 766 C 2; P 777 C 1]

Qabul Chand for M. L. Puri and M. L. Puri — for Appellant.

L. M. Dutta — for Respondents.

Judgment—On 21st September 1934, Hyder, a Bhatti Rai of Mauza Gahi, Tehsil Pind Dadan Khan, District Jhelum, gifted 26 Kanals and 2 Marlas of land to his daughter, Mt. Sattan. Hyder was sonless, but had a brother Waris, who consented to the gift. Waris himself is an old man over 50 years of age and is issueless. On 19th October 1935, Mubariz, who is a first cousin of Hyder, brought a suit for a declaration that the land gifted by Hyder to his daughter was ancestral *qua* him, and that the gift was invalid according to custom and was ineffectual against his reversionary rights after the death of Hyder. He claimed a right to maintain this suit, as Waris, the presumptive heir of Hyder, had consented to the gift. The defendants resisted the suit, denying the ancestral nature of the property, and alleging that even if it was ancestral, the gift was valid under custom. Hyder died during the pendency of the suit, and his widow Mt. Bhag Bhari was substituted as a defendant.

The trial Judge found the land to be ancestral and relying upon the entry in the Answer to Question 89 of Talbot's General Code of Tribal Custom in the Jhelum district, held that the gift was invalid. He accordingly decreed the suit. On appeal, the learned Senior Subordinate Judge agreed with the finding of the trial Judge as to the ancestral character of the land. He, however, found that according to the custom prevailing in the tribe, which was the same as that followed by the other agricultural Mahomedan tribes of the district, a sonless proprietor had the power to gift or bequeath his ancestral property to his daughter in the presence of near collaterals. He, therefore, accepted the appeal and dismissed the plaintiff's suit. The plaintiff has come in second appeal to this Court, with a certificate by the Senior Subordinate Judge for the decision of the question of custom involved in this case.

After hearing counsel and examining the record, I have no doubt that the decision of the learned Senior Subordinate Judge is correct and must be maintained. Admittedly, Bhatti Rai, the tribe to which the parties belong, are Rajputs, and it is common ground that their custom is the same as that of the other Mahomedan

tribes in the Jhelum District. The oral evidence produced by the parties is not of much value. The plaintiff produced only one witness who did not cite any instance. The defendants produced two witnesses, who deposed to a gift by Muhammad Khan, a Bhatti Rai of the village Gahi (to which the parties to this litigation belong) to his sister, and stated that the gift was not challenged by the reversioners of the donor. The plaintiff produced no documentary evidence whatever. The defendants relied upon a decision of Lala Mulk Raj Bhattia, Sub-Judge, Jhelum, dated 21st November 1929, in *re Shah Nawaz v. Ghulam Hussain, Bhattis of Tehsil Chakwal*. In that case one Shahmali had gifted his entire estate, which consisted of a considerable area of land, to his daughter's son. The gift was upheld and the suit of the collaterals dismissed. Before me, reliance is placed solely on the Answer to Question 89 of Talbot's Code of Tribal Custom. In this Answer the Bhattis of Pind Dadan Khan Tehsil are recorded as having stated that there was

no custom of a father making a gift of the whole or any specific share of the property moveable or immoveable, ancestral or acquired, to his daughter otherwise than as her dowry.

This is followed by a note stating that there have been instances of Gakkhars, Bhattis and one amongst Jalads of such gift. In view of this entry, the initial presumption is no doubt in favour of the plaintiff, but there is a large number of judicial instances in which it has been found that among the Mahomedan tribes of the Jhelum District, a sonless proprietor has the power to gift or bequeath the whole or a portion of his ancestral estate to his daughter, or daughter's son: see 56 P R 1881,¹ 22 P R 1904,² 71 P R 1904,³ 85 P R 1904,⁴ 62 P R 1906,⁵ 115 P R 1907,⁶ 87 P R 1918,⁷ 2 Lah 170,⁸

1. *Alla Baksh v. Mahomed Baksh*, (1881) 56 P R 1881.
2. *Sher Jang v. Ghulam Mohiuddin*, (1904) 22 P R 1904=40 P L R 1904.
3. *Hasan v. Jahana*, (1904) 71 P R 1904=96 P L R 1904.
4. *Fazal v. Khan Mahomed*, (1904) 85 P R 1904=172 P L R 1905.
5. *Bhole v. Fakir*, (1906) 62 P R 1906=136 P L R 1906.
6. *Gohra v. Hari Ram*, (1907) 115 P R 1907.
7. *Hayat v. Mt. Gullan*, A I R 1918 Lah 347=47 I C 931=87 P R 1918=99 P L R 1918.
8. *Muhammad Khan v. Mt. Kesran*, A I R 1921 Lah 221=62 I C 841=2 Lah 170=78 P L R 1921.

A I R 1928 Lah 489,⁹ A I R 1929 Lah 214,¹⁰ A I R 1931 Lah 450¹¹ and 14 Lah 553.¹² To this list may be added the decision of Mr. Mulk Raj Bhattia, Subordinate Judge, above referred to; it may also be stated here that Talbot's Code of Tribal Custom has been considered in a large number of cases in the Chief Court and the High Court and has been found to be an "imperfectly prepared" document: see 8 P R 1906,¹³ 10 Lah 249¹⁴ (at p. 251), 10 Lah 581¹⁵ (at p. 585), A I R 1931 Lah 450,¹¹ 7 Lah 390¹⁶ and 2 Lah 170.⁸

It must therefore be held that the onus, which initially lay on the defendants, has been amply discharged and that the gift in question is valid by custom. The appeal fails and is dismissed with costs.

K.B./A.L.

Appeal dismissed.

9. *Fazal Khan v. Anwar*, A I R 1928 Lah 489=110 I C 550=29 P L R 254.
10. *Imam Shah v. Zaman Shah*, A I R 1929 Lah 214=113 I C 62.
11. *Nadran v. Muhammad Husain*, A I R 1931 Lah 450=132 I C 209.
12. *Ismail v. Mt. Amiran*, A I R 1933 Lah 612=141 I C 364=14 Lah 553=34 P L R 230.
13. *Khuda Var v. Fatteh*, (1906) 8 P R 1906=64 P L R 1906.
14. *Sultan v. Mt. Sharfan*, A I R 1928 Lah 703=111 I C 846=10 Lah 249=30 P L R 668.
15. *Pahalwan Khan v. Bagga*, A I R 1929 Lah 192=114 I C 705=10 Lah 581=30 P L R 605.
16. *Mahomad Aslam Khan v. Jaban Khan*, A I R 1926 Lah 688=94 I C 398=7 Lah 390=27 P L R 271.

A. I. R. 1937 Lahore 767

JAI LAL, J.

Mangal Ram and another —

Defendants — Appellants.

v.

Sat Deo and others — Plaintiffs —

Respondents.

First Appeal No. 142 of 1936, Decided on 20th October 1936, from order of Dist. Judge, Ludhiana, D/- 18th April 1936.

(a) Practice—Discretion — Second appeal—District Judge exercising discretion not illegally under S. 5, Limitation Act—Correctness of order cannot be contested in second appeal.

Where an appeal was filed in the Court of the Senior Subordinate Judge but it was returned for proper presentation and then it was filed in the Court of District Judge to whom the appeal really lay and the District Judge exercised his discretion under S. 5, Limitation Act, extending time for presentation of the appeal before him by condoning the delay :

Held : that the correctness of his order could not be contested in second appeal as his order was not illegal, discretion being clearly vested in him. [P 769 C 1]

(b) Civil P. C. (1908), O. 2, R. 2—Mortgage—Principal payable after five years but interest payable annually — On default of interest mortgagee having right to recover principal and interest by sale of mortgaged property — First suit by mortgagee for interest alone — Second suit, before expiry of five years, for recovery of interest accrued subsequent to first suit — Second suit held not barred under O. 2, R. 2, as claim based on normal right independently of default clause.

In every mortgage, in the absence of a clear expression to the contrary, interest must be assumed to be charged on the mortgaged property and therefore in case of default in payment of interest the mortgagee would be entitled to recover the same by sale of the mortgaged property. [P 769 C 2]

A mortgage provided for payment of the principal in five years and interest thereon every year. It further provided that if there was default in the payment of the annual interest or in the payment of the principal amount on the due date, the mortgagee would be entitled to sue for the recovery of the whole principal and interest by sale of the mortgaged property. The default having been made in the payment of the interest, the mortgagee instituted a suit for recovery of the interest by sale of the mortgaged property and obtained a decree. Before the term of five years for the payment of the principal expired, the mortgagee instituted another suit for recovery of the amount of interest which fell due after the date of the previous suit by sale of the mortgaged property :

Held : that the second suit was not barred by O. 2, R. 2. The mortgagee was not bound to sue for recovery of the whole amount, principal and interest, when he filed the first suit and it was at his option to waive the default and to sue for interest alone. When the mortgagee asked in second suit for sale of the mortgaged property in default of payment of interest, he should be deemed to have based his claim on his normal right independently of the default clause to recover overdue interest by the sale of the mortgaged property : *A I R 1922 P C 412, Disting.; A I R 1933 Lah 463 and A I R 1935 Lah 672 (F B), Ref.*

[P 769 C 2]

Indar Deo and Achhru Ram —
for Appellants.

Mehr Chand Mahajan —
for Respondents.

Judgment.— This appeal raises a question which is not free from difficulty. On 1st November 1930 the appellant executed a mortgage deed for Rs. 500 in favour of the respondent. He agreed to pay the principal in five years and interest thereon at 9 per cent. per annum every year. He further stipulated that if he made default in the payment of the annual interest or in the payment of the principal at the agreed time, the mortgagee will have the

right to sue for the principal and interest in respect of which default is made by attachment and sale of the mortgaged property. Default having been made in the payment of the interest, the mortgagee instituted a suit on 3rd November 1932 for recovery of Rs. 216 which was the interest then due. In the plaint, after describing the terms of the mortgage as stated above, the mortgagee alleged that Rs. 216 were due on account of interest which the mortgagor had failed to pay. He therefore claimed a decree for that amount "with a lien on the mortgaged property". This suit was decreed but before the property could be sold the decretal amount was paid by the mortgagor. It appears that the decree passed by the trial Judge in that suit was for recovery of the amount by sale of the mortgaged property.

Subsequently the suit out of which this second appeal has arisen was instituted by the mortgagee for recovery of Rs. 216 interest which fell due to him after the date of the previous suit. The suit was instituted on 2nd February 1935 before the term of five years for the payment of the principal amount mentioned in the mortgage deed had expired. To this suit an objection was taken by the defendant mortgagor that it was barred by virtue of the provisions of O. 2, R. 2, Civil P. C. This objection was accepted by the trial Court and the suit dismissed but on appeal the learned District Judge has held that the suit is not barred under O. 2, R. 2, because according to the terms of the mortgage deed, it was at the option of the mortgagee to take advantage of the default clause and to sue for the recovery of the principal and the interest due or to waive the default and to sue only for recovery of the unpaid interest. He consequently held that in the previous suit the mortgagee having exercised his option of not taking advantage of the default clause and having sued for interest only, was competent to sue for interest now. On the present occasion also it may be mentioned the prayer of the plaintiff is for a decree for interest due by sale of the mortgaged property.

It appears that the appeal was first filed in the Court of the Senior Subordinate Judge but the memorandum of appeal was returned and was presented to the District Judge to whose Court the appeal really lay and the District Judge has exercised

his discretion under S. 5, Limitation Act, and has extended the time for the presentation of the appeal before him by condoning the delay. On this appeal it is contended that the District Judge exercised the discretion which did not vest in him and that in any case he exercised it arbitrarily. I am unable to accept this contention. In my opinion the District Judge having exercised his discretion which clearly vested in him, it is not open to the appellant on this second appeal to contest the correctness of the order of the District Judge, which in my opinion is not illegal.

The really difficult point that has to be decided in this case is whether the suit is barred under O. 2, R. 2, by virtue of the previous suit. Several judgments have been cited at the Bar but most of them have been decided on their own peculiar facts and do not seem to bear on the question involved in this case. The one decided case which appears to fully cover the present case is A I R 1933 Lah 463¹ which was decided by Tapp, J. in Chambers. On behalf of the appellant, reliance is placed mainly on the judgment of their Lordships of the Privy Council in 4 Lah 32.² The learned counsel for the respondent has urged that the observations in this judgment do not govern the present case because in the case before their Lordships of the Privy Council the first suit for recovery of interest alone was filed at a time when the term fixed for the payment of the principal amount had already expired. That this is an important distinction in deciding the applicability of O. 2, R. 2, must be recognized and was so recognized in a judgment of a Full Bench of this Court in 16 Lah 640.³

The real difficulty in the way of the respondent appears to be the fact that in the previous suit as in the present suit the mortgagee asked for the sale of the mortgaged property, a relief which it might be urged with some justification is conferred on the mortgagee only by the default clause in the mortgage deed which is that if there be default in the payment of the annual interest or in the payment

of the principal amount on the due date, then the mortgagee shall be entitled to sue for the recovery of the whole principal and interest by sale of the mortgaged property. But in my opinion in every mortgage in the absence of a clear expression to the contrary, interest must be assumed to be charged on the mortgaged property and therefore in case of default in payment of interest, the mortgagee would be entitled to recover the same by sale of the mortgaged property. It is therefore fair to assume in the present case that the mortgagee when he asked for the sale of the mortgaged property in default of the payment of interest to him based his claim on his normal right independently of the default clause to recover the overdue interest by sale of the mortgaged property. This is the only way in which the conduct of the respondent mortgagee in suing on both occasions for sale of the mortgaged property can be interpreted. In my opinion therefore the view of the learned District Judge that the mortgagee was not bound to sue for the recovery of the whole amount, principal and interest, when he filed the previous suit and that it was at his option to waive the default and to sue for interest alone and therefore that the present suit is not barred by O. 2, R. 2 is correct. I dismiss this appeal with costs.

W.D./A.L.

Appeal dismissed.

A. I. R. 1937 Lahore 769

TEK CHAND, J.

Khuda Bakhsh and another —

Plaintiffs—Appellants.
v.

Mohammad Bakhsh and others —

Defendants—Respondents.

Second Appeal No. 965 of 1936, Decided on 17th December 1936, from decree of Addl. Dist. Judge, Multan, D/- 29th April 1936.

Custom (Punjab) — Alienation — Widow succeeding to non-ancestral property of husband — Widow and her mother-in-law transferring property for valuable consideration — Next reversioner consenting bona fide to transaction on receipt of consideration — Transaction is binding on son of reversioner.

A widow, who succeeded to the non-ancestral property of her husband on the usual widow's life-estate, and her mother-in-law, who had to be maintained out of the estate, both transferred the property by sale for valuable consideration. The next reversioner on receipt of certain consideration consented to the transaction. On the death

1. Hukam Chand v. Ram Nath, A I R 1933 Lah 463=141 I O 613=34 P L R 520.

2. Kishen Narain v. Pala Mal, A I R 1922 P O 412=72 I O 187=50 I A 115=4 Lah 32 (P O).

3. Puran Chand v. Har Parshad, A I R 1935 Lah 672 = 158 I O 238 = 16 Lah 640 = 37 P L R 816 (F B).

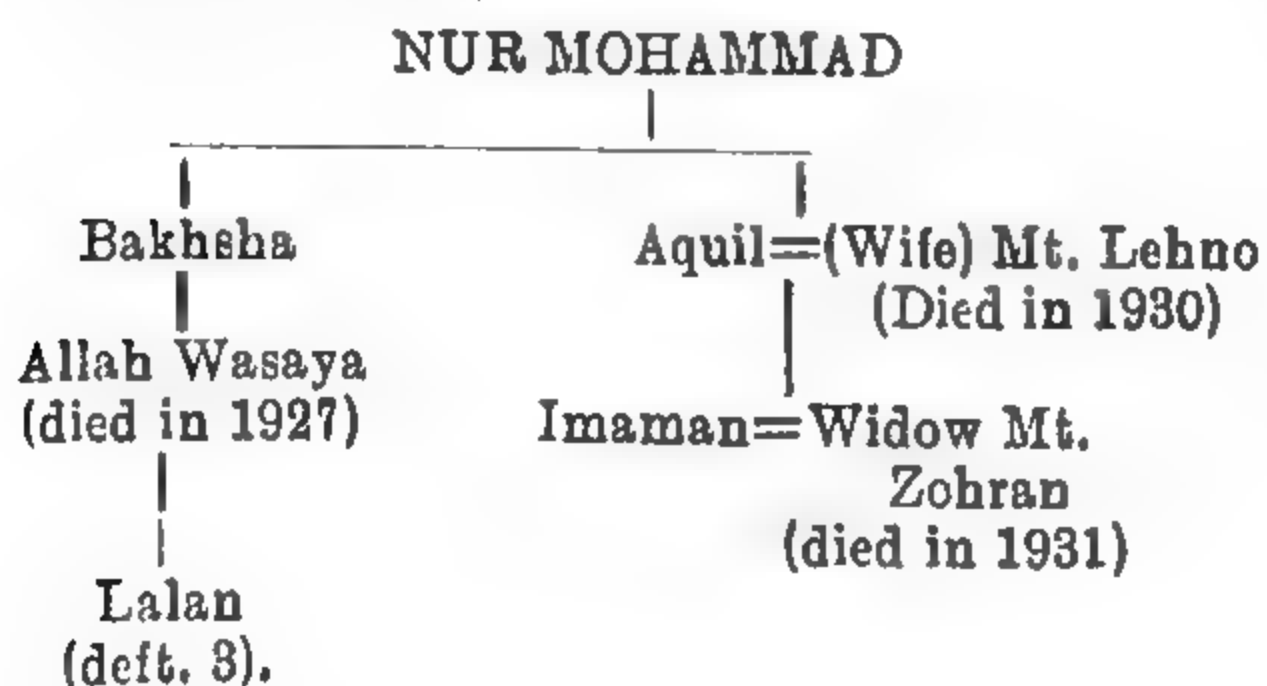
of the widow, the son of the deceased reversioner claiming himself as full owner of the property by succession to the widow, sold the property to the plaintiff, who brought the suit for possession:

Held: that to such a transaction the rule against sale of reversionary rights did not apply. The consent by the next reversioner was bona fide and was obviously binding on his son, the property not having been proved ancestral : *A I R 1923 Lah 353* and *A I R 1931 Lah 495, Rel. on.* [P 770 C 2 ; P 771 C 1]

Shamair Chand, C. L. Ghulati and
Qabul Chand — for Appellants.

Shambu Lal Puri — for Respondents.

Judgment. — The following pedigree-table will be helpful in understanding the facts of this case :



The house in dispute originally belonged to Imaman, who died in 1925 and was succeeded by his widow, Mt. Zohran. He also left him surviving a widowed mother, Mt. Lehno. On 16th March 1926, a document was executed by Mt. Zohran, Mt. Lehno and Allah Wasaya in favour of Abdulla, father of defendants 1 and 2, who was a distant collateral of Imaman. By this document the house in dispute was transferred by Mt. Zohran and her mother-in-law, Mt. Lehno to Abdulla, and Allah Wasaya, the then living next reversioner, gave his consent to the transfer on receipt of Rs. 80 from Abdulla. It was stated in the deed that after Imaman's death his widow and mother could not maintain themselves with the income of his estate, and that the next reversioner Allah Wasaya had refused to give them maintenance. They had therefore run into debt and owed Rs. 100 to a creditor. Abdulla undertook to pay the debt and also to maintain the widows in future, and as already stated he paid Rs. 80 to Allah Wasaya, who gave his consent to the transaction. The finding of the Courts below is that Abdulla actually paid the debt and maintained the widows till their death in 1930 and 1931 respectively. Allah Wasaya died in 1927 and his son, Lalan, defendant 3, describing himself as the owner of the house by succession to Mt. Zohran, sold it to Khuda Bakhsh and

Wahid Bakhsh, plaintiffs, on 10th October 1932. The plaintiffs have now brought a suit for possession of the house against the sons of Abdullah, who had died in the meantime, alleging that their vendor Lalan was the rightful heir of Mt. Zohran and that he had validly sold the house to them.

The suit was resisted by defendants 1 and 2, the sons of Abdullah—who pleaded that Abdullah had become the absolute owner of the house by the transaction of 16th March 1926 which had been assented to by Allah Wasaya, and that his consent was binding on his son Lalan through whom the plaintiffs purported to claim. In reply the plaintiffs pleaded that the consent of Allah Wasaya to the transaction of 1926 was in the nature of a transfer of reversionary rights and was void in law and in any case was not binding on his son, Lalan. They therefore contended that the transaction should be ignored and the property considered to have devolved, on Mt. Zohran's death, on the then surviving reversioner, Lalan, who had validly sold it to the plaintiffs. The trial Judge decreed the suit ; but on appeal by the defendants the learned Additional District Judge came to a contrary conclusion and held that the transfer in favour of Abdullah was valid and the consent given by Allah Wasaya to it was binding on Lalan. He accordingly accepted the appeal and dismissed the suit with costs throughout.

The plaintiffs have come up in second appeal to this Court and the sole contention raised on their behalf is that the transaction of 1926 should be ignored as it was a transfer of reversionary rights by Allah Wasaya in the lifetime of Mt. Zohran and Mt. Lehno and was therefore void. After examining the record and hearing counsel, I see no force in this contention. As already stated, Mt. Zohran had succeeded her husband on the usual widow's life-estate, and she and her mother-in-law Mt. Lehno, who had to be maintained out of the estate, both transferred the property for valuable consideration to Abdulla. The next reversioner, Allah Wasaya, had expressed his inability to maintain them and on receipt of Rupees 80 had consented to the transaction. To such a transaction the rule against sale of reversionary rights does not apply. The consent by Allah Wasaya was given bona fide, and is obviously binding on his son,

Lalan, the house having not been proved to be ancestral. The case is covered by 5 Lah 212¹ which was followed in 13 Lah 180.² The correctness of these rulings has not been impugned by the learned counsel for the appellants before me. It must therefore be held that the plaintiffs' suit was rightly dismissed by the learned Additional District Judge. The appeal fails and is dismissed with costs.

V.B.B./A.L.

Appeal dismissed.

1. Jaswant Kaur v. Wasawa Singh, A I R 1923 353=76 I O 592=5 Lah 212=5 L L J 347.
2. Roshan v. Wadhawa, A I R 1931 Lah 495 = 134 I O 197=32 P L R 446=13 Lah 180.

A. I. R. 1937 Lahore 771

JAI LAL, J.

Harnam Singh — Plaintiff — Appellant.

v.

Municipal Committee, Jhelum —

Defendant — Respondent.

Second Appeal No. 1023 of 1936, Decided on 18th December 1936, from decree of Dist. Judge, Jhelum, D/. 12th June 1936.

Punjab Municipal Act (3 of 1911), S. 81—Plaintiff highest bidder at auction of lease for one year—3 months' rent in advance and execution of rent deed within 48 hours, condition of lease—Failure to execute rent deed entitling Committee to forfeit deposit and re-sell lease — Plaintiff paying deposit but refusing to execute rent deed—Committee returning deposit—Committee subsequently trying to recover deposit supposed to be wrongly paid by attachment under S. 81—Attachment is illegal—Plaintiff suffering no special damage—Plaintiff held not entitled to damages for illegal attachment.

There is no law under which the amount voluntarily paid or returned to another person can be recovered either by suit or by other coercive method. [P 772 C 1]

The plaintiff was the highest bidder for the lease for one year of certain platforms auctioned by the Municipal Committee. One of the conditions of the auction was that the highest bidder should pay three months' rent immediately in advance and should execute a regular rent deed within 48 hours and on his failure to execute the deed, the Committee should be entitled to forfeit the deposit and re-sell the lease. The plaintiff paid the deposit but refused to execute the deed thereafter. The Committee thereafter returned the amount of the deposit. Subsequently the Committee decided to recover the amount of deposit supposed to have been wrongly paid and attached the property of the plaintiff under S. 81, Punjab Municipal Act. It was not proved that he suffered any special damage by the illegal attachment :

[P 772 C 1]

Held : that the amount of deposit returned could not be recovered as rent as no relation of landlord and tenant was created between the Committee and the plaintiff in the absence of the execution of the lease within 48 hours. Nor was the Committee entitled to recover for use and occupation as no actual possession of the platforms was taken by the plaintiff. The only remedy of the Committee was to confiscate the deposit, but the Committee had voluntarily returned that amount. Therefore the action taken by the Committee for recovery of the same from the plaintiff by attachment under S. 81 was illegal.

Held further : that the plaintiff was not entitled to any damages as the alleged illegal attachment of his property was not proved to have caused him any special damage. [P 772 C 1]

Manohar Lal Mehra — for Appellant.

Malik Mohammad Amin —

for Respondent.

Judgment.—The appellant was the highest bidder for the lease for one year of two platforms auctioned by the Municipal Committee of Jhelum. One condition of the auction, inter alia, was that the highest bidder shall pay three months' rent immediately in advance and shall execute a regular rent deed within 48 hours, and on his failure to execute the document the Committee shall be entitled to forfeit the deposit of three months' rent and re-sell the lease. The appellant in pursuance of the sale of one year's lease in his favour made a deposit of Rs. 25-8-0, rent of three months, but he refused to execute the rent deed and refused to take possession of the two platforms on the ground that they did not conform to the description given by the Committee. The Committee thereupon passed a resolution sanctioning the return of the deposit to the appellant and stating that he had behaved very badly and that in future no dealings would be done with him. It was also resolved that the lease be sanctioned for a specified amount in favour of another person. By virtue of this resolution the deposit made by the appellant was returned to him. In the meantime the matter appears to have been brought to the notice of the Deputy Commissioner, Jhelum, who recommended to the Committee that the matter should be reconsidered. Apparently he was of opinion that the lease in favour of the appellant should not have been cancelled and the deposit should not have been returned. This is what the learned counsel for the Municipal Committee has stated before me. The learned District Judge has stated that the resolution was vetoed by the Deputy Commissioner. This is incorrect.

It appears that subsequently the Municipal Committee itself decided to cancel its previous resolution and to recover from the appellant Rs. 25-8-0 supposed to have been wrongly paid to him and the recovery was sought to be made by attachment of the goods of the appellant. An attachment was actually effected. Thereupon the suit out of which this appeal has arisen was instituted by the appellant for an injunction against the Municipal Committee restraining it from recovering Rs. 25-8-0 by sale of his property attached and for recovery of Rs. 50 as damages for the illegal attachment.

This suit has been dismissed by both the Courts below, but in my opinion wrongly. It is not a suit for the recovery of rent because no relationship of landlord and tenant was created between the Municipal Committee and the appellant in the absence of execution of a lease within 48 hours. The Committee is not even entitled to recover for use and occupation because the appellant had not taken actual possession of the two platforms. The only remedy of the Municipal Committee was to confiscate Rs. 25-8-0, but the Municipal Committee by its resolution voluntarily returned that amount to the appellant. There is no law under which the amount voluntarily paid or returned to another person can be recovered either by suit or by other coercive method. The action taken by the Committee therefore under S. 81, Punjab Municipal Act, to recover the sum of Rs. 25-8-0 by attachment of the property of the appellant was therefore illegal and the appellant was in any case entitled to an injunction.

With regard to the question of damages, I note that the appellant himself was once a Municipal Commissioner and he initially broke his agreement to take a lease of the two platforms for one year and the Municipal Committee was entitled to forfeit Rs. 25-8-0, but, in my opinion, it is not entitled to recover it back because it has voluntarily returned it to the appellant, though wrongly. Moreover it has not been established that the appellant suffered any special damage by the illegal attachment, and in this case having regard to the circumstances mentioned above I decline to grant the plaintiff any decree for damages for the alleged illegal attachment of his property, but I grant him a decree for an injunction restraining the Municipal Committee from attaching and selling his

property in order to recover Rs. 25-8-0. The respondent shall pay to the appellant half the costs of this litigation throughout.

V.B.B./A.L. *Appeal partly allowed.*

A. I. R. 1937 Lahore 772

TEK CHAND, J.

Firm Nanak Chand-Ramji Das —

Plaintiff — Appellant.

v.

Ibrahim and another — Defendants —
Respondents.

Execution Second Appeal No. 656 of 1936, Decided on 17th December 1936, from order of Addl. Dist. Judge, Karnal at Ambala, D/- 2nd March 1936.

(a) *Res judicata*—Execution proceedings—Principle of *res judicata* and even of constructive *res judicata* applies to execution proceedings.

Though S. 11, Civil P. O., does not in terms apply to execution proceedings, the general principles underlying the rule of *res judicata* are applicable to them and the applicability of the rule is not limited to matters which were directly and substantially in issue and were heard and expressly decided in former execution proceedings, but the principle of constructive *res judicata*, as embodied in Expl. 4 of S. 11 is also applicable to such proceedings. If an objection which might and ought to have been taken in the earlier execution proceedings is not so taken and the matter is heard and decided, the party concerned is debarred from raising it in subsequent proceedings: *Case law referred.* [P 775 C 2 ; P 776 C 1]

(b) Civil P. C. (1908), S. 55—S. 55 does not provide that surety will be effective only if bond is formally executed—Liability of surety is determined by undertaking given by him by agreement or statement and accepted by Court.

Under S. 55, Civil P. O., all that is necessary is that security 'to the satisfaction of the Court' should be furnished. It is not provided that the surety will become effective only if a bond is formally executed. In such cases the liability of the surety is determined by the undertaking that is given to the Court by means of the agreement or statement made by him and accepted by the Court, and non-compliance with the undertaking renders the surety liable under S. 145, Civil P. O.: *A I R 1936 Lah 463, Rel. on.* [P 776 C 2]

(c) Court-fees Act (1870), Art. 6—It is not illegal for Court to accept person as surety under S. 55, Civil P. C., on his oral statement—It is not obligatory to take bond in writing.

Article 6, Court-fees Act, does not lay down that it is illegal for the Court to accept a person as surety in proceedings under S. 55, Civil P. O., on oral statements made before it, or that it is obligatory to take a bond in writing. [P 776 C 2]

(d) Civil P. C. (1908), S. 145 — Notice of attachment in writing is not necessary —

Notice of attachment to surety before actual attachment is sufficient — Objection to attachment if not raised before executing Court is deemed to have been waived.

Section 145, Civil P. C., does not lay down that the notice of attachment should be in writing. All that is necessary under the law is that before the attachment actually takes place, the surety should have notice of the order directing attachment, the object being that he may be able to raise objections, if any, to the validity of the order. If the objection of want of notice is not raised before the executing Court, it must be taken to have been waived: *Case law referred.*

[P 776 C 2; P 777 C 1]

Faqir Chand Mital — for Appellant.

Mohammad Amin — for Respondents.

Judgment.—The appellant firm Nanak Chand-Ramji Das had a simple money decree against Niaz Mohammad, husband of Mt. Niazi Begum, respondent 2. In execution of this decree, the decree-holder applied for arrest of the judgment-debtor. The judgment-debtor was arrested and brought before the Court on 7th March 1929 when he expressed his intention to apply for adjudication as an insolvent within one month or pay the amount during that period. The Court granted the prayer on condition of his furnishing security. Accordingly on that date, i. e. the 7th March, Ibrahim, respondent 1 stood surety for the judgment-debtor and executed a duly stamped bond undertaking that the judgment-debtor would either pay the amount before the next hearing or be present in Court on that date, failing which he, the surety, would pay the decretal amount to the decree-holder.

At the next hearing the judgment-debtor and the surety both appeared before the Court. The judgment-debtor however did not pay the decretal amount nor had he applied for being adjudicated insolvent. Both of them asked for time to come to a settlement with the decree-holder. With the decree-holder's consent the hearing of the case was adjourned twice for the purpose. At the third hearing, neither the judgment-debtor nor the surety appeared nor had they come to any settlement with the decree-holder in the meantime. Accordingly the Court directed notices to issue to the judgment-debtor and the surety for 14th November 1929. On that date the judgment-debtor and the surety both appeared and asked for one month's further time to pay the amount due. The decree-holder agreed, provided Ibrahim stood surety for the due compliance of the judgment-debtor's undertaking. Ibrahim

agreed and made a statement on oath before the Court praying that the judgment-debtor be not arrested but be allowed a further opportunity to pay the decretal amount before the next hearing, and undertaking that he would produce the judgment-debtor at the next hearing failing which he would be personally liable to pay it to the decree-holder. A statement of the judgment-debtor to the same effect was recorded and also that of the decree-holder agreeing to the postponement of the case on the conditions mentioned by Ibrahim. The Court accepted the security and adjourned the hearing to 17th December 1929. No fresh surety bond was, however, executed or filed.

At the next hearing, i. e. 17th December 1929, neither the judgment-debtor nor the surety appeared and in their absence on the decree-holder's application warrants for attachment of certain agricultural land belonging to Ibrahim were issued, returnable by 20th February 1930. On 21st December 1929 Ibrahim appeared and filed an application stating that the judgment-debtor had gone to a relation of his in Muzaffarnagar District, where he got an attack of pneumonia and therefore could not appear on the date fixed (17th December 1929) and praying that the order of that date be set aside. The Court directed notice of this application to issue to the decree-holder for 20th February 1930 which was the date already fixed for the return of the warrants of attachment of the land belonging to the surety. It may be noted that in this application Ibrahim did not object to the attachment of his land on the ground that he was not liable, as no written and properly stamped surety bond had been taken from him.

On the date fixed, i. e. 20th February 1930, both the judgment-debtor and the surety again absented themselves, and as none of them had appeared to support the application of the surety dated 21st December 1929, that application was dismissed. In the meantime the land of the surety had been attached on 8th February 1930 and on return of the warrant of attachment on 20th February 1930 the Court directed that the file be sent to the Collector for suggesting the period for which the surety's land could be temporarily alienated. On 19th May 1930 Ibrahim made another application praying for the setting aside of the attachment of his land on the ground that the absence of

the judgment-debtor on 17th December 1929 was not intentional but was unavoidable owing to serious illness, and further urging that the proceedings for realising the decretal amount should first be taken against the judgment-debtor who had sufficient property of his own, and that after this had been done, if his property was found to be insufficient to pay the decretal amount, execution should proceed against the surety. It is noteworthy that in this application also Ibrahim did not object to the invalidity of the proceedings of 14th November 1929 accepting his security, on the ground that a duly written and stamped bond had not been taken from him. Indeed he accepted his liability as such, but merely prayed for postponement of the execution of the process against him till steps had been taken to realise the decretal amount from the property of the judgment-debtor.

This application was fixed for hearing on 21st June 1930, but on that date Ibrahim again failed to appear and it was dismissed. No steps were taken to have this application restored nor was any appeal filed either against the order directing attachment of the land of Ibrahim or against the order dismissing his application last mentioned. The papers remained with the Collector for nearly two years, and on 19th January 1932 he suggested a lease of the land of Ibrahim for a period of 20 years in lieu of Rs. 240. The decree-holder agreed to the terms proposed by the Collector and accepted the lease. No appeal was filed by the surety against this order also.

It appears that though the decree-holder had accepted the lease early in 1932, he was not able to obtain possession of the leased land. Accordingly, on 15th February 1935, he applied that possession be given to him as lessee for a period of 20 years, as already ordered by the Court. Notice of the application was duly served upon Ibrahim and he appeared on 19th October 1935 and denied his liability on the ground that all that he had undertaken on 14th November 1929 was to produce the judgment-debtor at the next hearing and not to pay the decretal amount and therefore his person or property could not be proceeded against by the decree-holder for realisation of the amount due by the judgment-debtor. No other objection of any kind was urged by Ibrahim. On this, the executing Court framed the following

issue: "Is Ibrahim liable personally for the decretal amount?"

The learned Subordinate Judge however at the final hearing of the application appears to have raised *suo motu* two new points: (1) whether the statement of the petitioner, dated 14th November 1929 was sufficient to hold him liable, and (2) whether the order of the Court, dated 17th December 1929, directing the attachment of the agricultural land of the surety was legal or *ultra vires*. On the first point he held that in order to make Ibrahim liable, a written and properly stamped surety bond was necessary and therefore the statement of Ibrahim, dated 14th November 1929, could not make him legally liable. The second point also he found in favour of Ibrahim, holding that under S. 145, Civil P. C., the issue of a notice was a condition precedent to make the surety liable and as this had not been done in the case, the entire proceedings were illegal and *ultra vires*. In support of these conclusions he relied on A I R 1929 Lah 205¹ and A I R 1931 Mad 828.² He accordingly dismissed the decree-holder's application for execution.

The decree-holder went in appeal to the District Judge, before whom the first point taken was that the grounds on which the executing Court had dismissed the application for execution might and ought to have been raised by the respondent in the course of the former proceedings in execution of the decree and therefore the matter was *res judicata*. It was also urged that it was not open to the executing Court to raise the points *suo motu* and its order was *ultra vires*. The District Judge overruled these objections on the short ground that the pleas of *res judicata* and want of jurisdiction ought to have been specifically raised by the decree-holder in the executing Court, and as this had not been done it was not open to him to urge them for the first time in the Appellate Court. He accordingly dismissed the appeal in limine.

The decree-holder has come up in second appeal and it has been contended on his behalf that the orders of the Courts below are erroneous. After hearing both counsel, I am of opinion that the appellant's contentions are well-founded and must pre-

1. Muhammad Ewaz v. Naneh Mian, A I R 1929 Lah 205=117 I O 226=30 P L R 131.

2. Muhammad Sultan v. Nagoji Rao, A I R 1931 Mad 828=135 I O 539.

vail. I confess I find considerable difficulty in understanding the reasoning of the learned District Judge. As is clear from the summary of the proceedings in the case set out above, the grounds on which the executing Court dismissed the execution against the respondent, had not been mentioned by him in any of the applications filed by him in that Court. In the last application, which alone was before the Court, the only objection raised by the surety was that he had made himself liable only to produce the judgment-debtor on the date fixed and had not undertaken liability for payment of the decretal amount. He had not pleaded that he was not liable because he had not executed a formal bond in writing, or that his land could not be attached because no notice under S. 145, Civil P. C., had been issued to him. These objections appear to have been raised by the Subordinate Judge *suo motu*, apparently at the time of arguments. In these circumstances, the decree-holder had no occasion to plead before the executing Court that the points were barred by the rule of constructive *res judicata* and the Court had no jurisdiction to go into them. The first occasion therefore when he could have urged these pleas in writing was when he appealed to the District Judge, and in his memorandum of appeal the points were specifically raised. The learned District Judge has referred to a passage in Mogha's Law of Pleadings in British India (Edn. 4, p. 193), that the plea of *res judicata* should be specifically pleaded. But the rule of pleading mentioned there is obviously inapplicable to the facts of the case as stated above. The points taken by the appellant were purely questions of law, for a decision of which no fresh evidence was necessary. They should therefore have been considered by the learned Judge after examining the record and hearing the parties.

That these objections were well-founded does not appear to me to admit of any doubt. It is conceded that it was open to the respondent in the course of the earlier proceedings to object to his liability because of the alleged defect in the order accepting him as a surety without a written bond and also object to the attachment of land for want of notice under S. 145. He however did not do so. Indeed, he admitted his liability in clear terms, and asked the Court to exonerate

him because the judgment-debtor was ill or, at any rate, to order execution in the first instance against the property of the judgment-debtor. The executing Court proceeded on the assumption that the respondent was liable as surety and passed orders attaching his land and ordering its temporary alienation for 20 years. These orders were not appealed against and have now become final.

It is well settled that if an objection which might and ought to have been taken in the earlier execution proceedings is not so taken and the matter is heard and decided, the party concerned is debarred from raising it in subsequent proceedings. In 8 Cal 51³ it was held by their Lordships of the Privy Council that although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet, if an order for such execution has been regularly made by a competent Court, having jurisdiction to try, whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid, and that it was not open to the judgment-debtor to plead in subsequent proceedings that the original application was time-barred. Similarly in 14 Lah 409⁴ it was held that where a wife had obtained a declaratory decree for maintenance against the husband and the decree had been executed by her several times without objection, it was not open to the judgment-debtor to object for the first time in subsequent proceedings that the decree being declaratory was not executable.

The case-law on the subject was reviewed in 15 Lah 869,⁵ where it was observed that though S. 11, Civil P. C., did not in terms apply to execution proceedings, the general principles underlying the rule of *res judicata* were applicable to them and that the applicability of the rule was not limited to matters which were directly and substantially in issue and were heard and expressly decided in former execution proceedings, but that the principle of constructive *res judicata*, as

3. Mungul Pershad Dichit v. Grija Kant Lahiri, (1882) 8 Cal 51=8 I A 123=11 O L R 113=4 Sar 249 (P O).

4. Ved Kaur v. Balkishan Das, A I R 1933 Lah 594=141 I C 577=14 Lah 409=34 P L R 528.

5. Prabhu Dayal v. Dewat Ram, A I R 1935 Lah 200=155 I C 286=15 Lah 869=35 P L R 429.

embodied in Expl. 4 of S. 11, was also applicable to such proceedings : see to the same effect 48 I A 45,⁶ A I R 1933 Lah 3,⁷ A I R 1933 Lah 697,⁸ A I R 1936 Lah 167,⁹ A I R 1936 Lah 246¹⁰ and A I R 1930 Lah 80.¹¹ The last mentioned case may be specially referred to as its facts were very similar to those of the present case. There, a judgment-creditor in execution of a money decree obtained by him, had got the judgment-debtor arrested. A third party had stood surety, executing a bond to pay the entire amount if during execution proceedings the judgment-debtor absented himself. On the judgment-debtor being absent at one of the dates fixed, the decree-holder asked the Court to issue a warrant for attachment of the surety's property. The surety appeared and asked for time to settle with the decree-holder. Time was granted but the surety failed to make a settlement and, on notice having been issued, stated that he was not a surety at all. Johnstone, J. held that when the surety asked for time to settle with the decree-holder, he did not deny liability and therefore his liability had become *res judicata* and he was therefore still liable to the decree-holder. Similarly, in this case it must be held that it was not open to Ibrahim to raise these points now. It is conceded that if the points are *res judicata*, the executing Court was debarred from raising them *suo motu*.

On the merits also, there is no force in either of these points. It is true that no formal bond had been executed by Ibrahim on 14th November 1929 but, in my opinion, none was necessary under the law. He had already executed a bond on 7th March 1929, the operation of which had, at his own request been extended to 14th November 1929. On that date further time was asked for from the Court by the judgment-debtor and Ibrahim agreed to continue as surety on the same terms as before. He made a statement on oath to

that effect before the Court and on the decree-holder agreeing, the Court accepted him as surety and passed orders accordingly. Under S. 55, Civil P. C., under which proceedings were then going on, all that is necessary is that security "to the satisfaction of the Court" should be furnished. It is not provided that the surety will become effective only if a bond is formally executed. As observed in A I R 1936 Lah 463¹² at p. 465 :

In such cases the liability of the surety is determined by the undertaking that is given to the Court by means of the agreement or statement made by him and accepted by the Court, and non-compliance with the undertaking renders the surety liable under S. 145.

The learned Subordinate Judge has referred to Art. 6, Court-fees Act, under which a court-fee stamp of one rupee is required to be affixed on a surety-bond. He also relied on A I R 1929 Lah 205.¹ But neither Art. 6 nor the ruling cited lay down that it is illegal for the Court to accept a person as surety in proceedings under S. 55, Civil P. C., on oral statements made before it, or that it is obligatory to take a bond in writing.

The second point raised by the Subordinate Judge was that the proceedings for attachment were illegal and *ultra vires* as no notice had been issued to the surety as required by S. 145, Civil P. C., 1908. That section however does not lay down that the notice should be in writing, as was expressly provided for in the corresponding S. 253 of the Code of 1882. All that is necessary under the law now is that before the attachment actually takes place, the surety should have notice of the order directing attachment, the object being that he may be able to raise objections, if any, to the validity of the order. In this case, the order of attachment was issued on 17th November 1929, no doubt in the absence of the surety; but the attachment was not effected till 8th February 1930. About two months before the actual attachment, Ibrahim had, on 21st December 1929 made an application to the Court making an appeal *ad miseri cordiam* not to attach his land but take a lenient view of the case as the judgment-debtor was ill on the date fixed and was unable to come from Muzaffarnagar District to

6. Raja of Ramnad v. Velusami Tevar, A I R 1921 P C 23=59 I C 880=48 I A 45 (P C).

7. Kidar Nath v. Taj Muhammad Khan, A I R 1933 Lah 3=144 I C 259=15 Lah 208=34 P L R 685.

8. Madan Gopal v. Jaswant Rai, A I R 1933 Lah 697=144 I C 488=34 P L R 489.

9. Lal Mohammad v. Khemchand Radha Kishan, A I R 1936 Lah 167=166 I C 982.

10. Punjab National Bank Ltd. v. Nanhe Mal Janki Das, A I R 1936 Lah 246=163 I C 97=38 P L R 723.

11. Lal Singh v. Muhammad Afzal, A I R 1930 Lah 80=129 I C 689.

12. Parkash Chand v. Madan Theatres Ltd., A I R 1936 Lah 463=164 I C 281=38 P L R 623.

Karnal. This application was not pursued by the respondent and was dismissed in default. It is thus quite clear that he was fully aware of the order of 17th December long before his land was actually attached. The learned Subordinate Judge referred to A I R 1929 Lah 205,¹ but all that was laid down there was that under S. 145 there must be notice to the surety 'of some kind' before his property could be attached in execution of the decree. This ruling therefore, instead of supporting the contention of the respondent, is against him. The other ruling cited, A I R 1931 Mad 828², is also distinguishable as in that case the surety was not aware of the order of attachment at all. Counsel for the respondent has also relied upon 2 Rang 567¹³ and A I R 1928 Rang 249.¹⁴ In each of these cases also, no notice whatever had been issued to the surety nor is there anything to show that he was aware of the proceedings. Moreover, the objection in all those cases was taken at the earliest opportunity, whereas in this case the surety, who was fully aware of the attachment, allowed the proceedings to continue for several years, and his land was not only attached but was actually ordered to be leased by the executing Court. In the present proceedings also, the respondent did not raise the objection of want of notice before the executing Court. It must therefore be taken to have been waived, and the learned Subordinate Judge should not have raised it suo motu. The orders of the Courts below therefore cannot be sustained on any ground.

I accept the appeal, set aside the orders of the lower Courts and remand the case to the executing Court for disposal of the application of Ibrahim, respondent, dated 19th October 1935, on the ground mentioned therein. Court-fee on this appeal will be refunded ; other costs will abide the event.

S.C./D.S.

Appeal allowed.

13. Tan Kin Shan v. U Che Si, A I R 1925 Rang 135=84 I C 998=2 Rang 567.

14. Ko Maung Gyi v. Daw Tok, A I R 1928 Rang 249=112 I C 427=6 Rang 474.

A. I. R. 1937 Lahore 777

TEK CHAND, J.

Bashir Ahmad and others — Plaintiffs
— Appellants.

v.

Bur Singh and another — Defendants
— Respondents.

Second Appeal No. 517 of 1936, Decided on 7th January 1937, from decree of Senior Sub-Judge, Gurdaspur, D/- 20th December 1935.

Custom (Punjab) — Custom or Mahomedan law — Kakazais of Tapala — Kakazais are governed by personal law (Mahomedan law) in matters of alienation.

The Kakazais of the village Tapala in the Punjab are governed by personal law (Mahomedan law) in matters of alienation and the mere circumstance that the village was owned by the Kakazais or that this tribe supplied the lambardars did not prove custom : *A I R 1934 Lah 481, Expl. and Disting.* [P 778 C 1]

Shabir Ahmad for Asadullah Khan —
for Appellants.

J. L. Kapur — for Respondents.

Judgment.—This second appeal arises out of a suit instituted by the plaintiffs-appellants for a declaration to the effect that two mortgages of ancestral property, effected by their father, defendant 2, in favour of defendant 1, are void and ineffectual as against their reversionary rights after the death of their father. The defendant-mortgagee contested the suit, urging that the family of the mortgagor and the plaintiff, who belong to the Kakazai tribe, is not governed by custom but follows Mahomedan law under which the plaintiffs have no right to contest his alienations. He also pleaded in the alternative that even if it were found that the mortgagor was governed by custom, the alienations were for consideration and necessity. The trial Judge held in favour of the plaintiffs that custom applied, and on the second point he found that the first mortgage had been proved to be for consideration and legal necessity, and that out of the second mortgage Rs. 50 only were for necessity. He accordingly granted the plaintiffs a declaration that on the death of the mortgagor they would be entitled to get possession of the land on payment of Rs. 250. On appeal the learned Senior Subordinate Judge held that the mortgagor was governed by Mahomedan law and not by custom and, therefore, the plaintiffs had no locus standi to maintain the suit. He accordingly accepted the

appeal and dismissed the plaintiffs' suit. He, however, granted a certificate under S. 41 (3), Punjab Courts Act, for a second appeal on the question as to whether the mortgagor's tribe was governed by custom or Mahomedan law in matters of alienation.

The learned counsel for the appellants has read before me the evidence produced in the case bearing on this question and after hearing him I have no doubt that the conclusion of the learned Senior Subordinate Judge is correct. The evidence consists of the oral testimony of five witnesses, most of whom belong to a neighbouring village, and is to the effect that the village Tapala (to which the mortgagor belongs) is owned by Kakazais, and that lambardars of the village have been appointed from this tribe. The evidence shows that the Kakazais do not cultivate the land with their own hands and some of them are in service. There is not a single instance, supported by oral or documentary evidence, as to any alienations of ancestral land having been contested by sons or collaterals of Kakazais of this or the neighbouring village, nor has it been proved that in matters of succession Mahomedan law has been departed from and inheritance has gone according to custom. The onus lay heavily upon the plaintiffs to prove that they did not follow their personal law, and this onus cannot be held to have been discharged by the mere circumstance that the village is owned by Kakazais or that this tribe has supplied lambardars.

The learned counsel for the appellants has referred me to 15 Lah 828¹ which is a case of Uppal tarkhans of Mauza Shorian in Gujrat district, who were held to be governed by agricultural custom. It appears from the judgment in that case, however, that it was found as a fact that the tarkhans of that village had assimilated their customs in several matters to those of the dominant agricultural tribes living in the neighbourhood, and there were several instances of departure from rules of Mahomedan law. In the present case, such evidence is wholly wanting. I hold, therefore, that the plaintiffs' suit has been rightly dismissed. The appeal fails and is dismissed with costs.

V.B.B./A.L. *Appeal dismissed.*

1. Fakir v. Shadi, A I R 1934 Lah 481=151 I C 212=15 Lah 828=37 P L R 16.

A. I. R. 1937 Lahore 778

ADDISON AND DIN MOHAMMAD, JJ.
Shib Charan — Appellant.

v.

Chandgi Ram, Liquidator, Sonepat Flour Mills Ltd. (in liquidation) — Respondent.

Letters Patent Appeal No. 127 of 1936, Decided on 12th January 1937, from order of Bhide, J., D/- 29th June 1936.

Custom (Punjab) — Ancestral land—Liability — Tehsil Sonepat, District Rohtak — Land is not liable for debts of last male holder.

There is no special custom in Sonepat Tehsil of Rohtak District whereby ancestral landed property in the hands of the next holder becomes liable for the debts contracted by the last male holder : A I R 1937 Lah 148 (F B), *Foll.*; A I R 1933 Lah 593, *Not foll.* [P 779 C 1]

Qabul Chand — for Appellant.

Faqir Chand Mital — for Respondent.

Addison, J.—This case has not been properly dealt with and the Letters Patent appeal must be accepted and the objection remanded to the District Judge for re-decision. A house at Sonepat belonging to Chhajju Ram was attached by the Official Liquidator of the Sonepat Flour Mills as Chhajju Ram was a contributory of the Company which was in liquidation. Before the sale of the house Chhajju Ram died and his minor son put in objections claiming that he followed custom, that the house was ancestral and was therefore not attachable and salable in execution in his hands. It was also claimed that the house was used for agricultural purposes and was exempt from attachment under S. 60, Civil P. C. The liquidator traversed these pleas and added that (1933) 34 P L R 168¹ was an authority for holding that by custom in the District of Rohtak ancestral property was liable in the hands of the son for the debts of the father. The District Judge without framing any issues found that the house was not used for agricultural purposes and was not exempt from attachment under S. 60, Civil P. C. Without deciding anything else he held on the authority in (1933) 34 P L R 168¹ that whether the house was ancestral or not, it would be liable to be attached and sold in the hands of the son for the debts of the father. He therefore dismissed the objections.

There was an appeal against this decision in this Court, which was heard by a

1. Ram Chandar v. Daryao Singh, A I R 1933 Lah 593=141 I C 483=14 Lah 365=34 P L R 168.

Single Judge. He pointed out that the authority in (1933) 34 P L R 168¹ had been shaken by two decisions, 17 Lah 133² and 17 Lah 139,³ but he did not consider it necessary to remand the case as he thought that the evidence on the record established that the house was self-acquired property of Chhajju Ram as it was purchased by his grand-uncle Harnam Das. Though the District Judge had not given a finding on that point, he considered it unnecessary to remand the case for the reasons he gave and dismissed the appeal. Against that decision this Letters Patent Appeal has been preferred.

It was pointed out by appellant's counsel that there was no evidence to show how the house came from Harnam Das to his grand-nephew Chhajju Ram and that as a matter of fact it had first passed into the hands of Chhajju Ram's father, Sada Ram, and that the house was therefore ancestral. It was contended that an opportunity should be given to establish the ancestral nature of the property in view of the fact that no issues were framed and the parties did not know what they had to prove. On behalf of the respondent, i.e. the Company represented by the Official Liquidator, it was stated that in that case his contention that Chhajju Ram's family did not follow custom should also be decided. Chhajju Ram and the objector are Bhore Brahmins.

Before sending the case back, a few remarks are necessary as to the dispute raised by the pleadings. In 4 P R 1913⁴ it was held that where a male proprietor governed by customary rules had contracted a just debt and died leaving ancestral landed property, such property was not liable in the hands of the next holder in respect of such debt, unless the debt had been expressly charged on the property. This Full Bench decision was approved by another Full Bench in 17 P R 1919⁵ which stated however that the general rule expressed in 4 P R 1913⁴ did

not cover the case in which the creditor could prove that by special custom the person in possession of the ancestral property which it was sought to attach was the legal representative of the deceased debtor and that the property was deemed to be the property of the said debtor. (1933) 34 P L R 168¹ which is also reported in 14 Lah 365¹ is a decision to the effect that such a special custom as is mentioned in the Full Bench decision, 17 P R 1919,⁵ had been established as regards Jats of village Kawali in Sonapat Tehsil of the Rohtak District. But this decision has practically been dissented from in a Full Bench decision reported in (1937) 39 P L R 16.⁶ The learned counsel for the respondent Company did not contest that proposition and admitted that the section in the *riwaj-i-am* relied upon did not establish any special custom. It will not therefore be necessary for the District Judge to go further into this particular question and it will be taken that no special custom, such as is mentioned in 17 P R 1919,⁵ helps the Company or has been established.

The general rule laid down in 4 P R 1913⁴ will therefore apply, if Chhajju Ram's family follows custom. But that leaves two issues to be decided which have not yet been gone into. These are : (1) Is the objector governed by custom or by his personal law? (2) If he is governed by custom, is the property ancestral? Counsel for the respondent Company wishes to raise a third issue, namely (3) even if the property is ancestral, does its attachment in the lifetime of the objector's father render it liable to sale for the father's debt? He has pointed out that there is an obiter dictum in 4 P R 1913⁴ to the following effect :

It may perhaps be conceded that such attachment is permissible during the lifetime of the debtor but with that aspect of the question we are not at present concerned.

In the case before the Full Bench in 1913, there had been no attachment in the lifetime of the debtor. In the present case there was attachment before the debtor died. The subject is also discussed at some length but no decision was given as to it in (1936) 38 P L R 613⁷ which was

2. Narain Singh v. Ahmad Yar Khan, A I R 1936 Lah 21=162 I O 374=17 Lah 133=38 P L R 472.

3. Muhammad Nawaz Shah v. Ram Dayal Karam Chand, A I R 1935 Lah 855=159 I O 1024=17 Lah 139=38 P L R 521.

4. Jagdip Singh v. Narain Singh, (1913) 4 P R 1913=15 I O 866=173 P L R 1912=160 P W R 1912 (F B).

5. Mt. Mikor v. Chhajju Ram, A I R 1919 Lah 145=49 I O 281=17 P R 1919=6 P W R 1919 (F B).

6. Ranjit Singh v. Maghimal, A I R 1937 Lah 148=167 I O 725=18 Lah 125=39 P L R 16 (F B).

7. Sukhdial v. Nazir Ahmad, A I R 1937 Lah 157=169 I O 416=17 Lah 799=38 P L R 613.

a case where the land had been attached and sold in the lifetime of the debtor. It will therefore only be fair to allow this third issue to be gone into. For the reasons given we accept this appeal, set aside the orders of the District Judge and the Single Judge of this Court and remand the objections for re-decision on the three issues already set out. We do not remand the case on the question as to whether the property was used for agricultural purposes and was therefore exempt under S. 60, Civil P. C., as clearly it was not so used. Parties will bear their own costs up to date.

S.C./R.K.

Case remanded.

A. I. R. 1937 Lahore 780

JAI LAL, J.

*Messrs. Asa Ram-Ram Pat —*Plaintiff — Petitioner.
v.*J. D. Picton Clark — Defendant —*

Opposite Party.

Civil Revn. No. 682 of 1936, Decided on 18th February 1937, from order of Dist. Judge, Ambala, D/- 4th June 1936.

Civil P. C. (1908), O. 38, R. 5 (3)—Judge issuing notice to defendant to show cause and at same time ordering interim attachment—Defendant objecting to attachment but voluntarily furnishing security—Appellate Court cannot cancel security merely because it thinks attachment is illegal.

Where the trial Judge issues a notice to the defendant to show cause why the application of the plaintiff for attachment before judgment of the property of the defendant be not granted and at the same time orders attachment of the same and the defendant objects to the attachment but voluntarily offers security pending disposal of the plaintiff's application for attachment before judgment, the Appellate Court cannot cancel security merely because it thinks that the attachment is illegal. [P 780 C 2]

Mathra Das — for Petitioner.

Order.—The petitioner instituted a suit for recovery of money against the respondent in the Court of the Senior Subordinate Judge of Simla, and at the same time made an application supported by affidavit under O. 38, R. 5, Civil P. C., for attachment of his property before judgment. When the application came up for hearing before the Senior Sub-Judge, he examined the plaintiff and, after requiring him to specify the property which he desired to be attached, he passed an order for the attachment of the property which con-

sisted of some debts alleged to be due to the defendant-respondent and at the same time issued a notice to him. On the receipt of the notice the defendant appeared in Court and objected to the attachment before judgment stating that the same had been applied for on insufficient grounds. He, therefore, prayed that the attachment be moved and compensation be awarded to him under S. 95 and added that he was prepared to give security. Thereupon the learned Senior Sub-Judge made an order that if the defendant furnished security for the amount claimed and costs, then the attachment would be withdrawn. The plaintiff's counsel having agreed to this order the learned Judge directed that security for Rs. 850 should be given and if it is given attachment would be withdrawn. Next day the security was filed and the attachment was withdrawn. The Senior Sub-Judge then decided that there was good ground for the attachment before judgment and therefore the application of the defendant for compensation under S. 95 was dismissed and also his objection to the attachment before judgment.

Against this order an appeal was preferred to the learned District Judge of Ambala, who held that the order of attachment before judgment was illegal and consequently the security filed by the defendant was liable to be cancelled. He accordingly set aside the order of attachment and also discharged the surety. In my opinion, the view of the learned District Judge is erroneous. Under O. 38, R. 5, sub-r. 3, the Court is entitled to direct the conditional attachment of the whole or a portion of the property of the defendant at the time of issue of a notice to the defendant to show cause why he should not furnish security. The learned trial Judge in this case issued a notice to the defendant to show cause why the application of the plaintiff for attachment before judgment of the property of the defendant be not granted and at the same time ordered attachment of the same. There was nothing illegal in this procedure. In any case the defendant himself having offered to give security pending the disposal of the plaintiff's application for attachment before judgment, the security bond could not be cancelled and the surety could not be discharged merely because in the opinion of the learned District Judge there was no ground for applying for

attachment before judgment. In fact in the same order the learned District Judge has held that :

Far from the application under O. 38, R. 5, Civil P. C., being frivolous, it would appear that this petition under S. 95 is frivolous.

He has held that the plaintiff has throughout behaved in a perfect good faith, and that the plaintiff apprehended that the defendant intended to defeat their decree by disappearing to England. On this finding in my opinion there was good ground for issuing an order of attachment before judgment of the property of the defendant. Both on the merits, therefore, and in law the order of the learned District Judge cannot be sustained so far as it relates to the discharge of the surety. I accept this petition and set aside his order pro tanto, i. e. the order cancelling the security bond and discharging the surety is hereby set aside. The petitioner will have his costs against the respondent.

P.R./D.S.

Petition accepted.

A. I. R. 1937 Lahore 781

TEK CHAND, J.

Din Mohammad — Defendant 1
— Appellant.

v.

D. R. Sethi, Plaintiff and another,
Defendant — Respondents.

Second Appeal No. 1250 of 1936, Decided on 20th January 1937, from decree of Addl. Dist. Judge, Lahore, D/. 14th July 1936.

Contract Act (1872), S. 65 — Agreement to purchase plot after sanction of Municipality to 'layout' scheme — Earnest money paid—Sanction suspended by Deputy Commissioner—Vendor is bound to refund earnest money.

A 'layout' scheme for constructing small residential houses on plots was sanctioned by the municipality. After the sanction, a person entered into an agreement with the owner of the plots to purchase one for certain price and paid the earnest money. The foundation of the agreement was the permission to convert the plots into a site where residential buildings and roads could be constructed. The sanction was subsequently suspended by the Deputy Commissioner :

Held : that as the very foundation of the contract had been taken away and as for all practical purposes the contract had become impossible for performance, the vendor was bound to refund the earnest money.

[P 782 C 1, 2]

Akbar Ali — for Appellant.

Hargopal — for Respondents.

Judgment.—The defendants are the owners of an extensive property near the Mall, Lahore, formerly known as the Sunny View Hotel and now called "Victoria Park". It appears that in 1934 they intended to convert it into a "Chhota Abadi" and submitted to the Municipal Committee a "layout plan" for constructing small residential houses on plots, $\frac{1}{2}$ kanal in area, intending to construct a number of roads 20 feet wide across the property so as to give access to, and provide light and air for the houses which were to be constructed on the proposed plots. This layout plan was sanctioned by the Municipal Committee on 19th March 1934. On 8th August 1934, the defendants entered into an agreement with the plaintiff to sell plot No. 36 on the proposed layout scheme for Rs. 10,000. The area of this plot was stated to be 10 marlas, and its dimensions are given as 50'x45'. The eastern and northern boundaries were described as roads 20 feet wide each, while the western and southern boundaries were stated to be plots Nos. 45 and 37 respectively. Out of the price of Rs. 10,000, Rs. 1,000 was paid by cheque by the plaintiff to the defendants on the date of the agreement and it was stipulated that the balance would be paid at the time of registration, which was to be effected on or before 5th October 1934. It was agreed that if the vendors failed to have the sale-deed executed by 5th October 1934, the vendee would be entitled to have the agreement specifically enforced, and if the vendee backed out of the agreement the earnest of Rs. 1,000 would be forfeited.

It appears that about a month after the execution of this agreement, the Deputy Commissioner of Lahore suspended the resolution of the Municipal Committee sanctioning the "layout plan", on the ground that the scheme for converting the "Sunny View Hotel property into a "Chhota Abadi" was really a "building scheme" which, under S. 192, Punjab Municipal Act, the Municipal Committee had no power to sanction. The result, therefore, was that the proposed streets could not be laid out on the estate, nor small residential quarters built on plots 10 marlas in area. Accordingly, the plaintiff, through his pleader, served a notice on the defendants on 5th October 1934 demanding a refund of Rs. 1,000, which he had paid as earnest money and also claimed interest

thereon and damages. After some correspondence between the parties, the plaintiff instituted a suit for recovery of Rs. 1,035 being the amount of the earnest and interest due thereon. The trial Court dismissed the suit, but on appeal the learned Additional District Judge granted the plaintiff a decree for the refund of Rs. 1,000, disallowing interest and leaving the parties to bear their own costs in both Courts.

Defendant 1, Din Mohammad, has come to this Court in second appeal, and it has been contended on his behalf that on the facts established in the case the plaintiff had no right to a refund of the amount paid by him on the date of the agreement. It has also been argued that the rule of caveat emptor applied, and that if by an act of the executive authorities the layout plan which had been sanctioned by the Municipal Committee has been suspended, the defendants are not responsible therefor.

After hearing counsel at length and examining the terms of the agreement, I have no doubt that the decision of the learned Additional District Judge is correct and this appeal must fail. It is quite clear from the terms of the agreement and the other circumstances disclosed on the record that the foundation of the agreement was the permission granted by the Municipal Committee to the defendants to convert the Sunny View Hotel's estate into a Chhotta Abadi, where residential buildings could be constructed on small plots of land, half a kanal in area. The defendants intended to construct roads from the Mall across the property to enable the intending purchasers to have access to the proposed buildings. It was on this understanding that the plaintiff had agreed to purchase the plot in question, and paid a heavy price of Rs. 10,000. On this plot the hotel building stood at the time of the execution of the agreement and the defendants had expressly stated in the agreement that the superstructure was not included in the transaction and that it would be removed by them. In view of the suspension of the so-called "layout scheme" by the Deputy Commissioner, the superstructure had not been removed by 5th October 1934, and it is stated that it is still standing in its original form. In these circumstances it is quite clear that the very foundation of the contract had been taken away, and for all practical purposes the contract had

become impossible of performance. This being so, under S. 65, Contract Act, the defendants were bound to refund to the plaintiff the amount of the earnest money which they had received. No doubt the law in England on the point is different. There it has been ruled that when a contract becomes impossible of performance by the destruction of the subject matter or the failure of an event or state of things contemplated as the foundation of the contract to happen or exist, the parties are excused from further performance and acquire no right of action. But as pointed out by Pollock and Mulla in their Commentary of the Indian Contract Act (Edn. 6), p. 380, the Indian law as enacted in Ss. 56 and 65 of the Act is different. Here, in the circumstances mentioned above, each party is under an obligation to restore any advantage which it might have received under the agreement or to make compensation for it to the person from whom he received it.

The learned Subordinate Judge has described the order of the Deputy Commissioner suspending the layout scheme as an "Act of State". This is obviously incorrect. The Deputy Commissioner had the power under the law to declare that the so-called "layout scheme" was in reality a "building scheme" and as such the Municipal Committee had no power to sanction it without referring it to the higher authorities. In my opinion such an act can, by no stretch of imagination, be described as an Act of the State. The appeal fails and is dismissed with costs.

S.C./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 782

TEK CHAND, J.

Sohan Singh — Appellant.

v.

Official Receiver, Sheikhpura, and another, Insolvent — Respondents.

Second Appeal No. 51 of 1936, Decided on 5th February 1937, from order of Addl. Dist. Judge, Sheikhpura at Lyallpur, D/- 29th June 1936.

Provincial Insolvency Act (1920), S. 28 (5) — Occupancy rights under S. 6, Punjab Tenancy Act, do not vest in Receiver — Duami rights vest in Official Receiver only if they come under S. 5, Punjab Tenancy Act.

Occupancy rights under S. 6, Punjab Tenancy Act, do not vest in the Court or in the Receiver under S. 28, Provincial Insolvency Act. The

duami rights can vest in the Official Receiver only if they are occupancy rights under S. 5, Punjab Tenancy Act, or are rights held under some peculiar tenure, outside the Act, and are liable to attachment or sale in execution of a decree or order of a Court : *A I R 1936 Lah 502, Rel. on.* [P 783 C 2]

J. G. Sethi — for Appellant.

Jagan Nath Aggarwal and *Assa Ram Aggarwal* — for Respondents.

Judgment.—On the application of one of his creditors Shambu Nath, respondent 2, was adjudicated insolvent in 1934. Two and a half months before the making of the application for insolvency, he had mortgaged certain agricultural land, of which he was a duami tenant, to Sohan Singh appellant for Rs. 1,500. After adjudication, the Official Receiver applied under Ss. 53 and 54, Provincial Insolvency Act, that the aforesaid mortgage be set aside as fraudulent. Sohan Singh pleaded that the duami rights in the land, which had been mortgaged to him did not vest in the Official Receiver and the latter had no right to apply under S. 53 or S. 54. The Insolvency Judge did not determine the exact nature of the duami rights, which Shambu Nath held in the land. He assumed that Shambu Nath was an occupancy tenant and, whether the occupancy rights were under S. 5 or S. 6 or S. 8, Tenancy Act, they had vested in the Official Receiver. He further found that out of the consideration for the mortgage, Rs. 386 only was genuine. He accordingly set aside the mortgage as fraudulent. Sohan Singh appealed to the Additional District Judge, but he dismissed the appeal. Before me the conclusions of the Courts below on both the points mentioned above have been assailed. The finding that the transaction was fraudulent has, however, been arrived at by the learned Additional District Judge on a consideration of the evidence on the record and cannot be reopened in second appeal.

But on the first point, I find it impossible to maintain the decision of the lower Courts on the materials on the record. In the Jamabandi of 1933-34, which is the only evidence bearing on the point on the record, Shambu Nath is described as a duami tenant of the land in dispute. This entry does not indicate the exact nature of the tenure. Under S. 28 (2), Provincial Insolvency Act, on the making of an order of adjudication the 'property' of the insolvent vests in the Court or the Receiver. In sub-s. (5) of S. 28 it is laid down that

the 'property' of the insolvent for the purposes of this section shall not include any property which is exempted by the Code of Civil Procedure or by any other enactment for the time being in force, from liability to attachment and sale in execution of a decree. Under S. 55, Punjab Tenancy Act, a right of occupancy under S. 55 may be sold in execution of a decree or order of a Court. But S. 56 provides that a right of occupancy under any other section than S. 55 shall not be attached or sold in execution of a decree or order of any Court or, without the previous consent in writing of the landlord, be transferred by private contract. The learned Additional District Judge has assumed that occupancy rights under S. 6 or S. 8 would also vest in the Official Receiver, even though they are not liable to attachment and sale in execution of a decree or order of a Court, because they can, with the previous consent in writing of the landlord, be transferred by private contract. This conclusion is clearly contrary to the express terms of sub-s. (5) of S. 28, Provincial Insolvency Act, as set out above, and Mr. Jagan Nath Aggarwal for the Official Receiver frankly conceded that he is unable to support this part of the reasoning of the Courts below. The matter has recently been considered by Bhide, J. in 38 P L R 233,¹ in which it was held that occupancy rights under S. 6, Punjab Tenancy Act, do not vest in the Court or in the Receiver under S. 28, Provincial Insolvency Act.

The duami rights can vest in the Official Receiver only if they are occupancy rights under S. 5, Tenancy Act, or are rights held under some peculiar tenure, outside the Act, and are liable to attachment or sale in execution of a decree or order of a Court. Neither party appears to have applied its mind to this crucial point in the case. It is therefore, necessary to elucidate the exact position by further enquiry. I accordingly remand the case under O. 41, R. 25, Civil P. C., to the Insolvency Judge, Sheikhpura, for the purpose. The onus is on Sohan Singh appellant to prove that the duami rights in question are exempt from attachment and sale in execution of a decree or order of a Court. The Official Receiver will lead evidence in rebuttal. An effort should

1. *Abdullah v. Shankar Das*, *A I R 1936 Lah. 502=160 I C 921=38 P L R 233.*

be made to trace the history of the tenancy in question as to the earliest Settlement, and if possible the relevant extracts from the revenue records should be got produced.

The Insolvency Judge shall record his finding on the point and submit the papers together to the District Judge, also will make the return to this Court within three months. Both counsel have been directed to cause their clients to appear before the Insolvency Judge, Sheikhupura, on 23rd February 1937, when a date will be fixed for the evidence of the parties.

T.M./D.S.

*Case remanded.***A. I. R. 1937 Lahore 784**

SKEMP, J.

Thandi Ram — Judgment-debtor —
Appellant.

v.

Jagan Nath and others—Decree-holders
—Respondents.

Execution Second Appeal No. 1163 of
1936, Decided on 18th January 1937.

Evidence Act (1872), S. 112—Presumption
under, when applies.

The presumption under S. 112, Evidence Act, applies quite irrespective of the fact whether the mother was married or not at the time of the conception. [P 784 C 2]

D. N. Aggarwal — for Appellant.

Chander Gupta — for Respondents.

Judgment.—The facts material to this second appeal are as follows: Lakhpat Rai brought a suit for partition against other members of his family. A decree was passed allotting the plaintiff a half share of the property, a shop valued at Rs. 928, and the rest of the property, a shop and a house to Kulwant Rai and Thandi Ram. Lakhpat Rai died during execution proceedings and one Nauhirya Mal as next friend of Jagan Nath minor applied on behalf of Jagan Nath to carry on the execution proceedings. Nauhirya Mal died and one Nand Lal was appointed next friend of the minor in his place. This Nand Lal is said to have been a jajman of Jagan Nath but is not related to him in any way. This Jagan Nath was born on 17th August 1920. His mother Mt. Durgi, who is now dead, married Lakpat Rai on 7th April 1920. She had previously been the wife of one Jiwa Ram, who died on 27th March 1920. The marriage between Lakhpat Rai and Mt. Durgi was celebrated at an Arya Samaj temple and on the date

of the marriage Lakhpat Rai executed a document making various promises in respect of Mt. Durgi, amongst others that any son born from her by him would be his heir. Jagan Nath applied in the executing Court that he was the son of Lakhpat Rai and his legal representative. Kulwant Rai and Thandi Ram pleaded that he was not the legitimate son of Lakhpat Rai. The trial Court relying on S. 112, Evidence Act and various rulings, found in his favour and the learned District Judge dismissed the appeal in limine. A second appeal was lodged to this Court entirely on grounds that the marriage was not valid and that Jagan Nath was not the legitimate son of Lakhpat Rai. It was admitted by a learned Judge of this Court, and on the day the appeal came on for hearing before me, a compromise was put in between Thandi Ram and Kulwant Rai on the one hand and Nand Lal on the other acknowledging that Jagan Nath was not the son of Lakhpat Rai and surrendering Jagannath's rights in the property on the ground that the debts left by Lakhpat Rai exceeded the value of his assets. Apparently Thandi Ram and Kulwant Rai, the cousins of Lakhpat Rai, and his next heirs after Jagan Nath are showing a spirit of altruism and are prepared to take the property and pay the debts rather than let the minor be so burdened.

In my judgment this compromise is not for the benefit of the minor and I refuse to sanction it. Further, S. 112, Evidence Act, is absolutely conclusive of this appeal and there is no doubt but that the lower Courts were right. S. 112 reproduces the English law on this point. The rule is that if a child is born during the continuance of a valid marriage it should be conclusive proof that he is the son of the woman's husband. As Mr. Mohammad Monir in his edition of the Evidence Act says, the presumption of this section applies quite irrespective of the fact whether the mother was married or not at the time of the conception. No arguments were addressed to me that the marriage was not valid. An inference was sought to be drawn from the clause in the deed that any son born to Mt. Durgi by Lakhpat Rai should be Lakhpat Rai's heir, but such a clause might have been inserted in any marriage deed. This appeal is therefore dismissed with costs.

P.R./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 785

JAI LAL, J.

Firm Narain Singh-Tehl Singh —
Defendants — Appellants.
v.

Firm Tulsi Ram-Suraj Parkash —
Plaintiffs — Respondents.

Second Appeal No. 1322 of 1936, Decided on 15th January 1937, from decree of Addl. Dist. Judge, Amritsar, D/- 16th July 1936.

Sale of Goods Act (1930), S. 39 (2)—Mere delivery of goods to carrier is not enough to entitle seller to claim from buyer price of goods sent to him—Proof of receipt from carrier and intimation thereof to buyer in addition to delivery of goods to carrier is necessary—Such proof is not necessary when carrier is nominee of buyer.

A seller cannot claim a decree against the buyer unless he can establish that he has placed him i. e. the consignee of the goods in a position to claim delivery thereof from the carrier. A delivery to the carrier would be tantamount to a delivery to the purchaser only if this is done. The mere delivery to a carrier without taking a receipt from him and without intimating his name to the consignee or without sending the receipt taken from the carrier to the consignee will not entitle the seller to claim the price of the goods from the purchaser. It is only on proof of these two matters in addition to the delivery of the goods to the carrier that the seller can claim a decree against the buyer. This will not be the case if the carrier be the nominee of the purchaser in which case the mere proof of delivery of the goods to such a carrier would entitle the seller to claim the price of the goods from the purchaser. [P 785 C 2]

Iqbal Singh — for Appellants.

Jai Gopal Sethi — for Respondents.

Judgment.—The respondents are Commission Agents. The appellants are their customers. The appellants ordered some goods from the respondents. The case of the respondents is that they purchased and sent the same through a carrier to the appellants. Within a month of the alleged despatch of the goods however the appellants wrote to the respondents that neither the goods nor the receipt of the carrier had been received by them. This notice has been proved by the production of a copy by the appellant. This copy was held to be inadmissible and unproved by the learned District Judge. But Mr. J. G. Sethi, Advocate for the respondents, has relied upon it and has asked me to admit it. I have consequently admitted the copy. From the account books of the plaintiffs-respondents it is quite clear in my opinion that the goods were despatched by them to the appellants

through a carrier, the owner of a motor lorry. It also appears from the books that they had obtained a receipt from this carrier. There is, however, no evidence that the receipt was despatched to or received by the appellants or that the goods were delivered to them. The learned District Judge has held that the mere delivery of the goods to the carrier is sufficient to entitle the respondents to a decree for its price against the appellants. This conclusion is sought to be supported at the Bar by reference to S 39, Sale of Goods Act. Having regard to sub-s. (2), however, of that section, it is clear to me that the seller cannot claim a decree against the buyer unless he can establish that he has placed him, i. e. the consignee of the goods, in a position to claim delivery thereof from the carrier. A delivery to the carrier would be tantamount to a delivery to the purchaser only if this is done. If the contention of the learned counsel for the respondents is correct, then the mere delivery to a carrier without taking a receipt from him and without intimating his name to the consignee or without sending the receipt taken from the carrier to the consignee would entitle the seller to claim the price of the goods from the purchaser. In my opinion this position is untenable in law. In the present case there is no proof that the respondents sent the receipt which they had taken from the owner of the motor lorry to the appellants or that the goods were actually delivered to them. It is only on proof of these two matters in addition to the delivery of the goods to the carrier that the plaintiffs can claim a decree against the appellants. This, of course, would not be the case if the carrier be the nominee of the purchaser in which case the mere proof of delivery of the goods to such a carrier would entitle the seller to claim the price of the goods from the purchaser.

Some cases were cited by Mr. Sethi. They do not however deal with the point involved in this case. At the same time I consider that this is a case in which there should be further enquiry on the question of actual delivery of the goods to the appellants. This evidence should have been produced by the respondents at the trial because in the notice given by the appellants on 10th April 1933, the respondents had been informed that the goods had not been received nor had the receipt

of the carrier been received by the appellants. But it seems that there has been some misapprehension as to the legal position of the parties and documentary evidence ought to be available to prove the delivery of the goods or of the receipt to the appellants.

I consequently remand the case to the District Judge of Amritsar to record evidence of both the parties on the question and to make a report within three months from to-day. Parties to appear before the District Judge on 16th February 1937. Remand is under O. 41, R. 25, Civil P. C. Ten days for objections.

W.D./A.L.

Case remanded.

A. I. R. 1937 Lahore 786

COLDSTREAM AND BHIDE, JJ.

Ram Piari — Appellant.

v.

Sardar Singh and others, Objectors and
others — Respondents.

First Appeal No. 2256 of 1935, Decided on 21st December 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 24th September 1935.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 8 and 2 (4) (i) and (iv)—Scope—Word 'office' in S. 2 (4) (i) relates also to performance of rites or ceremonies in course of private worship—After founder, widow and daughter appointing Granthis for performance of rites and ceremonies—Institution private place of worship—Widow and daughters are hereditary office holders and competent to apply under S. 8.

The use of the word "any rituals or ceremonies" in the latter part of the definition of 'office' as opposed to the word 'public worship' in the first part is significant and seems to indicate that the rituals or ceremonies referred to in the second part may be in the course of private worship. [P 787 C 2]

Though there is distinction between a public and a private place of worship in that the public can resort to the former as a matter of right, they cannot do so in the case of a private place of worship, it is not unlikely to find a private place of worship with a succession of hereditary office holders. Thus if after the death of the founder of the institution of worship, his widow and daughters have been in charge of the management of the institution and they have appointed Granthis from time to time for the performance of religious ceremonies and rites, the widow and daughters are 'hereditary office-holders' within the meaning of the Act, even if the institution in dispute is a private one. They thus have locus standi to apply under S. 8. [P 787 C 2; P 788 C 1, 2]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 8 and 10—Plaintiff denying institution claimed as Sikh Gurdwara under S. 7,

to be at all place of worship—Plaintiff should petition under S. 10 and not under S. 8. (*Obiter*).

Obiter.—If a petitioner denies that an institution claimed as a Gurdwara under S. 7, Punjab Sikh Gurdwaras Act, is a place of worship at all—whether public or private—no petition under S. 8 is competent and his proper remedy in such a case is a petition under S. 10. [P 788 C 1]

(c) Evidence Act (1872), S. 90—Proper custody—Will made in 1899—Will produced in 1907 in probate proceedings by person not named in will—No evidence how it came into his possession—Will subsequently produced in some proceedings in 1930—No presumption under S. 90 arises, as proper custody not proved.

Where a will alleged to have been made by the testator in 1899 was first produced in the probate proceedings by a person who was not named in the will and it was not known how it came into his custody, a presumption under S. 90, Evidence Act as to its genuineness cannot arise when it is subsequently produced in some proceedings in 1930, as there is nothing to show that it was produced in the probate proceedings from proper custody. [P 788 C 2]

(d) Appeal—Additional documentary evidence—Original petition referring to it—No reason why it was not produced earlier—Additional evidence in appeal is inadmissible.

Where in appeal the respondents relied on certain additional documentary evidence, which they pleaded was brought to their notice after the case was decided, but the appellant had referred to it in his original petition and there was no reason why it was not produced earlier:

Held: that the additional documentary evidence could not be allowed. [P 788 C 2; P 789 C 1]

(e) Punjab Sikh Gurdwaras Act (8 of 1925), S. 16 (2) (iii)—Institution founded by Keshadhari Sikh—Granth revered and kept in institution—Granth in charge from time to time—Place used for congregational worship and prayers since founder's time—Witnesses produced to prove public worship found to be worshipping ever since founder's time—Accounts deliberately withheld—Institution held to be established and used for public worship.

Gurdwara Baba Narain Singh was established by Narain Singh who was a Keshadhari Sikh and he read and revered the Granth Sahib in the institution. Gurupurbs were celebrated and several Granthis were in charge from time to time. The place had been used for congregational worship and prayers since the founder's time. Some of the witnesses produced to prove that there was performance of public worship in the institution ever since the time of the founder were found to have been worshipping in it since its foundation. The institution since the death of the founder was kept vacant, though it was situated in the bazaar. The accounts of the institution property were deliberately withheld:

Held: that the institution had been used for the purposes of the public worship of the Granth Sahib by the Sikhs ever since the time of the founder and the evidence was sufficient also to justify the inference under the circumstances that

the institution was established for public worship: *A I R 1935 Lah 666* and *A I R 1935 Lah 809, Ref.* [P 790 C 1, 2]

Mehr Chand Mahajan, Kartar Singh, Achhru Ram and Bhagat Singh—for Appellant.

Badri Das and Harnam Singh — for Respondents.

Bhide, J.—A petition under S. 7, Sikh Gurdwaras Act, having been presented to the Local Government, claiming that an institution described as Gurdwara Babu Narain Singh situated at Jhelum was a Sikh Gurdwara, Shrimati Ram Piari and Shrimati Ram Rakhi, daughters of Babu Narain Singh, presented two counter-petitions under S. 8 of the same Act to contest the claim. The petitioners contended that the alleged Gurdwara Babu Narain Singh was not established as a place of public worship by the Sikhs, but was a private study room and a place of worship of Sardar Narain Singh and his family. The two petitions were consolidated and heard together. The respondents pleaded that the petitioners Shrimati Ram Rakhi and Shrimati Ram Piari were not hereditary office-holders and had, therefore, no locus standi to present the petitions under S. 8, and secondly that the institution in question has been established by Babu Narain Singh as place for public worship by Sikhs and had been used as such ever since. The President as well as another member of the Tribunal who disposed of these petitions found that the petitioners were hereditary office-holders and had a locus standi to present the petitions, but they differed on the question whether the institution was a Sikh Gurdwara. The learned President was of opinion that it was a Sikh Gurdwara while the other member held that it was not proved that the place had been used for public worship by Sikhs at the time of the presentation of the petitions, and therefore it was not liable to be declared a Sikh Gurdwara. The third member of the Tribunal gave no decision. Under S. 13, Sikh Gurdwaras Act, the opinion of the learned President prevailed and a declaration was accordingly made that the institution described as Gurdwara Babu Narain Singh was a Sikh Gurdwara. From this decision the present appeal has been preferred by Shrimati Ram Piari. The other petitioner Shrimati Ram Rakhi is alleged to have compromised with the respondents and therefore did not present any appeal.

The first point which requires decision in this appeal is whether the appellant Shrimati Ram Piari had a locus standi to present a petition under S. 8, Sikh Gurdwaras Act. It was contended on behalf of the respondents that such a petition could only be presented by a hereditary office-holder of an institution which is used for public worship and that inasmuch as the appellant had alleged in her own petition that the institution in question had been only used as a study and a private place of worship, she could not be held to be a "hereditary office-holder" within the meaning of the Act. In order to decide this question, it is necessary to refer to the definition of the word 'office' as given in S. 2 (4) (i) of the Act. That definition runs as follows :

"Office" means any office by virtue of which the holder thereof participates in the management or performance of public worship in a gurdwara or in the management or performance of any rituals or ceremonies observed therein and "office-holder" means any person who holds an office.

'Office-holder' is a person who holds an office as defined above, and 'hereditary office-holder' would be a person holding 'a hereditary office' as defined in Cl. (iv) of S. 2 (4), Sikh Gurdwaras Act. It will appear from the above that the interpretation to be placed on the expression 'hereditary office-holder' depends in the first place on the definition of the word 'office'. For, an office-holder whether hereditary or otherwise must be the holder of an "office" as defined above. The definition of the word "office" shows that the holder must either (i) participate in the management or performance of public worship in a Gurdwara, or (ii) in the management or performance of any rituals or ceremonies observed therein. The use of the word "any rituals or ceremonies" in the latter part of the definition as opposed to the word "public worship" in the first part is significant and seems to indicate that the rituals or ceremonies referred to in the second part may be in the course of private worship. It was urged that there could be no hereditary office-holder in a private place of worship. But I do not see any force in this contention. There seems to be no good reason why there should not be a private place of worship, with a succession of office-holders. The main point of distinction between a public and a private place of worship is that the public can resort to

the former as a matter of right, while they cannot do so in the case of a private place of worship. In the present instance it appears from the evidence that Babu Narain Singh, who was the founder of the institution and after his death his widow and his daughters have been in charge of the management of the institution and that they have appointed Granthis from time to time for the performance of religious rites and ceremonies. In the circumstances I see no good reason why the appellant should not be held to be a "hereditary office-holder" within the meaning of the Act, even if the institution in dispute were a private and not a public place of worship as alleged in her petition.

Another contention urged on behalf of the respondents in this connexion was that the provisions of S. 8 show that the Gurdwara referred to therein must be a public place of worship and that if a petitioner does not admit the existence of any such place of worship, his only remedy is to petition under S. 10 of the Act. Attention was particularly drawn to the fact that a petition under S. 8 of the Act can be presented either by a "hereditary office-holder" or by "20 or more worshippers of the Gurdwara." But I do not think this wording necessarily excludes from the scope of the section petitions with reference to an institution which is alleged by the petitioner to be a private place of worship. The question whether such petitions are or are not included within its scope, must be decided primarily with reference to the definition of the word "office" as pointed out above and for reasons stated already that definition seems to me to include private as well as public worship. It seems also appropriate that a petition with respect to a private place of worship should be competent under S. 8; for there is frequently a dispute whether the institution claimed under S. 7 is or is not a place of public worship and such a question can be suitably decided under S. 8. It may be that if a petitioner denies that an institution claimed as a Gurdwara under S. 7 is a place of worship at all, whether public or private, no petition under S. 8 is competent and his proper remedy in such a case may be a petition under S. 10; but it is unnecessary to consider this question for the purpose of this appeal as the present appellant admitted in her petition that the place in dispute was a place of

private worship. I accordingly agree with the decision of the tribunal that the appellant had a locus standi to present a petition under S. 8.

The next point for decision is whether the institution is or is not a "Sikh Gurdwara" within the meaning of the Act. The respondents relied on the provisions of S. 16 (2) (iii), according to which it was necessary for them to prove that (a) the institution had been established for public worship by the Sikhs and (b) had been used as such before and at the time of the presentation of the petition under S. 7, i. e. till the year 1926 in this case. As regards these points, there is unfortunately no documentary evidence in the shape of any deed of dedication, etc., available in this case. The respondents relied on a will of Babu Narain Singh (Ex. O/2) alleged to have been made by him in October 1899. This will was produced in the course of an application for probate made by one Malik Singh in 1907. But the application was apparently not presented and no probate was ever granted. In the present proceedings, one witness named Mul Raj was summoned to prove the will but he was eventually given up. There is thus no evidence whatever on the record in support of the will. The learned President was of opinion that the will being a document more than 30 years old and having been produced from proper custody should be held to be genuine. But it must be remembered that the will was produced first in the probate proceedings in 1907, and there is nothing to show that it was then produced from proper custody. The other member of the tribunal has pointed out in his judgment that the will was produced in that case by one Bodh Raj but this person is not named in the will and it is not known how it came into his custody. In the circumstances, it seems to me that due execution of the will cannot be presumed under S. 90, Evidence Act. The respondents realized the weakness of their case in this respect and sought to produce in this Court some additional documentary evidence in support of their case, which was printed in Vol. III of the printed record subject to all just exceptions. The admission of this evidence was objected to by the appellant.

It was urged on behalf of the respondents that this documentary evidence was brought to their notice only after the

decision of the case and hence it could not be produced earlier. But this statement cannot be accepted. The documentary evidence includes, for instance, a compromise of the year 1923 between the two petitioners; but this compromise was referred to even in the appellant's petition and there was no reason why it should not have been produced earlier. The additional evidence was accordingly disallowed. As a consequence, the question referred to above must be decided on the basis of the oral evidence. We were taken practically through the whole of the oral evidence, by the learned counsel who argued the case. After carefully considering it, I am of opinion that the evidence of the respondents is distinctly superior and should be accepted. Most of the respondents' witnesses are persons who have themselves visited the institution as worshippers for a number of years. They are unanimous in deposing that two copies of the Granth Sahib are kept in cradles under canopies and ceremoniously opened and read in this institution, that Gurupurbs are celebrated and that several Granthis, who have been named, have been in charge from time to time. The witnesses do not appear to have any personal motive for making false statements against the appellant and the mere fact that some of them have been shown to be members of the 'Gurumat Pracharak Sabha' does not appear to me to be an adequate ground for rejecting their testimony. The appellant's witnesses on the other hand appear to be mostly interested. Amir Singh (P. W. 1) has been appellant's counsel for a long time and is inimical to Sardar Singh who has taken a leading part in prosecuting the case of the respondents. Khushal Singh (P. W. 2) has been a Granthi and manager of the institution. He is a servant of the appellant and his testimony shows a clear bias. This witness deposed that there was no 'Guru Granth Sahib' at all in the institution in question in the time of Narain Singh while Amir Singh (P. W. 1) admitted that Narain Singh used to read Granth Sahib though he added that he also used to read Ramayan and other Hindu sacred books. Mul Raj (P. W. 3) has made conflicting statements and his attitude in the witness box was not satisfactory. He admits that Ranga Singh, Punjab Singh and Karam Singh were 'Keshadharis' and so also was Narain Singh and that they used to take

part in 'Gyan Gosht' in the institution, but he would have us believe that they only used to read Hindu religious books, such as Ramayan, etc. He admitted that a Gurdwara situated at Jhelum was named after one of these persons, viz. Karam Singh. His attitude when he was confronted with three postcards written by him was unsatisfactory. He stated that he used to begin his letters with "Om" or "Sri Ganeshaenamah" in the Hindu style, but the postcards begin with "Sat Kartar", an expression generally used by Sikhs. When further questions were put with reference to the postcards, he refused to look at them. P. W. 4 seems to know little about the institution, having visited it only once and that too some 16 years before he gave evidence. Rajindar Singh (P. W. 5) had to surrender to the Sikhs a Gurdwara which was in his possession and his statement that he does not remember whether he brought a complaint against Sundar Singh and 16 others is sufficient to condemn his testimony. Allah Ditta (P. W. 6) is admittedly a tenant of the appellant. Rahim Bux (P. W. 7) is another Muhammadan shopkeeper whose shop is at some distance, and who can scarcely be expected to know much about the character of the worship in this institution. He and Nizam Din (P. W. 9) certainly seem to go beyond the appellant's own case when they say that they never saw any jalsa or gathering of people in the chaubara or any religious music or singing going on there. Gurmukh Singh (P. W. 8) belongs to a different village. From the cross-examination of Nizam Din (P. W. 9) it appears that some of the witnesses such as Rai Bahadur Dhanpat Rai and others who were summoned by the appellant had come to Court but were not examined, presumably because they were not expected to give evidence in appellant's favour.

From a perusal of the evidence as a whole, I feel no doubt that Narain Singh was a Keshadhari Singh and that he read and revered the Granth Sahib. There is also no doubt that the place in dispute has been used for congregational worship or prayers since Narain Singh's time. The appellant admitted in the witness box that she had heard from her mother that Narain Singh used to hold "Satsangh" there. Khushal Singh (P. W. 2) made a statement to the same effect, though he said that only Hindu religious books such

as Gita, Ramayan, etc., were read. He further admitted that after the death of Narain Singh, his father Amar Singh had a "path" of Guru Granth Sahib, i. e. Darbar Sahib performed and that the widow Mt. Kesra Devi had also a path of the "Darbar Sahib" performed for over a year, in memory of her husband. The appellant admits that she is a Sikh and she is married to a Sikh. Khushal Singh stated in his examination-in-chief that he used to read "Sanatani" books in this institution but in his cross-examination he displayed singular ignorance about them. Even if some Sanatani books were kept in this institution, I do not believe that they were given any prominence or were used for purposes of worship. According to the appellant's own case the place was used for purpose of private worship. But it is admitted that Narain Singh used to reside in a house at some distance and no explanation is forthcoming why he should have found it necessary to have a place for his private worship in a chaubara over shops in the bazaar. The worshippers who have frequented the place and who have given evidence do not appear to be near-relatives or friends of Narain Singh. The appellant has deposed that the place was closed after the death of their mother. But Khushal Singh admits that the chaubara has been never rented. If the place had ceased to be used for religious purposes, there is no reason why such valuable property situated in a bazaar should have been allowed to remain vacant. In the petition of the appellant under S. 8 there is no mention of the place having been closed for the purposes of religious worship after the death of Mt. Kesra Devi. It is significant that Khushal Singh has produced no accounts, although he has been managing the appellant's property. There is, I think, force in the contention of the learned counsel for the respondents that the accounts have been deliberately withheld as they would have shown that the income was being used at least in part for the purposes of the Gurdwara. In view of all these facts I would accept the respondents' evidence that the institution has been used for purposes of public worship of the Granth Sahib by the Sikhs ever since the time of Narain Singh, and up to the date of the presentation of the petition.

The only point which now remains to be considered is whether on the above finding it can also be held to be proved that

the institution was established for public worship by Sikhs as required by section 16 (2) (iii), Sikh Gurdwaras Act. On behalf of the appellant, attention was invited in this connexion to the rulings reported in A I R 1935 Lah 666¹ and A I R 1935 Lah 809.² But the question whether any inference as to the establishment of a place for purposes of public worship can be drawn from its user for such purpose must depend upon the circumstances of each case. In A I R 1935 Lah 666¹ the only inference that could be drawn from the earliest documents was that the institution in question was charitable in its origin and that it was founded sometime between 1730 and 1850. In A I R 1935 Lah 809² also, there was no reference at all to any "public worship" in the earliest documents relating to the institution in dispute in that case. In the present instance the institution was established in comparatively recent times and some of the witnesses have been worshipping it since the time of the founder Narain Singh. Narain Singh appears to have been a "Keshadhari" Sikh and the evidence relating to the performance of public worship in the institution ever since his time is, in my opinion, sufficient to justify the inference in the circumstances of the case that the institution was established for public worship by Sikhs. I would accordingly agree with the finding of the learned President of the tribunal and dismiss the appeal with costs.

Coldstream, J.—I agree.

V.B.B./A.L.

Appeal dismissed.

1. Lachhman Das v. Atma Singh, A I R 1935 Lah 666=158 I C 903.
2. Atma Das v. Takhat Singh, A I R 1935 Lah 809=160 I C 145.

A. I. R. 1937 Lahore 790

BHIDE, J.

Sundar Das — Plaintiff — Appellant.

v.

Official Receiver and others —

Defendants—Respondents.

Second Appeal No. 973 of 1936, Decided on 20th January 1937, from decree of Senior Sub-Judge, Amritsar, D/- 16th April 1936.

(a) Provincial Insolvency Act (1920), S. 34 — Arrears of rent due to insolvent for period subsequent to adjudication — Such arrears do not amount to "provable debt" under S. 34.

Where the Official Receiver realizes rent of the property of the insolvent from the period subsequent to his adjudication, such arrears of rent do not amount to "provable debt" under S. 34 of the Act. The Official Receiver cannot claim such amount for the purpose of distribution amongst the creditors of the insolvent: *A I R 1922 Oudh 73* and *A I R 1930 Cal 459, Rel. on.* [P 791 C 2]

(b) Mortgage — Mortgage with possession and subsequent lease of mortgaged property executed in favour of mortgagee — Rent agreed to be credited towards interest — Mortgage and lease being independent transactions, mortgagee can claim rent independently of his claim on mortgage.

Where a mortgagor executes a usufructuary mortgage of his property and subsequently executes a rent deed thereof, agreeing that the rent would go in payment of interest of the mortgage, the mortgage and the lease being independent of each other, the mortgagee can claim the rent independently of his claim on the footing of the mortgage. [P 791 C 2]

C. L. Aggarwal—for Appellant.

Qabul Chand through *Parkash Chand*
—for Respondent 1.

Judgment.—The material facts of the case for the purposes of this second appeal may be briefly stated as follows: One Gurdit Singh mortgaged certain immovable properties with possession in favour of Arur Singh and the day after the execution of the mortgage deed he also executed a rent deed in favour of the mortgagee. It was stipulated in the rent deed that the rent would be deducted out of the interest payable on the mortgage. Subsequently Arur Singh sold his mortgagee rights to Sunder Das. The original mortgagor, namely Gurdit Singh, was thereafter declared an insolvent. After the adjudication, the Official Receiver recovered Rs. 510 as the rent for one of the properties mortgaged from a sub-tenant of the insolvent. Sunder Das claimed this amount from the Official Receiver, but the Official Receiver refused to hand it over to him as he was of opinion that the amount was liable to be distributed amongst all the creditors. Thereupon Sunder Das instituted a suit for recovery of Rs. 510 against the Official Receiver and the insolvent. The trial Court granted plaintiff a decree but on appeal the learned Senior Subordinate Judge modified the decree and directed that the amount would be recoverable from the mortgaged property only and not from the person of the Official Receiver or the insolvent. From this decision the present appeal has been preferred by Sunder Das.

The only point urged by the learned counsel for the appellant before me was that the learned Senior Subordinate Judge was not right in directing the amount to be realized from the mortgaged property only. He contended that the claim for arrears of rent amounting to Rs. 510 referred to a period subsequent to the adjudication and, therefore, was not a "provable debt" within the meaning of S. 34, Provincial Insolvency Act. In support of this contention he relied on *A I R 1922 Oudh 73*¹ and *57 Cal 1210*.² Secondly he contended that the mortgage and the lease were independent transactions and the appellant was entitled to sue for the rent apart from the mortgage. Both these contentions appear to me to be sound. The rent-deed was no doubt executed before the adjudication of the insolvent, but the claim for the arrears of rent admittedly referred to a period subsequent to the adjudication and in view of the authorities cited it seems to me that the claim did not fall within the meaning of a debt provable under S. 34, Provincial Insolvency Act. I have considered the terms of the mortgage deed and the lease and they too do not appear to me to form one and the same transaction. The mortgagor was no doubt allowed to remain as a tenant but the mortgagee had the option of ejecting him. The only stipulation in the rent-deed was that the rent, if realized, would be credited towards the interest on the mortgage. This does not mean that the rent could not be realized independently of the claim on the footing of the mortgage. I therefore accept this appeal and restore the order of the trial Court with costs.

W.D./A.L.

Appeal allowed.

1. *Kuer Behari Lal v. Kalka*, *A I R 1922 Oudh 73=67 I C 549*.

2. *Official Trustee Bengal v. Kissen Gopal*, *A I R 1930 Cal 459=134 I C 91=57 Cal 1210=34 C W N 751=51 C L J 392*.

A. I. R. 1937 Lahore 791

BRIDE, J.

Rattan Chand — Defendant —

Appellant.

v.

Mt. Ram Piari — Plaintiff —

Respondent.

First Appeal No. 263 of 1936, Decided on 25th January 1937, from order of Senior Sub-Judge, Ferozepore, D/- 14th October 1936.

Civil P. C. (1908), O. 47—Wrong interpretation of certain ruling by predecessor is no ground for review.

A wrong interpretation of certain ruling by the predecessor cannot be considered an error of law apparent on the face of the record, so as to justify a review: *A I R 1922 P C 112*; *A I R 1933 All 274* and *112 I C 277*, *Ref.* [P 792 C 1]

J. L. Kapur — for Appellant.

Achhru Ram and Indar Deb —

for Respondent.

Judgment.—This is an appeal from an order of the Senior Subordinate Judge, Ferozepore, granting an application for review. It is urged that no appeal lies except on grounds specified in O. 47, R. 7, Civil P. C., and that no such ground is specified in this case. The learned counsel for the appellant however contended that the learned Senior Subordinate Judge had no jurisdiction to grant a review in the circumstances of the case and hence a petition for revision would, at any rate, lie. This contention seems to be correct and I shall treat this as a petition for revision.

In the present instance, the learned Senior Subordinate Judge has reviewed his predecessor's order on the ground that a ruling relied upon by him, viz. *A I R 1930 Lah 195*,¹ had been wrongly interpreted. In the first place it is not quite clear that the ruling was misinterpreted, but in any case this could not be considered an error of law apparent on the face of the record, such as could justify a review: see *3 Lah 127*,² *55 All 196*³ and *112 I C 277*,⁴ etc. I hold that the Court had no jurisdiction to grant a review and therefore set aside the order. The case will now be tried on merits. Costs will follow final decision. Parties to appear in the trial Court for further proceedings on 8th February 1937.

T.M/D.S.

Case sent back.

1. *Amir Chand v. Buti Shah*, *A I R 1930 Lah 195*=*125 I C 334*=*31 P L R 302*.
2. *Chhajju Ram v. Neki*, *A I R 1922 P C 112*=*72 I C 566*=*3 Lah 127*=*49 I A 144 (P C)*.
3. *Balkrishan v. Mt. Bundia*, *A I R 1933 All 274*=*146 I C 756*=*55 All 196*=*1933 A L J 75*.
4. *Gurditta Shah Hari Chand v. Balmokand*, (1928) *112 I C 277*.

A. I. R. 1937 Lahore 792

ADDISON AND DIN MOHAMMAD, JJ.

Murli Mall & Sons — Decree-holders
— Appellants.

v.

Bhawani Dass and others —

Judgment-debtors — Respondents.

L. P. A. No. 44 of 1936, Decided on 2.2.1937, from judgment of Bhide, J.

Limitation Act (1908), Art. 182 (5)—Decree against *A* and *B* jointly — Clause appended providing execution against *A* in first instance — Application by decree-holder for execution on 10th November 1930 against *B*—Application dismissed — Second application on 16th October 1933 against *B* — First application held took effect against *A* and *B* alike and was therefore in accordance with law — Second application held was in time.

A decree was passed jointly against *A* and *B* for certain amount, and there was an appended clause to the effect that the decree-holder should attempt realization of the amount from *A* in the first instance. The first application for execution was made on 10th November 1930 and it was against *B* only. The application was dismissed on the ground that the decree-holder had not made any attempt to realize the decree from *A* in the first instance. The second application for execution was made on 16th October 1933. This application was also against *B* alone. The second application was dismissed as time-barred:

Held: that according to Expl. 1 to Article 182 the application against one must take effect against all. The first application was therefore in accordance with law falling under Art. 182 (5) and Expl. 1 thereto, and the fact that the execution was not allowed did not make it an application, not in accordance with law. The second application was therefore in time. [P 793 C 1, 2]

Chuni Lal Vohra — for Appellants.

Nand Lal Salooja — for Respondents.

Addison, J.— There was a decree for Rs. 13,946.14.0 passed against defendants 4 and 5, namely, Messrs. Frank Johnson and Company, Limited, Thayetmyo, Burma, and Messrs. Chuni Lal Behl Mohan Lal Wahi and Company, Multan. The decree is in the following terms:

It is ordered that defendants 4 and 5 do pay to the plaintiffs the sum of Rs. 12,562.14.0 with interest on Rs. 12,000 at the rate of 5 per cent. per annum from the date of institution of suit to date of realization of the said sum and do also pay Rs. 1,384 being the proportionate costs of the suit. Defendants 1 to 3 to be free, but they should bear their own costs. The plaintiffs to attempt realization of the money from defendant 4 in the first instance and then from defendant 5.

The first application for execution was made on 10th November 1930 and it was against defendant 5 only. It was dismissed on the ground that the decree-holder had not made any attempt to realise the decree from defendant 4. The second application for execution was made on 16th October 1933. It was supported by an affidavit of the decree-holder that he had not been able to discover the whereabouts of defendant 4 and believed that he had no property. This application was also for execution against defendant 5.

alone. The executing Court held that it had not been established that Messrs. Frank Johnson and Company were carrying on business or had property in British territory, and therefore ordered the execution to proceed against defendant 5. From this decision, defendant 5 preferred an appeal to this Court, which was heard by a Single Judge. He held that the first application was not a step-in-aid of execution, inasmuch as the decree-holder was not entitled to execute the decree against defendant 5 without first attempting to realise it from defendant 4. The second application was therefore held to be time-barred. The Single Judge further held that there was no reliable evidence on the record to show that the decree-holder had made any attempt to realise the decree from defendant 4. He stated that the wording of the decree was not very happy, but he took it that the decree meant that the decree-holder was not entitled to execute the decree against defendant 5 unless he had made a bona fide attempt to realise it from defendant 4 and failed. On the evidence he considered that such a bona fide attempt had not been made. For both reasons he accepted the appeal and set aside the order of the executing Court directing the execution to proceed. He left the parties to bear their own costs however. Against this decision this Letters Patent Appeal has been instituted.

From the wording of the decree, which has already been set out, it is clear that it is a decree passed jointly against defendants 4 and 5 for the amount stated, there being an appended clause to the effect that the plaintiffs should attempt realization from defendant 4 in the first instance. The last portion of Expl. 1 to Art. 182, Sch. 1, Lim. Act enacts that where a decree or order has been passed jointly against more persons than one, the application if made against any one or more of them, or against his or their representatives, shall take effect against them all. The application of 10th November 1930 was an application to execute a decree passed jointly against two persons with the rider mentioned and it seems to us to follow from Expl. 1 that an application against one must take effect against all. It is true that this first application was dismissed on the ground that it had not been established that a sufficient attempt had been made

to realise the money from defendant 4. This may have been a correct decision, but it does not mean that the application was not in accordance with law and, as it was in accordance with law falling under Art. 182 (5) and Expl. 1 thereto, the fact that execution was not allowed does not make it an application which was not in accordance with law. The second application of 16th October 1933, therefore, was also within time and it also is an application in accordance with law. We hold therefore that the second application was not barred by limitation.

On the whole we see no reason to disturb the finding of the Single Judge that a sufficient attempt has not yet been made to realise the money from defendant 4 in the first instance. This being so, we dismiss the appeal, but in doing so we desire to point out that the application is a valid application and is only being dismissed because a sufficient attempt has not yet been made by the decree-holder to execute his decree against defendant 4 in the first instance. The decree-holder should take some steps in Burma to establish that the principal partner of defendant 4 is no longer in India and that the Company is defunct and has no assets. When he has done so and if his attempt is unsuccessful, he should then proceed in accordance with law to execute the decree against defendant 5. The parties will bear their own costs of these proceedings throughout.

S.C./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 793

YOUNG, C. J. AND MONROE, J.

Khazan — Appellant.

v.

Emperor.

Criminal Appeal No. 1118 of 1936, Decided on 4th March 1937, from order of Magistrate, First Class, Karnal, D/- 16th July 1936.

Criminal P. C. (1898), S. 239 (d)—Scope—Accused illegally possessing revolver while preparing for dacoity — Accused can be jointly charged and tried for offences under S. 399, I. P. C., and S. 19 (f), Arms Act.

Where accused illegally possess a revolver for preparation of dacoity, the offence of illegal possession of revolver is a continuing one, and therefore possession of such weapon at the time of preparation for dacoity or at the time of taking part in the dacoity will form part of the same transaction. S. 239 (d), Criminal P. C., being

applicable to the case, the accused can be jointly charged and tried under S. 399, I. P. C. and S. 19 (f), Arms Act. [P 794 C 1]

D. R. Sawhny — for the Crown.

Young, C. J.—In this case the appeals of the convicts came before a learned Single Judge of this Court. They have been referred to a Bench as the learned Judge had a doubt whether a charge under S. 399, I. P. C., that is preparation for dacoity, could legally be tried with another charge under S. 19 (f), Arms Act, that is being in possession of a revolver. The relevant section of the Criminal Procedure Code is S. 239. It is there enacted:

The following persons may be charged and tried together, namely....(d) persons accused of different offences committed in the course of the same transaction;.....

In our opinion the point is quite clear. The possession of the revolver by one of the accused in this case was clearly an act of preparation for the committal of the dacoity. Actually there is evidence that one of the accused told a witness called for the Crown that they had a revolver for the purpose of the dacoity. In any event, apart from such evidence the connection between the revolver and preparation for dacoity is obvious. The offence of illegal possession of revolver is a continuing one and, therefore, having possession of such a weapon at the time of preparation for dacoity or at the time of taking part in the dacoity would, in our opinion, form part of the same transaction, and the facts would certainly bring the two charges within the ambit of S. 239 (d), Criminal P. C.

The other point referred to this Bench is the question of guilt of Salamat Ullah. We have studied the evidence and we can see no distinction between the case of Salamat Ullah and the rest of the accused. Indeed Salamat Ullah appears to have been the organizer of the dacoity. With regard to all the appellants there is no reason for us to interfere in the decision arrived at by the lower Court with regard to any of them. The appeals are, therefore, dismissed.

W.D./A.L.

Appeals dismissed.

A. I. R. 1937 Lahore 794

ADDISON AND DIN MOHAMMAD, JJ.

Ghulam Qadir Khan — Plaintiff —

Appellant.

v.

Ghulam Hussain and others —

Defendants — Respondents.

Second Appeal No. 1342 of 1936, Decided on 2nd February 1937, from decree of Dist. Judge, Mianwali, D/- 4th June 1936.

Civil P. C. (1908), O. 22, R. 4 — Suit instituted in wrong Court in 1934—Plaint returned and presented in proper Court on 26th February 1935 — Two out of many defendants dead in meantime and their legal representatives not brought on record — On 20th May 1935 plaintiff making necessary application therefor—Suit held could only be said to be properly instituted on 26th February 1935—Question of abatement held did not arise.

A suit was instituted in 1934 in the Court which had no pecuniary jurisdiction to try it. The plaint was returned and presented in the Court of competent jurisdiction on 28th February 1935. In the meantime two out of the number of defendants had died and the plaintiff had not brought their legal representatives on the record. On 20th May 1935 the plaintiff made the necessary application to represent all the defendants. On 18th May the plaintiff applied under O. 1, R. 8 to allow certain defendants, named to represent all in the suit. The contesting defendants objected that the whole suit had abated as the representatives of the deceased defendants had not been impleaded within time:

Held: that the time during which the plaintiff prosecuted his case in the wrong Court did not matter, as it had no jurisdiction to deal with the case and consequently the suit could not but be taken to have been instituted for the first time on 26th February 1935. The position was that at the time of the proper institution of the suit the list contained the names of two dead persons and that on being apprised of the fact the plaintiff on 20th May 1935 replaced them by their legal representatives. Accordingly no question of abatement arose in the case. At most it could be considered that the new defendants were added for the first time on 20th May 1935. This was material for the limitation but obviously had nothing to do with the abatement. [P 795 C 1, 2]

Asa Ram Aggarwal — for Appellant.

Mohammad Monir — for Respondents.

Din Mohammad, J. — The suit giving rise to this appeal was instituted by one Ghulam Qadir Khan of Notak against 34 ala maliks for a declaration that he had, under the terms of the wajib-ul-arz, acquired the status of an adna malik in some shamilat land situated in the same village. This suit was instituted in 1934 in the Court of the Subordinate Judge, Bhakkar, who however found, after protracted proceedings, that he had no pecu.

niary jurisdiction to try the suit. The plaintiff was consequently returned to the plaintiff for presentation in a Court of competent jurisdiction. The plaintiff, accordingly, put in the plaint in the Court of the Senior Subordinate Judge on 26th February 1935. In the meantime, Muhammad and Ghulam Muhammad Khan, two out of the thirty-four defendants, had died and the plaintiff had not brought their legal representatives on the record in accordance with the provisions of the Civil Procedure Code. On 20th May 1935, the plaintiff made the necessary application to the Court. On 18th May he had moved the Court to take action under O. 1, R. 8, Civil P. C., and to allow the four defendants named in the application to represent all the defendants in the suit. This was done on 20th May. Afterwards, a preliminary objection was raised by the contesting defendants that, as the legal representatives of the deceased defendants had not been impleaded within time, the whole suit had abated. This objection prevailed with the Senior Subordinate Judge who dismissed the suit. On appeal the District Judge affirmed the decision of the Senior Subordinate Judge. From this order the plaintiff has preferred a further appeal.

We consider that neither the Senior Subordinate Judge nor the District Judge has, in the circumstances of the case, taken a correct view of the law and both have based their judgments on erroneous ground. The authorities relied upon by them do apply in cases of abatement, but they are not of universal application and can be invoked in those cases only where the facts are similar. Here the circumstances are different and to such altered conditions the authorities discussed in the judgments of the Courts below are altogether inapplicable. The time during which the plaintiff prosecuted his case in the Court of the Subordinate Judge, Bhakker, does not matter, as he had no jurisdiction to deal with the case and consequently the suit cannot but be taken to have been instituted for the first time on 26th February 1935. The position therefore is that at the time of the proper institution of the suit the list of the defendants contained the names of two dead persons and that on being apprised of the fact the plaintiff, on 20th May 1935, replaced them by their legal representatives. Accordingly, no question of abate-

ment arose in the case. At most it could be considered that the new defendants were added for the first time on 20th May 1935. This may be material for the purposes of limitation but has obviously nothing to do with the abatement.

The result is that we allow the appeal and send the case back to the trial Court with directions to dispose of it in accordance with law. The court-fee on the appeal will be refunded. The plaintiff will get his costs in the Court of the District Judge as well as in this Court. The costs of the trial Court will abide the event.

V.B.B./A.L.

Case remanded.

A. I. R. 1937 Lahore 795

ADDISON AND DIN MOHAMMAD, JJ.

Mehnga Dass and others—Appellants.

v.

Maya Singh and another—Objectors—Respondents.

First Appeal No. 133 of 1936, Decided on 21st January 1937, from decree of Sikh Gurdwaras Tribunal, Lahore, D/. 25th November 1935.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 10 and 14—Scope—Person filing petition under S. 10 claiming notified property as his own—Second petition presented directly to tribunal misdescribed as better statement of original petition and claiming property as manager of dharmashala—Second petition held constituted new petition—Tribunal held had no jurisdiction to entertain such new application under S. 10 or S. 14.

A person filed a petition under S. 10, Punjab Sikh Gurdwaras Act, claiming certain property included in the Government Notification as his own. Subsequently a second application was filed claiming the property not in his own right but as manager of Dharmashala. The petition was described as better statement of the original petition. This second application was not submitted to the tribunal through the Government as required by the Act but was presented to the tribunal directly :

Held : that as the claim put in under second petition was clearly repugnant and inconsistent with the claim in the previous petition, the second petition constituted a new petition, and the tribunal had no jurisdiction to entertain such new petition under S. 10 of the Act. [P 796 C 1,2]

Held also : that the tribunal had no jurisdiction to entertain such new petition under S. 14 of the Act, as under that section the tribunal could take cognizance of only those petitions which had been forwarded to it by the Local Government. [P 796 C 2]

(b) Civil P. C. (1908), O. 6, Rr. 5 and 7—R. 5 does not permit submission of new material altogether based on entirely dif-

ferent cause of action — This is also repugnant to R. 7 of O. 6.

Order 6, Rule 5, Civil P. C., permits merely a further and better statement of the nature of the claim or further and better particulars of any matter stated in any pleading, and not the submission of new material altogether based on an entirely different cause of action. This would be really repugnant to R. 7 of the same Order which unequivocally prohibits the raising of any new ground of claim or the alleging of any fact inconsistent with previous pleadings. [P 796 C 2]

Bhagat Singh—for Appellants.

J. L. Kapur and Gurcharan Singh—
for Respondents.

Din Mohammad, J. — On the publication by the Punjab Government of Notification No. 86/1671-G. dated 16th October 1933, Mehnga Dass and his three minor brothers submitted a petition under S. 10, Sikh Gurdwaras Act, claiming the properties included in the list published along with the said Notification to be their own and asserting that they did not belong to any institution. This petition under the terms of S. 10 had to be submitted within 90 days from the date of the publication of the said Notification and was so submitted. On 15th May 1935, Mehnga Dass realized that his petition as lodged could not succeed and he accordingly put in another petition which he misdescribed as a better statement of his original petition, wherein he took up an entirely inconsistent position and alleged that he claimed the property not in his own right but as manager of the Dharamsala Ram Saranwali to the exclusion of his brothers. The objectors contested his right to put in a new petition in the manner in which he had done and contended that the Gurdwaras Tribunal had no jurisdiction to entertain such a petition. It appears, however, that this objection was overlooked at the time of the framing of the issues, as no issue touching this point was struck. The Tribunal came to the conclusion that the Dharamasala Ram Saranwali was the owner of a certain part of the building mentioned in the decree sheet and dismissed the petition in all other respects. A decree was drawn up in accordance with this judgment but in the decree sheet the title of the petition showed Mehnga Dass as well as his three brothers as the petitioners. Mehnga Dass and his brothers have appealed.

This appeal can be disposed of on the short ground that the tribunal had no jurisdiction to entertain any new petition

under S. 10, Sikh Gurdwaras Act, and the petition submitted by Mehnga Dass, although it was described as a better statement, in fact constituted a new petition. As stated above, the right, title or interest that Mehnga Dass claimed under the new petition was claimed on behalf of the Dharamsala Ram Saranwali which under no circumstances could be said to have been covered by the claim put forward in the original petition on behalf of Mehnga Dass and his brothers, and it was clearly repugnant to and inconsistent with that claim. Counsel for the appellants has frankly conceded that if the original petition had been allowed to proceed and if it had been eventually found that the petitioners in their own right did not possess any right, title or interest in the properties in suit and that the right, title or interest belonged to the Dharamsala, their petition would have been dismissed. This by itself is enough to show that the change subsequently introduced in the position of the petitioners on the 15th of May was to all intents and purposes equivalent to the submitting of a new petition to the Tribunal on behalf of a new petitioner. This evidently was not permissible under the Sikh Gurdwaras Act. The Tribunal under S. 14, Sikh Gurdwaras Act, could take cognizance only of those petitions which had been forwarded to it by the Local Government and was debarred from hearing any petition which had not been received through that channel. In these circumstances, we have no hesitation in holding that the Tribunal was not competent to entertain the petition as put in on 15th May 1935.

Counsel for the appellants has, however, urged that the Tribunal was within its rights to receive a better statement of the claim under R. 5 of O. 6, Civil P. C., read with sub-s. 11 of S. 12, Sikh Gurdwaras Act. This argument, however, is devoid of force. In the first place, R. 5 permits merely a further and better statement of the nature of the claim or further and better particulars of any matter stated in any pleading, and not the submission of new material altogether based on an entirely different cause of action. This would be clearly repugnant to R. 7 of the same Order which unequivocally prohibits the raising of any new ground of claim or the alleging of any fact inconsistent with previous pleadings. Secondly, sub-s. 11 of S. 12 cannot help the appel-

lants in this case. That sub-section lays down that the proceedings of a Tribunal shall be conducted in accordance with the provisions of the Civil Procedure Code but subject to the provisions of the Sikh Gurdwaras Act, and where that Act prohibits a certain course from being adopted, the Civil Procedure Code cannot permit it.

We have no hesitation in holding, therefore, that the appellants have no legs to stand on. We accordingly affirm the decision of the Tribunal and dismiss this appeal, but leave the parties to bear their own costs throughout. The cross-objections having been dropped before us are also dismissed but without costs. The result is that the decree of the Tribunal will stand intact.

K.B./A.L.

*Appeal dismissed.***A. I. R. 1937 Lahore 797**

SKEMP, J.

Mt. Nazir Begum — Appellant.

v.

Ghulam Qadir Khan and others —

Respondents.

First Appeal No. 255 of 1936, Decided on 7th January 1937, from order of Sub-Judge, First Class, Multan, D/- 24th August 1936.

(a) Guardians and Wards Act (1890), S. 9 (1)—Mahomedan minor girl born at Multan — On her father dying two years after, minor sent to Bhawalpur State—Application by mother for guardianship in Multan Court after few weeks — Minor held was ordinarily resident of Multan district—Court at Multan held had jurisdiction to entertain application.

A Mahomedan minor girl was born in her father's house at Multan. Her father died after two years and the minor was then sent to Bhawalpur State with her mother's consent. The mother applied for guardianship of her minor girl in the Court of Multan within a few weeks thereof. The application was rejected on the ground that the Court at Multan had no jurisdiction because the minor ordinarily resided in the Bhawalpur State :

Held : that the minor, who had lived all her life in the Multan District until a few weeks before the application, ordinarily resided in the Multan District and the Court at Multan had jurisdiction to entertain the application : 53 P L R 1902 and A I R 1932 Bom 592, *Rel. on.*

[P 798 C 1]

(b) Guardians and Wards Act (1890), S. 39 (b) — Application for guardianship by person not resident within jurisdiction is competent.

A person not residing within the jurisdiction of the Court to which the application for guardian-

ship is made is not incompetent to make the same: A I R 1933 All 780, *Rel. on* ; A I R 1914 All 541 and A I R 1923 Lah 716, *Dissent.*

[P 798 C 1]

Mohammad Amin for *Malik Mohammad Hussain* — for Appellant.

Mela Ram — for Respondents.

Judgment. — This is an appeal against an order of the learned Subordinate Judge, First Class, Multan, rejecting the application of Mt. Nazir Begum to be appointed guardian of her minor daughter, Fahmida Khanam. The minor was born on 30th August 1933 in her father's house at Multan. The learned trial Judge states that the family is the premier family of Multan. Her father, Nawab Abdul Karim, died at Multan on 7th March 1935, and his *chehlum* ceremony was celebrated on 7th April. The minor was sent to Bhawalpur State in the custody of Mt. Mehan Bibi a few days later, it is said, with her mother's consent. Mt. Nazir Begum's application to be appointed guardian was drafted on 13th May 1935 and presented in Court on 14th May 1935. The learned Subordinate Judge rejected the application on the following grounds : (1) that he had no jurisdiction because the minor ordinarily resided in Bhawalpur State ; (2) that the mother had consented to her being sent to Bhawalpur ; and (3) that although by the personal law of the parties the mother was the guardian until the age of puberty, it was in the circumstances for the welfare of the minor that she should not be appointed guardian.

In my judgment the conclusions of the learned Subordinate Judge are wrong and the appeal must be accepted. S. 9 (1), Guardians and Wards Act, requires that an application for guardianship of the person of the minor should be made to the District Court having jurisdiction in the place where the minor ordinarily resides. In 53 P L R 1902¹ the minor's father had lived both in Delhi and Khan Khoda in the Rohtak District dying in the latter place. The child was born at Khan Khoda but brought to Delhi by her mother who died a few weeks later in the house of a relative in Delhi. Robertson, J. held that the minor ordinarily resided in Khan Khoda. To much the same effect is a Division Bench ruling of the Bombay High Court reported in A I R 1932 Bom

1. Mubarik Shah Khan v. Mt. Wajehunnisa, (1902) 53 P L R 1902.

592.² I hold that the minor, who had lived all her life in the Multan District until a few weeks before the application, ordinarily resided in the Multan District.

Before me it was also urged that the law requires that the applicant should live in the District in which the application is made. Admittedly at the time of the application the applicant was living in the house of her father, a rais of Lahore and she is still living there. Reliance was placed on 36 All 280,³ which contains an obiter dictum to this effect reproduced in the head note. This obiter dictum was also followed in a Single Bench judgment of this Court reported in A I R 1928 Lah 716⁴ where it was quite unnecessary for the decision of the case. The Allahabad ruling has been dissented from by a later Bench of the Allahabad High Court in A I R 1933 All 780.⁵ Rachhpal Singh, J. said :

It is nowhere laid down that a person not residing within the jurisdiction of the Court to which the application is made will be incompetent to make the same. The District Judge relies on Cl. (h) of S. 39 of the Act.

The learned Judge then explained that this section merely means that in certain cases, ceasing to live within the jurisdiction of the Court which made the order of appointment may be a ground for the removal of the guardian from his office and no more.

He then distinguished 36 All 280³ and pointed that the remark was only an obiter dictum. It is quite clear, in view of the foregoing, that the dictum in 36 All 280³ can no longer be regarded as good law. In cases like the present, it would lead to the consequence that a mother cannot be appointed guardian of her own child because she has gone to live in her father's house in another District.

As to the merits, the Mahomedan law lays down that a mother is the proper guardian of a female child until the child attains the age of puberty. The learned trial Judge however persuaded himself that it was for the welfare of the child that another person should be appointed. He was quite right that the welfare of the child should take precedence even of the personal law of the parties, but it passes

my comprehension how it is for the welfare of the child to be under the care of a nominee of her step-brothers living outside British India and not with her own mother. He said that the mother had agreed to the child being taken away to Bhawalpur. Even if she did so in order that she might leave Multan and return to her father's house in Lahore, it is no bar to this application. I accept this appeal and direct that the applicant Mt. Nazir Begum be appointed guardian of the person of her minor daughter Mt. Fahmida Khanam. The respondents are to pay the appellant's costs throughout.

K.B./A.L.

Appeal allowed.

A. I. R. 1937 Lahore 798

BHIDE, J.

Mohammad Hassan and another —
Plaintiffs — Appellants.

v.

Mt. Itar Nishan and others —
Defendants — Respondents.

Second Appeal No. 889 of 1936, Decided on 8th February 1937, from decree of Dist. Judge, Sialkot, D/. 13th May 1936.

(a) Punjab Limitation (Custom) Act (1 of 1920), Art. 2—Suit by collaterals of last male holder for possession on ground that will by widow of last male holder in favour of her daughter and other persons is invalid according to custom—Suit is governed by Art. 2.

The widow of the last male holder made a will in favour of her daughter and other persons. On the death of the widow the collaterals of the last male holder brought a suit for possession of their share on the ground that the will was invalid according to the custom :

Held: that the suit was governed by Art. 2, Punjab Limitation (Custom) Act. [P 799 C 2]

(b) Punjab Limitation (Custom) Act (1 of 1920), Arts. 1 and 2—Word 'deed' is equivalent to 'document'—Term 'alienation' includes testamentary disposition—Registration is starting point of limitation simply because it amounts to certain amount of publicity.

The word 'deed' is not used in a technical sense but is merely equivalent to 'document'. The term 'alienation' as used in Arts. 1 and 2, Punjab Limitation (Custom) Act, includes a testamentary disposition of property. Such disposition also might be made by a 'registered deed' and the starting point of limitation would be the date of registration as registration is fixed to be the starting point of limitation in Arts. 1 and 2 simply because registration amounts to certain amount of publicity. [P 799 C 2; P 800 C 1]

M. C. Mahajan — for Appellants.
S. L. Puri for J. N. Aggarwal and
J. N. Aggarwal — for Respondents.

2. Lakshman v. Gangaram, A I R 1932 Bom 592 = 140 I C 571 = 34 Bom L R 1293.

3. Asghar Ali v. Amina Begam, A I R 1914 All 541 = 24 I C 59 = 36 All 280 = 12 A L J 392.

4. Lachhmi v. Nanak Chand, A I R 1928 Lah 716 = 107 I C 606.

5. Beni Prasad v. Parvati, A I R 1933 All 780 = 147 I C 217 = 56 All 20 = 1933 A L J 1933.

Judgment.—The plaintiffs sued in this case for possession of some land and house property of which the last male holder was one Inait Ullah, a Kakkezai Sheikh of Pasrur. Inait Ullah died leaving a widow, named Mt. Amir Nishan, who executed a will in 1926 in favour of her daughter, named Mt. Itar Nishan and two other persons, named Sukhawat Ali and Barkat Ali. On the death of the widow a dispute arose between the collaterals of Inait Ullah and the legatees as to the succession to the property. Mutation of the landed property was at first sanctioned in favour of the collaterals but the order was reversed on appeal by the Collector. The plaintiffs, therefore, instituted the present suit for possession of their share of the property. The suit has been dismissed by the Courts below as barred by time and from this decision the plaintiffs have appealed.

The Courts below have held that the case was governed by Art. 2 of Act 1 of 1920 and the period of limitation was six years and that it had commenced to run from the date of registration of the will in 1926. The contention of the learned counsel for the plaintiffs-appellants is that Art. 2 of Act 1 of 1920 was not applicable as the plaintiffs did not base their claim on the ground that the alienation in favour of the defendants was not in accordance with custom. The learned counsel referred to a ruling of their Lordships of the Privy Council reported in 34 Cal 329¹ and contended that the alienation in the present case being by a widow, the plaintiffs were at liberty to ignore it and merely sued for possession; but a perusal of the plaint shows that this is not what they did. The plaint clearly recites that the will made by Mt. Amir Nishan in favour of the defendants was invalid according to the custom and leaves no doubt that this is the basis of their claim. There is a statement in the plaint that the plaintiffs do not admit the existence of the will but the recitals in the plaint must be read as a whole and when they are so read, they leave no doubt that the suit is one for possession of the property in dispute on the ground that the alienation made by Mt. Amir Nishan was not valid according to custom. In the circumstances it is unnecessary to consider the question whether Art. 2 would have

applied if the plaintiff had sued for possession without any reference to the will. It appears to me that the Courts below were right in holding on the plaint as it stands that the suit was governed by Art. 2 of Act 1 of 1920.

The next contention of the learned counsel for the appellants was that, even if the suit was governed by Act 1 of 1920, the period of limitation commenced from the date on which the plaintiffs came to know of the will during the mutation proceedings. The learned counsel urged that the word "deed" in its legal sense means a document which is signed, sealed and delivered by one person to another and does not include a 'will' and, therefore, part 1 of Art. 2 of Act 1 of 1920 was not applicable. No authority on the point was cited by the learned counsel. There is no definition of the word "deed" given in Act 1 of 1920, or Registration Act, or General Clauses Act. But after considering the definition of the term 'alienation' as given in Act 1 of 1920, and the wording of Arts. (1) and (2) of the same Act, I am inclined to think that the word 'deed' is not used in the latter Articles in the technical sense referred to above. The term 'alienation' as used in the Act includes a testamentary disposition of property, and the wording of Art. (1) and Art. (2) seems to imply that such a disposition also might be made by a 'registered deed'. It therefore appears to me that the word 'deed' is merely used as equivalent to 'document'. It might perhaps be said that registration is fixed as one of the starting points of limitation in these Articles as registration amounts to notice and that registration cannot properly be held to be tantamount to notice in the case of a will, as copies of a will are not allowed to be given to third parties: *vide* S. 57, Registration Act. But I do not think there is much force in this argument; for, the question of 'notice' can hardly be determined in this case on this footing. It seems to me that registration is probably fixed as one of the starting points in these Articles as registration involves a certain amount of publicity. Unless registration itself is taken to involve such publicity amounting to notice, I do not see how it would be justifiable to fix it as a starting point for limitation. For, the question of taking copies will not arise until and unless a person comes to know that a document affecting his interests has

1. *Bijoy Gopal Mukerji v. Krishna Mahishi*, (1907) 34 Cal 329=34 I A 87=11 C W N 424=5 C L J 334 (P O).

been executed and registered. The cases in which the question of notice to subsequent transferees arises, stand of course on a different footing. In that class of cases if it is found that it was the duty of the transferee to examine the previous registers and his failure to do so amounts to gross negligence, it might be said that he had constructive notice of the transfer in question even if he failed to examine the registers and did not actually know anything about the transfer: 38 Cal 1.² But no such question arises where a document is executed, affecting the interests of reversioners, whether the document is a 'will' or some other kind of disposition of property. The reversioners cannot be expected to search the registers from time to time merely on the chance of discovering some alienation affecting their interests.

I am, therefore, of opinion that registration in the present instance is taken to be the starting point for limitation merely because it involves a certain amount of publicity and for no other reason. If a will is registered, there would be usually the same amount of publicity as there is in the case of other documents. The question whether copies are or are not available does not therefore seem to be material. As at present advised, I see no reason to dissent from the view taken by the Courts below and therefore dismiss this appeal with costs.

S.C./D.S.

Appeal dismissed.

2. Suchand Ghoshal v. Balaram Mardana, (1911)
38 Cal 1=6 I C 810=14 O W N 945=12
C L J 566.

A. I. R. 1937 Lahore 800

BHIDE, J.

Punjab Co-operative Bank Ltd., Lahore

— Plaintiff — Appellant.

v.

Lala Ishar Das and others —

Defendants — Respondents.

First Appeal No. 9 of 1937, Decided on 15th March 1937, from order of Senior Sub-Judge, Lahore, D/- 9th December 1936.

(a) Appeal—Suit on pro-note executed by A, B, C and D — Court ordering that suit could not proceed against A on ground that pro-note was signed by him at place beyond that Court's jurisdiction — Order held was tantamount to rejection of plaint as regards A, and appeal therefore was competent—Even

if no appeal lay, revision was competent as there was case decided.

A suit was instituted against A, B, C and D on the basis of a pro-note executed by them. The Court ordered that the suit could not proceed against A as the pro-note was signed by A at a place which was beyond jurisdiction of that Court :

Held : that the order was tantamount to rejection of the plaint so far as A was concerned and was therefore appealable : [P 801 C 1]

Held further: that even if an appeal was not competent, a revision would be competent as the proceedings terminated so far as A was concerned and therefore there was a case decided within meaning of S. 115, Civil P. C. [P 801 C 1]

(b) Jurisdiction—Suit by Bank at L on pro-note executed by A, B, C and D — Pro-note signed by A at N and then delivered to Bank at L by B with implied authority of A—L Court held had jurisdiction to try suit against A.

A suit was instituted in the Lahore Court by a Bank of Lahore on the basis of a pro-note executed by A, B, C and D. A signed the pro-note at Nawansher in the Hazara District and sent it to C at Lahore. B under C's instructions delivered it to the Bank :

Held : that the delivery was made by B with implied authority of A and therefore Lahore Court had jurisdiction to try the suit against A. [P 801 C 2]

R. L. Chawla — for Appellant.

Amin Chand for *Ishar Das* and *A. N. Kapur* for *Special Official Receiver* — for Respondents.

Judgment. — This is an appeal arising out of a suit for recovery of Rs. 50,287-0-6 on the basis of a pro-note executed in favour of the Punjab Co-operative Bank, Ltd., Lahore, by four persons, namely, Lala Harkishen Lal, Raja Sir Daya Kishen Kaul, Rai Bahadur Lala Ishar Das and Lala Sawan Mal. The suit was instituted in the Court of the Senior Subordinate Judge at Lahore and a preliminary objection was raised on behalf of Rai Bahadur Lala Ishar Das that the suit could not proceed against him at Lahore inasmuch as the pro-note was signed by him at Nawansher in the Hazara District. This objection has been upheld by the learned Senior Subordinate Judge and from this decision the present appeal has been preferred.

A preliminary objection is raised that no appeal is competent and that the appeal could not even be treated as a petition for revision as prayed for by the appellant as the order was an interlocutory one. As to the first point, the learned counsel for the appellant urged that the order was tantamount to rejection of the plaint so far as the defendant Rai Bahadur Ishar

Das was concerned and secondly that in any case a revision would be competent as the proceedings terminated so far as Rai Bahadur Ishar Das was concerned and therefore there was a case decided within the meaning of S. 115, Civil P. C. Both these contentions appear to me to be sound. There is no doubt that there was one plaint only against the four defendants, but it was open to the plaintiff to file a suit against each of them separately on the basis of the pro-note. The mere fact that four defendants were included in one suit does not necessarily mean that there could not be rejection of the plaint so far as one of the defendants was concerned. In any case, even if there was any doubt on the point, it seems to me that a revision is competent as the proceedings terminated as against the defendant Ishar Das by the order passed by the learned Senior Subordinate Judge. It was urged that the plaintiff applied later on for permission being given under S. 20, Cl. (b), Civil P. C., for the suit to proceed against Rai Bahadur Ishar Das, but this fact cannot, I think, affect the question whether the suit did or did not terminate against him with the order passed by the learned Senior Subordinate Judge by which he held that the Lahore Court had no jurisdiction to try the suit as against Rai Bahadur Ishar Das.

On merits, the only point for decision is whether the Lahore Court had jurisdiction in spite of the fact that the pro-note was signed by Rai Bahadur Ishar Das at Nawansher in the Hazara District. It is admitted that the pro-note was sent by Rai Bahadur Ishar Das to Pandit Gwash Kaul who had sent it to him for signature under the instructions of Lala Harkishen Lal: *vide* Ex. D.1. It appears from the evidence that the pro-note was actually delivered to the Bank by Lala Sawan Mal under the instructions of Lala Harkishen Lal. In the circumstances, it seems to me that it may be legitimately inferred that Lala Sawan Mal had authority to deliver the pro-note on behalf of the defendant Ishar Das. In sending the pro-note duly signed, Rai Bahadur Ishar Das, defendant, did not impose any conditions as to the person by whom the pro-note was to be delivered. The pro-note was sent to him under the instructions of Lala Harkishen Lal and delivery was also made by Lala Sawan Mal under the instructions of Lala Harkishen Lal. In view of these facts I

hold that delivery was made by a person who had implied authority to do so on behalf of Rai Bahadur Ishar Das and therefore the Lahore Court had jurisdiction to try the suit against Rai Bahadur Ishar Das.

I therefore set aside the order of the learned Senior Subordinate Judge and direct the suit to proceed against defendant Rai Bahadur Ishar Das. The appellant will get his costs of this appeal.

P.R./D.S.

Appeal allowed.

A. I. R. 1937 Lahore 801

ADDISON AND DIN MOHAMMAD, JJ.

Sawan Ram and another — Appellants.
v.

Fateh Chand and others —

Respondents.

Letters Patent Appeal No. 147 of 1936,
Decided on 4th February 1937, from
judgment of Jai Lal, J., D/- 7th October
1936.

Provincial Insolvency Act (1920), S. 53—
Burden of proof—When genuineness of transaction is challenged even by insolvent, burden of proving good faith and also valuable consideration shifts to transferee—
Mere production of accounts unattended by disinterested statement about their genuineness is not sufficient.

When the genuineness of a transaction is challenged even by the insolvent, the duty is cast upon the transferee then to defend his transfer on both grounds that are mentioned in S. 53, Provincial Insolvency Act, and the burden therefore shifts on to him to establish not only good faith but valuable consideration. This he can only establish if he leads unimpeachable evidence to prove that prior to the transaction impugned, any debts were due to him from the insolvent and that he was not merely sheltering the property for the insolvent's benefit as against his bona fide creditors. Mere production of books of account, unattended by any disinterested statement to the effect that the accounts were genuine or that the sums covered by the accounts were actually advanced to the insolvent, would not be enough to discharge the onus cast on him. [P 802 C 2]

Hargopal — for Appellants.

Mehr Chand Mahajan —

for Respondents.

Din Mohammad, J.—Kirpa Ram was adjudged insolvent on the petition of two of his creditors, Sawan Ram and Chaman Ram. The act of insolvency, which was alleged against him, was the execution of a mortgage deed in favour of one Fateh Chand who is related to Kirpa Ram. A few months prior to this mortgage, Kirpa Ram had already mortgaged the same

property to Fateh Chand for Rs. 5,000. After adjudication, the two petitioning creditors submitted two applications to the District Judge, praying for the annulment of those mortgage deeds on the ground that they were tainted with collusion and fraud. The District Judge accepted both the applications and annulled the first mortgage under S. 53 and the second mortgage under S. 54, Provincial Insolvency Act. Fateh Chand appealed to this Court and his appeal came on for hearing before Jai Lal, J. Unfortunately the list of creditors submitted by Kirpa Ram was misrepresented to him as the list put in by the petitioning creditors themselves and, mainly influenced by the fact that the creditors had themselves admitted the existence of the mortgage debts in favour of Fateh Chand, he allowed the appeal so far as the first mortgage was concerned. Hence this Letters Patent Appeal. It is admitted before us that there is no list on the record which was submitted by the petitioning creditors enumerating the debts of the insolvent, and that the only list on the record is the one which was submitted by the insolvent himself. We consider, therefore, that the judgment of Jai Lal, J. loses its effect altogether on account of this mistake having crept in inadvertently in his judgment. We are, therefore, forced to fall back upon the decision of the District Judge and to determine whether there are any reasons to differ from the conclusions arrived at by him.

After hearing counsel on both sides, we have come to the conclusion that there is ample material on the record to establish that the transfer in question was not made in good faith and for valuable consideration. The District Judge has discussed all the circumstances at length which threw doubt on the genuineness of the transaction and we need not cover the same ground over again. Suffice it to say that the relationship of the insolvent with Fateh Chand taken along with the fact that the insolvent did not produce any books of account evidencing the debt transactions as well as the fact that the books of Fateh Chand were produced at a very late stage and his account was not of such a nature as could not be fabricated at any time, leaves no doubt in our mind that the transaction could not be upheld against the insolvent's creditors. It is also significant that the part played by the

insolvent throughout the trial was such as would evidently lay him open to the charge of unreliability. At the earlier stage of the case he supported Fateh Chand, but towards the end he joined hands with the petitioning creditors to wriggle out of this transaction. He stated that he had not received any amount from the mortgagee and that he did not owe him any debts at all and that he had placed his signatures on the mortgagee's books of account all at the same time and on the same day. Besides, there is no independent evidence on the record to prove that any amount was due from the insolvent to the mortgagee. In our view, when the genuineness of a transaction is challenged in such circumstances, the duty is cast upon the transferee then to defend his transfer on both grounds that are mentioned in S. 53 and the burden, therefore, shifts on to him to establish not only good faith but valuable consideration. This he can only establish if he leads unimpeachable evidence to prove that prior to the transaction impugned, any debts were due to him from the insolvent and that he was not merely sheltering the property for the insolvent's benefit as against his bona fide creditors. Mere production of books of account, unattended by any disinterested statement to the effect that the accounts were genuine or that the sums covered by the accounts were actually advanced to the insolvent, would not in our view be enough to discharge the onus indicated above. We accordingly hold that the transfer in question was not in good faith and for valuable consideration and on this ground we allow the appeal and affirm the decision of the District Judge, annulling the transaction. The appellants will get their costs from the contesting respondents before us.

W.D./A.L.

*Appeal allowed.***A. I. R. 1937 Lahore 802**

ABDUL RASHID, J.

Ghulam Mohammad and another
Accused—Petitioners.

v.

Emperor.

Criminal Revn. No. 266 of 1937, Decided on 5th April 1937, reported by Sess. Judge, Ludhiana.

Penal Code (1860), Ss. 193, 211, 218 and 220—Accused charged under Ss. 193, 211, 218

and 220 — No complaint by Magistrate — Charges under Ss. 193 and 211 held should be quashed—Complaint held not necessary for charges under Ss. 218 and 220.

Where the accused was charged under Ss. 193, 211, 218 and 220, Penal Code, in respect of proceedings under S. 109, Criminal P. C., without the complaint being filed by the Magistrate before whom the proceedings were pending :

Held : that the charges under Ss. 193 and 211, Penal Code, should be quashed as no Court could take cognizance of these offences except on the complaint in writing of the Magistrate in whose Court these proceedings were pending or of some other Court to which the Magistrate in question was subordinate: *A I R 1925 Pat 483* and *A I R 1917 Cal 593, Rel. on.* [P 803 C 2]

Held further : that the offences under Ss. 218 and 220, I. P. C., did not fall within the purview of S. 195, Criminal P. C. These offences were distinct from offences under Ss. 193 and 211, I. P. C. and the prosecution had to prove facts which were distinct from the facts constituting offences under S. 193 and 211. Hence no complaint was necessary for continuation of the proceedings under Ss. 218 and 220, I. P. C.

[P 803 C 2]

Ghulam Rasul Khan for Government Advocate—for the Crown.

Order. — On the night of 7th September 1936, Ghulam Mohammad and Murid Hussain, Head Constables, Ludhiana, arrested Prem Singh, Karm Singh and Bachna, and recorded a report against them under S. 109, Criminal P. C. This report under S. 109 was presented in the Court of a Magistrate by Ghulam Mohammad, Head Constable, on 8th September. The report was returned to the Head Constable for 'partial' on that day, and the accused Prem Singh, Karm Singh and Bachna were released on bail. The case was adjourned to 14th September. Ghulam Mohammad completed the report on 9th September and again presented it in Court. It was ordered that the case would be taken up on 14th September. On 14th September the accused as well as Ghulam Mohammad, Head Constable, were present and it was ordered that the evidence for the prosecution would be recorded on 17th September. On 17th September the case was adjourned to 24th September. On the 19th, however, the Prosecuting Inspector and the accused appeared in Court and the Prosecuting Inspector withdrew the case against Prem Singh, Karm Singh and Bachna under the instructions of the District Magistrate.

On 23rd September the prosecuting Inspector, under the instructions of the Superintendent of Police, presented a complaint against Ghulam Mohammad and Murid Hussain, Head Constables, and five

others. In this complaint it was stated that Ghulam Mohammad and Murid Hussain with the assistance of five other persons had: (a) fabricated false evidence; (b) had prepared a false police record; and (c) had illegally committed Prem Singh, Karm Singh and Bachna to prison and that they might be prosecuted under Ss. 193, 211, 218 and 220, I. P. C. The Magistrate took cognizance of this complaint, and after recording the prosecution evidence discharged the five persons who were alleged to have helped the two Head Constables in preparing a false record, but framed charges against Ghulam Mohammad and Murid Hussain, Head Constables, under Ss. 193, 211, 218 and 220, I. P. C. Ghulam Mohammad and Murid Hussain preferred a petition for revision in the Court of the learned Sessions Judge. The learned Sessions Judge has recommended that the charges framed against Ghulam Mohammad and Murid Hussain be quashed as no complaint had been presented by the Magistrate in whose Court proceedings under S. 109, Criminal P. C., were initiated against Prem Singh, Karm Singh and Bachna.

So far as the charges under Ss. 193 and 211 are concerned, I accept the recommendation of the learned Sessions Judge. These offences were committed in relation to proceedings pending in the Court of the Magistrate, and no Court can take cognizance of these offences except on the complaint in writing of the Magistrate in whose Court these proceedings were pending or of some other Court to which the Magistrate in question is subordinate. Reference may be made in this connexion to 4 Pat 323¹ and 43 Cal 1152.² The offences under Ss. 218 and 220 do not fall within the purview of S. 195, Criminal P. C. These offences are distinct from offences under Ss. 193 and 211, I. P. C. For the purpose of obtaining a conviction under Ss. 218 and 220, I. P. C., in the present case, the prosecution has to prove facts which are distinct from the facts constituting offences under Ss. 193 and 211, I. P. C. I am therefore of the opinion that proceedings under Ss. 218 and 220, I. P. C., can be continued against the peti-

1. Mahomed Yassin v. Emperor, *A I R 1925 Pat 483=86 I O 825=26 Cr L J 889=4 Pat 323=6 P L T 457.*

2. Tayabullah v. Emperor, *A I R 1917 Cal 593=36 I O 845=43 Cal 1152=18 Cr L J 13=20 C W N 1265=24 C L J 134.*

tioners Ghulam Mohammad and Murid Hussain without a complaint by the Court which dealt with the proceedings under S. 109, Criminal P. C., against Prem Singh, Karm Singh and Bachna.

For the reasons given above, I accept this petition for revision in part and quash the charges under Ss. 193 and 211, I. P. C., and direct that the proceedings shall continue in respect of the other two charges. It would be open to the Court concerned, if so advised, to present a complaint against the petitioners under Ss. 193 and 211, I. P. C.

U.S./K.S. *Petition partly accepted.*

A. I. R. 1937 Lahore 804

TEK CHAND, J.

Jaswant Lal—Defendant—Petitioner.
v.

Goverdhan Lal—Plaintiff—

Opposite Party.

Civil Revn. Petn. No. 883 of 1936, Decided on 10th March 1937, from order of Sub-Judge, First Class, Lahore, D/. 12th November 1936.

Succession Act (1925), S. 276—Letters of administration—Order of Court exercising probate jurisdiction is order in rem—Such order cannot be impugned by other Courts and is not subject to collateral attack—Injunction by other Court staying proceedings for letters of administration cannot be issued—Proper orders for administration of property can be made while granting letters of administration.

A Court exercising probate jurisdiction can go into the question of the due execution of a will although it cannot determine the validity of the will itself. An order of Court granting probate or letters of administration cannot be impugned by any other Court exercising any other jurisdiction. Such order is not subject to any collateral attack being an order conclusive not only against the parties but against the whole world; *A I R 1916 P C 78* and *A I R 1921 Cal 292, Rel. on.* [P 804 C 2; P 805 C 1]

Where a person applied for grant of letters of administration with will annexed and thereafter another person contesting that application filed another suit in a different Court impeaching the validity of the will itself, such other Court cannot issue an injunction staying the proceedings for letters of administration. The Court issuing letters of administration can make proper orders as to the administration of the property.

[P 805 C 1, 2]

Vishnu Datta—for Petitioner.

Panna Lal Bahl—for Opposite Party.

Order.—One Mt. Chand Kaur died on 8th March 1936. On 18th April 1936, the present petitioner Jaswant Lal, filed

an application under S. 276, Succession Act, in the Court of the District Judge, Lahore, for grant of letters of administration with the will annexed. He alleged that Mt. Chand Kaur had made a will on 2nd March 1936 by which she had bequeathed a box of ornaments, which was in deposit with the Allahabad Bank, to Jaswant Lal petitioner and Goverdhan Lal respondent, in equal shares. Goverdhan Lal appeared to oppose the will and denied the factum as well as the validity of the will. The Additional District Judge passed an order on 5th August 1936 declining to go into the question of the validity of the will and ordering that the proceedings in his Court were confined only to the factum of the due execution of the will. He framed issues relating to this point and fixed a date for evidence.

On 15th August 1936, Goverdhan Lal filed a suit in the Court of Subordinate Judge, First Class, Lahore, for a declaration that the box of ornaments which was in deposit for safe custody with the Allahabad Bank belonged solely to him and that the defendant, Jaswant Lal, had no right to it "under the alleged will of Mt. Chand Kaur or for any other reason." Along with the plaint, Goverdhan Lal presented an application under O. 39, Rr. 1 and 2 and S. 151, Civil P. C., for issue of an injunction to the defendant Jaswant Lal, prohibiting him from proceeding with his application for letters of administration in the Court of the Additional District Judge, Lahore, and praying that a copy of the order issuing the injunction be sent to the Additional District Judge for "information". The Subordinate Judge, purporting to act under his 'inherent powers' has granted the application and has issued the injunction to Jaswant Lal as prayed. Jaswant Lal has come in revision as the order purported to be under S. 151, Civil P. C., it being admitted that O. 39, R. 1 or R. 2 was inapplicable to the case.

It is admitted that the application for letters of administration had been filed in the Court of the Additional District Judge several months before the institution of the civil suit by Goverdhan Lal in the Court of Lala Ganga Bishen, Subordinate Judge, First Class, Lahore. It is also conceded that the Court of the Additional District Judge in exercise of its probate jurisdiction was competent to adjudicate on the question of the due execution of the will and that any decision passed by

it in the matter will be a judgment in rem and conclusive not only against the parties to the litigation but against the whole world. It is, however, contended that it was necessary to have the injunction issued as the suit filed in the Court of Lala Ganga Bishen was of a more comprehensive nature, inasmuch as it involved a decision not only upon the question of the execution of the will but also of its validity, the former Court being incompetent to go into the question of title which had been raised in the suit. It is also urged that the balance of convenience is in favour of the proceedings in the Additional District Judge's Court as being stayed. These contentions have been accepted by the Subordinate Judge and, as already stated, he has issued the injunction asked for.

In my opinion, none of these grounds is sustainable. It is no doubt true that the suit in the Court of Lala Ganga Bishen is of a more comprehensive nature but that is no ground for the Subordinate Judge virtually staying proceedings in the Court of the Additional District Judge, which is the appropriate Court to deal with the question of the genuineness of the will and whose decision will be conclusive on the point. The learned Subordinate Judge has observed that there was a chance of conflict of decisions on this question between him and the Additional District Judge. In making this observation the learned Subordinate Judge appears to have overlooked that while his own decision on this particular matter would be a judgment *in personam*, the judgment of the Additional District Judge in the proceedings for grant of letters of administration would be a judgment in rem. It is hardly necessary to cite many authorities on this point. It is sufficient to refer to the decision of the Privy Council in 43 Cal 694¹ at p. 704, where it was observed that the order of a probate Court granting probate or letters of administration cannot be impugned by a Court exercising any other jurisdiction : *see also* 66 I C 882² where it was held that such order is not subject to any collateral attack and is conclusive not only against the parties to the litigation but against all persons and all Courts.

The first ground given by the learned Subordinate Judge, therefore, fails. Nor do I see how the balance of convenience is in favour of staying the proceedings in the Court of the Additional District Judge. Mr. Panna Lal Bahl for the respondent says that the only inconvenience which is apprehended is that after the grant of letters of administration by the Additional District Judge, the administrator may proceed to distribute the ornaments in accordance with the terms of the will and that it may be difficult to get them back from the petitioner, who is a person of no substance. I can see no force in this contention. If the letters of administration are granted, appropriate orders in this behalf can be passed, at that stage. I have no doubt that the injunction in this case has been improperly issued. I accept the petition for revision, set aside the order of the learned Subordinate Judge and discharge the injunction. A copy of this order will be sent to the District Judge, Lahore (as the Additional District Judge Mr. Mongia has since been transferred), who is directed to proceed with the application for grant of letters of administration with all convenient speed. The petitioner will get his costs in this Court. Pleader's fee Rs. 16.

B.D./R.K.

Petition allowed.

A. I. R. 1937 Lahore 805

MONROE, J.

*Khema Nand and others — Plaintiffs—
Appellants.*

v.

*Kundan, Lessee and another, Lessor—
Defendants — Respondents.*

Second Appeal No. 221 of 1937, Decided on 29th June 1937.

Custom (Punjab)—Landlord and Tenant—Dholi tenure—Dholidar is tenant in perpetuity—Such tenure however does not confer right of taking minerals on dholidar unless such right is expressly given to him.

The nature of dholi tenure is a form of tenure known in Punjab only, for the benefit of the temple. On a grant of dholi the proprietors continue to be proprietors of the land and the dholidar in right of the temple and his successors become tenants in perpetuity. Such tenure however does not ordinarily confer the right of taking mines and minerals on the tenant, unless such right has been expressly conferred on the tenant : *A I R 1922 Lah 126 and 37 Cal 723, Rel. on.*

[P 806 C 1]

Girdhari Lal — for Appellants.

*L. M. Datta and D. N. Aggarwal —
for Respondent (Lessee).*

1. Sheoparsan Singh v. Ramnandan Prasad Narayan Singh, A I R 1916 P O 78=33 I C 914=43 I A 91=43 Cal 694 (P O).

2. Hemangini Debi v. Sarat Sundari Debya, A I R 1921 Cal 292=66 I C 882=34 C L J 457.

Judgment.—This is a second appeal from a decree of the District Judge, Hissar, dismissing the plaintiffs' suit for a perpetual injunction restraining the defendants from quarrying on a small plot of land in the village Bhanki. The plaintiffs are proprietors in the village and sued on behalf of themselves and the other proprietors. Baba Ram Das, one of the defendants, is the custodian of a temple to whose predecessor the plot in suit was granted in dholi, a form of tenure known in this province only, for the benefit of the temple. The only question is whether a dholidar has power to take minerals. The nature of dholi tenure is somewhat obscure: some account of it is to be found in the judgment in 2 Lah 313.¹ There it was stated that in this form of tenure, there is a rent-free grant of land by a village community for the benefit of a temple, mosque or shrine or to a person for a religious purpose: in the revenue records, the proprietary body are recorded as the owners of the property and the grantee is recorded as a tenant in the column of cultivation.

It would appear, therefore, that on a grant in dholi, the proprietors continue to be proprietors of the land and the dholidar in right of the temple and his successors become tenants in perpetuity. Ordinarily, such a tenure would not confer the right of taking mines and minerals on the tenant: that right would, if it was intended to be given, have to be given expressly. For this view, 6 I C 785² is a sufficient authority: it was there held that the zamindar of a certain tenure must be presumed to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them.

The learned District Judge has not considered this aspect of the case: he has inferred that the dholidar can do with the land in suit what he has done with land in a neighbouring village: but it has not been shown that he has the right to quarry even there: he has granted a lease for quarrying but it may be that no one contested his right to do so. In the absence of something to show that a dholidar has the right of taking minerals, I think that it must be assumed that he

has not such a right. I set aside the decree of the learned District Judge and grant the plaintiffs an injunction as sought. It has been shown that the land is of no value for any purpose other than quarrying. The attitude of the plaintiffs is that of a dog in the manger and for this reason I order that the parties abide their own costs.

A.L./R.K.

Appeal allowed.

A. I. R. 1937 Lahore 806

COLDSTREAM AND BHIDE, JJ.

Mt. Fatima Sultan — Defendant — Appellant.

v.

Nisar Ali Khan and others, Plaintiffs and others — Defendants — Respondents.

First Appeal No. 1459 of 1935, Decided on 18th January 1937, from decree of Asst. Collector, Lahore, D/. 8th May 1935.

(a) Custom — Evidence — Recent instances of family custom being followed—Custom may be taken as ancient.

The evidence of a few and comparatively recent instances of family custom being followed may be accepted as proof that custom is ancient: *A I R 1925 Bom 380, Foll.* [P 810 C 1, 2]

(b) Custom (Punjab) — Succession — Interests of female in conflict with those of male — No documentary record of custom of females not succeeding to family property — No instance of claim by female actually claimed and denied — Evidence that daughter's assent always taken when succession went to prejudice of daughter — Evidence does not prove exclusion of females in succession to family property.

When the interests of a female are in conflict with those of a male and the only evidence is that of instances of succession without any documentary record of the custom alleged, such as a regularly compiled *riwaj-i-am*, the instances can ordinarily have small evidential value unless they show that a claim by a female has been actually made and denied. Where there is no evidence that any female ever claimed an inheritance which was denied, while there is the admitted fact that when a will was made in favour of a nephew to the prejudice of a daughter and a son, the testator took precautions to obtain the daughter's assent as well as the son's, the evidence does not prove that in the family of the parties females do not inherit. [P 810 C 2]

Saleem and Darbari Lal — for Appellant.

Barkat Ali, Abdul Aziz and Nazar Mohammad for *Jamil* — for Respondents (Plaintiffs).

Coldstream, J. — This is an appeal against a judgment delivered by the Assistant Collector, First Grade, Lahore, acting

1. *Sewa Ram v. Udegir*, A I R 1922 Lah 126=65 I C 252=2 Lah 313=25 P L R 1922.

2. *Hari Narayan Singh v. Sriram, Chakravarti*, (1910) 37 Cal 723=6 I C 785=37 I A 136 (P O).

as a Civil Court in exercise of the power conferred by S. 117, Punjab Land Revenue Act. The subject matter of the dispute is land in a number of revenue estates in Lahore district acquired by Sir Fateh Ali Khan, grandson of Nawab Ali Raza Khan, Qazilbash, who had come to India with the British forces on their return from Afghanistan after the campaign of 1839. Nawab Ali Raza Khan had been of great assistance to the British army in Afghanistan and throughout his life in India continued to render signal services to the British Government who created him a Nawab and granted him a pension and an estate in Oudh. He died in 1865 and was succeeded by his eldest son Nawazish Ali Khan who in recognition of his good services was knighted and given a grant of land in the Punjab in 1868, known as the Rakh Khamba property. In 1871 he purchased from Government a property in the Punjab known as the Khalikabad property and in 1886 Government conferred on him another property in the Punjab known as the Juliana property. In 1882 he executed a will, which he registered, appointing his brother Nasir Ali Khan as his successor to the Oudh property making no provision for his son Hidayat Ali Khan.

Sir Nawazish Ali Khan died in 1890. His brother Nasir Ali Khan succeeded without dispute to all four properties. He was created a hereditary Nawab and recognized by Government as head of the family. In 1892 he executed a deed of endowment including the Khalikabad property in the waqf. In 1896 he made two wills one disposing of the Oudh property and the other of the Punjab properties Rakh Khamba and Juliana. He died in 1896 and his nephew Sir Fateh Ali entered into possession of the properties (as trustee in the case of the Khalikabad property).

On Sir Fateh Ali Khan's death on 28th October 1923, his son Nisar Ali Khan took possession of all these properties. His title was challenged by his cousin Mohammad Ali Khan, son of Nawab Nasir Ali Khan, who claimed the properties other than the Khalikabad land under the wills made by his father in 1896. Of the Khalikabad property he claimed to be mutwalli. The dispute between Mohammad Ali and Nisar Ali was taken into the Oudh Chief Court by Mohammad Ali on 9th December 1925. The suit was decided by Pullan, J. on 5th September 1927 : A I R

1928 Oudh 67.¹ Both parties appealed and the appeals were decided by a Division Bench in the judgment reported in 5 Luck 305.² The parties appealed again to the Privy Council who dismissed both appeals on 21st April 1932: 7 Luck 324³ at p. 329. With the properties in suit in that litigation we are not now concerned, but it is necessary to refer to this litigation as the matter now in dispute is the law or custom governing the succession to the property of Sir Fateh Ali Khan and the litigation concerned not only properties whose devolution depended on the terms of the grants made by Government, but also property which passed independently of these terms.

I have already mentioned that Sir Fateh Ali died on 28th October 1923. On 9th March 1925 the property now in dispute was recorded by the Collector in the revenue records as having passed to his heirs in accordance with Mahomedan law, that is to say, to his four sons, Nisar Ali Khan, Talib Ali Khan, Zulfikar Ali Khan and Muzaffar Ali Khan, his five daughters Alia Sultan, Safia Sultan, Balkis Sultan, Maryam Sultan and Fatima Sultan and his widow Afsar Sultan. Nisar Ali Khan, Musaffar Ali Khan, Zulfikar Ali Khan, Safia Sultan, Alia Sultan and Maryam Sultan were children of one wife; Talib Ali Khan and Balkis Sultan of another; Fatima Sultan was the only child of a third wife Zorah Begum, sister of Sir Fateh Ali Khan's cousin, Mohammad Ali.

On 5th November 1931 Fatima Sultan applied to the Assistant Collector for partition of her share according to the mutation in her favour. The application was resisted by the other members of her family who contended that Fatima Sultan had no right in any of the property because, by a family custom, females did not inherit and the whole property had therefore devolved on Sir Fateh Ali's sons. The Assistant Collector directed the objectors to establish their title by regular suit and on 7th September 1932 Nisar Ali and his brothers, Talib Ali Khan and Zulfikar Ali Khan, instituted the suit from

1. Mahomed Ali Khan v. Nisar Ali Khan, A I R 1928 Oudh 67=109 I O 835.

2. Nisar Ali Khan v. Mahomed Ali Khan, A I R 1929 Oudh 494=119 I O 337=5 Luck 305=6 O W N 549.

3. Nisar Ali Khan v. Mahomed Ali Khan, A I R 1932 P C 172=137 I O 539=7 Luck 324=59 I A 263 (P O).

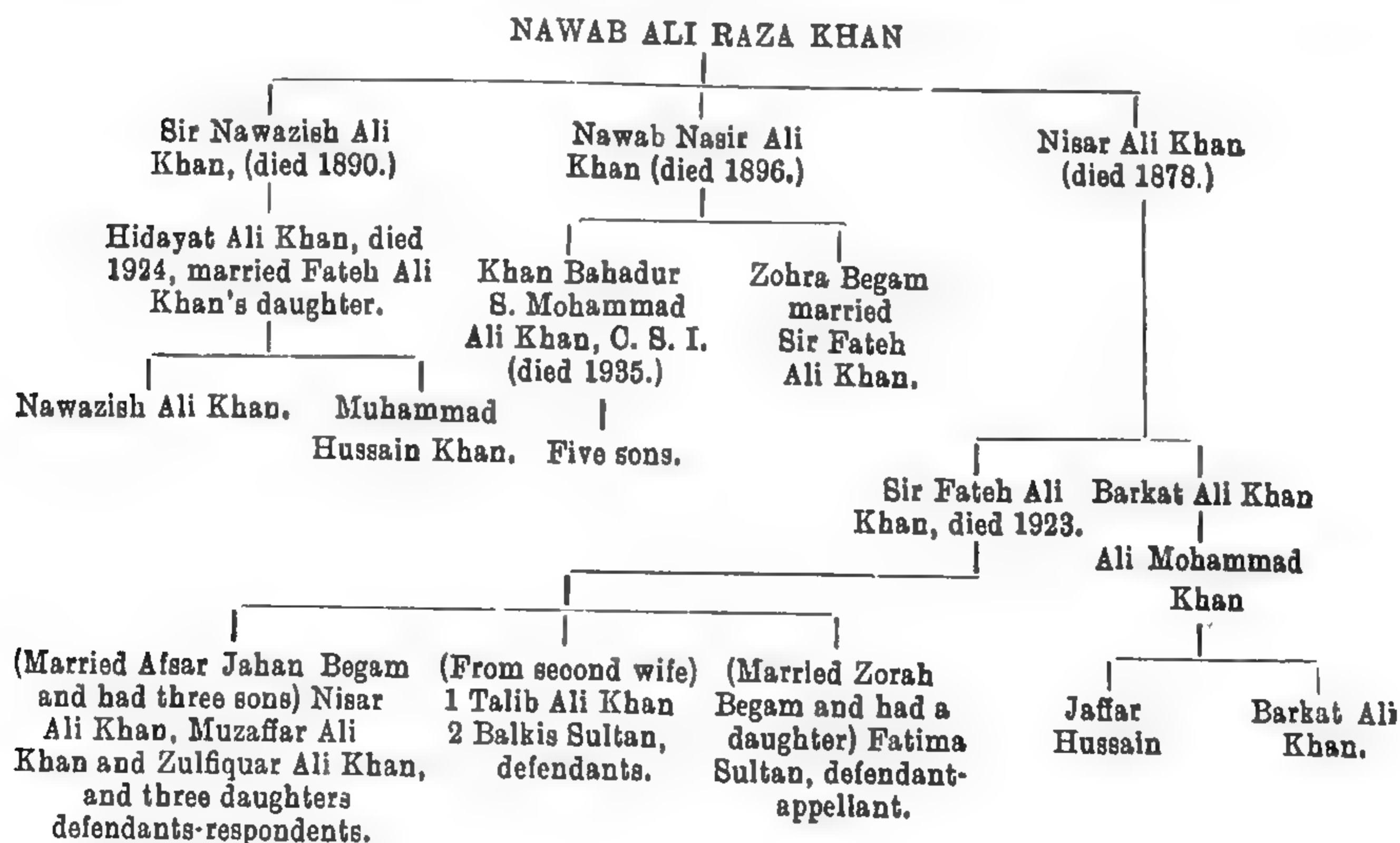
which this appeal arises, against all the other members of the family who had been recorded as sharers in the mutation proceedings praying for a declaration that the females had no interest in the property other than a right of maintenance. The suit was contested by Fatima Sultan alone, her contention being that there was no family custom excluding females from inheritance and that she was entitled to her share according to the Imamia law. The only point for decision was whether the custom alleged existed. The Assistant Collector found that the evidence proved the custom and granted the declaration sought and the present appeal is by Fatima Sultan against this decision.

The plaintiffs relied on evidence that since the death of Nawab Ali Raza Khan, the founder of the Indian branch of the family in 1865, no female has succeeded to a share in the family estate on the oral statements of witnesses, including members of the family, that the family followed the custom alleged, and on admissions to the same effect made in the witness-box by the defendants Afsar Sultan (P. W. 1), Alia Sultan (P. W. 2), Safia Sultan (P. W. 3) and Balkis Sultan (P. W. 4). They also relied strongly on a finding of Pullan, J. in A I R 1928 Oudh 67¹ that the family

followed a custom by which females did not inherit. In that suit, Mohammad Ali had asserted the existence of this custom and Nisar Ali, the present plaintiff, had denied it, maintaining that the family followed Mahomedan law. Pullan, J. dealt with the issue at pp. 77 and 84 of his reported judgment. He found that the custom did exist, and it seems that the correctness of his finding was not challenged. The appellate judgment of Stuart, C. J. and Mohammad Raza, J. makes no mention of this issue. Before the Privy Council the question was not disputed and in their judgment their Lordships remarked :

The family are Shia Mahomedans of the Asna Ashri Sect governed by the Imamia law. By family custom, women do not inherit.

It is contended before us for the appellant that the evidence falls far short of proof of the existence of the custom, the instances of succession relied upon by the Court below being inconclusive and the oral evidence interested and unreliable. It is common ground that except as regards the rights of females to inherit, the family follows the Imamia law in matters of succession. The following pedigree-table shows the descendants of Nawab Ali Raza Khan :



The difficulty of this appeal has been greatly increased by the failure of the parties to bring upon the record evidence establishing a mass of circumstances upon which both sides rely. These circumstances

are stated in the judgments of the Oudh Courts referred to above. But counsel have agreed that statements of uncontested historical facts made in those judgments such as the dates on which different mem-

bers of the family died, the terms of the deeds of grant in favour of Nawab Ali Raza Khan and Sir Nawazish Ali Khan, the facts that Sir Nawazish Ali in 1882 made a will in respect of the Oudh property in favour of his brother Nawab Nasir Ali, and that the latter made two wills in 1896 appointing his nephew Nawab Sir Fateh Ali Khan as his immediate devisee and successor in respect of the Oudh and the Punjab properties inherited from Sir Nawazish Ali, to be succeeded by the testator's son Mohammad Ali, may be accepted as proved. They also agreed that the contents of the wills are correctly stated in those judgments. (Their Lordships then examined the evidence and proceeded.) I come now to the evidence of the appellant relied on before us. For the reasons already made clear, they are unable to show that any female, as a fact, took possession of any part of the estates left by the Nawabs from Ali Raza Khan onwards. They have shown that Nawab Fateh Ali Khan decided a dispute in a Qazilbash family in accordance with Mahomedan law (evidence of Agha Rahat Ali Khan, D. W. 1). But that family is not related to the parties. Agha Abbas Raza Khan, D. W. 5, a Qazilbash, states that a Qazilbash family follows Mahomedan law in matters of succession and gives instances, but his family is not that of the parties. Nor is the witness, Baiza Khan, D. W. 7, related to them. His evidence shows merely that other Qazilbash families in the Punjab do not all follow the custom alleged. Here I must advert to a matter on which there has been much argument before us—the admissibility in evidence of a statement made by Nisar Ali in July 1926. It is alleged, and there is an affidavit of this appellant's mukhtar in support of the allegation, that the appellant produced a copy of this statement at the trial and the Court by order refused to allow it to be proved. The affidavit has not been contradicted by any counter-affidavit. The record however contains no mention of this order. A copy of this statement has been printed at p. 78 of the second book and a reference to it is made in para. 4 of the memorandum of appeal (here I may notice that no argument has been addressed to us in support of the ground taken in para. 6, which relates to copies of other statements). What the record shows is this: The appellant's advocate when asked at

the beginning of the trial on what documents he wished to rely, stated that he would produce copies of statements made by Nisar Ali at different times (*see* p. 62 of the second book). On 31st July 1933, before the Court began hearing evidence, the appellant requested the Court to call for the records of the mutation proceedings in which the statement was made (p. 67 of the second book), noting that though copies had been asked for they had not been given. It appears that the records came into Court, for a witness was asked to prove some of them on 24th April 1935 (p. 56 of the first book). Appellant's counsel had summoned Nisar Ali (p. 55 of the second book) presumably to confront him with his previous statement but Nisar Ali avoided appearance by sending a medical certificate of his illness. When he did appear on 11th February 1935 (p. 55 of the first book), appellant's counsel did not put him in the witness box. It seems clear that the appellant had an opportunity to prove the statement and deliberately refrained from doing so as he feared that Nisar Ali's explanation might damage his case. On 24th April 1935 appellant's counsel closed his evidence without any reference to a refusal by the Court to accept the copy of Nisar Ali's statement: *see* p. 59 of the first book.

In the circumstances I am not prepared to accept this statement as further evidence now. The rejection of this evidence however seems to me of little consequence, for it is admitted before us that when the Oudh trial was proceeding (December 1925 to September 1927), Nisar Ali was contending that his family did not by custom exclude females, but followed the Imamia law. This fact is an important piece of evidence to which the rejected statement would not add material weight. In addition to this admission, we have the equally important evidence referred to above that when Ali Mohammad Khan, Nisar Ali Khan's grandson died, his land was recorded after enquiry from the son as having devolved upon his heirs according to Mahomedan law without any objection and remained so recorded until the record was altered, obviously for the purpose of this case, and the evidence that no objection was made to the mutation of the land now in dispute in March 1925 in favour of Sir Fateh Ali's widow and daughters as well as his sons until the

appellant applied for partition in November 1931. In my view these three pieces of evidence go very strongly against the plaintiffs. The fact that Mohammad Ali, the appellant's maternal uncle, set up the custom is on the other hand of little importance. It is to me doubtful whether the custom alleged was even thought of until after Sir Fateh Ali's death. It is in evidence (Safia Sultan's) that Sir Fateh Ali owned property in Iraq. There is no evidence who is now owner of this property. Nor has any attempt been made to show that the custom was followed by Ali Raza Khan's family before he migrated to India some less than a hundred years ago.

The instances relied on are, for the reasons I have stated, not clear and convincing. They indicate a dominant intention on the part of the Nawabs to preserve the property intact and to restrict its devolution to the head of the family, the assent of females and other heirs being procured when necessary to insure such devolution. It is argued that the existence of the custom having received judicial recognition in the Privy Council cannot now be doubted, 61 Cal 694⁴ being cited in support of this argument. That case, however, did not deal with a family custom but a public right of which a previous judgment, relevant under S. 42, Evidence Act, was held to be conclusive evidence. In the circumstances of the Oudh litigation the Privy Council judgment proves merely that at that time Nisar Ali, who had denied the existence of a family custom in his pleas, recognized it when the Court decided against him on the point. But there was no such recognition by the present appellant and we have to decide this case upon the evidence on this record and the facts admitted. Nor can the fact that the members of the family other than Fatima Sultan now assert that females do not inherit be regarded in the circumstances as weighty evidence. The sons are seeking their own gain and the widows and other daughters are admittedly dependent on Nisar Ali Khan whom they are supporting against the niece of Mohammad Ali, who, by litigation, had deprived Nisar Ali of his possession of very valuable property. No doubt there may be cases in which the evidence of a few and comparatively recent instances of a family custom

being followed may be accepted as proof that the custom is ancient: see e. g. A I R 1925 Bom 380,⁵ but this is clearly not such a case.

The judgment of their Lordships of the Privy Council in 6 Lah 502⁶ to which our attention has been drawn in this connexion dealt with a case in which the circumstances were not similar to those of this case. There was in that case a large body of oral evidence, wholly un rebutted, which was accepted as sufficient proof of a custom without instances. Here in this case we have the outstanding facts that recent mutations of property, contrary to the custom alleged, have remained long unchallenged while one of the persons now asserting its existence definitely took up the position in the Oudh Court in 1925 that it did not exist. It is not even contended that the custom set up is ancient. In a case of this kind when the interests of a female are in conflict with those of a male and the only evidence is that of instances of succession without any documentary record of the custom alleged, such as a regularly compiled *Riwaj-i-am*, the instances can ordinarily have small evidential value unless they show that a claim by a female has been actually made and denied. There is no evidence here that any female ever claimed an inheritance which was denied, while there is the admitted fact that when a will was made in favour of a nephew to the prejudice of a daughter and a son, the testator took precautions to obtain the daughter's assent as well as the son's.

My conclusion is that the evidence on this record does not prove that in the family of the parties, females do not inherit. On this finding, I would accept the appeal and dismiss the plaintiff's suit with costs throughout.

Bhide, J.—I agree.

V.B.B./A.L.

Appeal accepted.

5. Ratilal Nathalal v. Moti Lal Sankalchand, A I R 1925 Bom 380=88 I O 891=27 Bom L R 880.

6. Ahmad Khan v. Mt. Channi Bibi, A I R 1925 P C 267=91 I O 455=6 Lah 502=52 I A 379 (P C).

4. Gireschandra Bhattacharya v. Rabeendra Nath, A I R 1935 Cal 17=156 I C 512=61 Cal 694.

A. I. R. 1937 Lahore 811

ABDUL RASHID, J.

Amar Nath — Plaintiff — Appellant.
v.*Ram Rakha and another* — Defendants
— Respondents.

Second Appeal No. 923 of 1936, Decided on 29th January 1937, from decree of Addl. Dist. Judge, Ferozepore, D/- 8th May 1936.

Adverse Possession—Acquisition of title—Defendant building house on land in dispute more than 12 years before suit by plaintiff for possession—Suit for pre-emption by defendant against plaintiff less than 12 years before plaintiff's suit—Pre-emption land subsequently discovered to include land in dispute — Mere inclusion of area in dispute in land covered by pre-emption suit does not amount to conscious admission of plaintiff's title to area in dispute—Adverse possession of defendant held started on date of constructing building and not on date of his pre-emption suit.

The criterion of adverse possession is whether a person possesses land claiming it as his own; if he does, he must be held to be in adverse possession. [P 812 C 2]

The defendant built a house in 1919 on the land claimed by the plaintiff as his own and was in possession for over 12 years till date of suit in 1932. In 1920, less than 12 years before date of suit, the defendant sued the plaintiff for possession of certain land by pre-emption. It was discovered subsequently that this land included the land in dispute. In the suit by the plaintiff for possession, it was contended that the defendant had admitted the title of the plaintiff by his suit for pre-emption and this cancelled the effect of overt act of adverse possession:

Held: that the fact that the area in dispute was included in the pre-emption suit did not show that there was any conscious admission by the defendant of plaintiff's title to the area in dispute, and by putting the building on the land in dispute the defendant claimed the site as his own and his adverse possession therefore started from that date and not from the date of the institution of the pre-emption suit: *A I R 1928 Lah 317, Disting.*; *A I R 1922 Oudh 152, Ref.*; *A I R 1922 Oudh 24*; *A I R 1918 Lah 308* and *A I R 1934 P C 23, Rel. on.* [P 812 C 1, 2]

Shamair Chand and Inder Dev —
for Appellant.

Achhru Ram — for Respondents.

Judgment.—This appeal arises out of an action instituted by Amar Nath for possession of a piece of land measuring a little over 7 marlas on the ground that it belonged to him and had been encroached upon by Ram Rakha, defendant-respondent. In the alternative Amar Nath asked for a permanent injunction ordering Ram Rakha, defendant 1, to close the ventilators and pernalas opening towards the

land of the plaintiff. The trial Court passed a decree for possession of the land in dispute in favour of the plaintiff and ordered the demolition of any buildings existing thereon. Ram Rakha, defendant, preferred an appeal in the Court of the learned District Judge. The learned District Judge accepted the appeal and dismissed the plaintiff's suit on the ground that Ram Rakha had been in adverse possession of the land in dispute for a period exceeding 12 years. Against this decision the plaintiff has preferred a second appeal to this Court. The land in dispute is under a building. It has been held by the learned District Judge that this building was completed by the end of 1919. The present suit was instituted by the plaintiff on 8th July 1932. It is clear therefore that Ram Rakha, defendant, had been in possession of the site in dispute for more than 12 years at the time of the suit.

It appears that Amar Nath, plaintiff, bought 27 kanals 19 marlas of land in the year 1919. This plot is contiguous to the site in dispute towards the west. Ram Rakha, defendant, sued for possession of this area of 27 kanals 19 marlas by pre-emption, and this suit was instituted on 9th July 1920. It was subsequently discovered that this area of 27 kanals 19 marlas includes 7 marlas of land which is in dispute in the present case. It was strenuously contended by the learned counsel for the appellant that by instituting this suit for pre-emption Ram Rakha, defendant, had admitted the title of the plaintiff with respect to the 7 marlas now in dispute, and that this admission by Ram Rakha cancels the effect of any overt act of adverse possession that he had committed. It was urged that the adverse possession of Ram Rakha therefore commenced on 9th July 1920, and as the present suit was instituted on 8th July 1932, Ram Rakha had not been in adverse possession for a period exceeding 12 years on the date of the institution of the present suit. Reliance was placed in this connexion on a Division Bench ruling of this Court reported in *A I R 1928 Lah 317*,¹ where it was held that :

An admission of another's title by a person claiming land adversely cancels the effect of any overt act that he has committed and it cannot be inferred or presumed that that admission carries with it an assertion of adverse title.

1. *Muhammad Bakhsh v. Nathu*, *A I R 1928 Lah 317*=106 I C 814.

In my opinion A I R 1928 Lah 317¹ is of no assistance to the appellant. In that case the learned District Judge had held that the plot in dispute belonged to the plaintiffs and had been in their possession within the last 12 years. It was contended on behalf of the defendants that by attempting to build a wall in the year 1909 the defendants had asserted their adverse title. It was held that subsequent to the attempt made by the defendants to build the wall, they had admitted the title of the plaintiffs during the course of a criminal case and therefore the attempt to build a wall did not make the possession of the defendants adverse from the time when that attempt was made. In the present case, there is a finding of fact given by the learned District Judge that the building erected by the defendant on the land in dispute was completed by the end of 1919. The defendant in the suit for pre-emption had given the khasra numbers of the entire land purchased by Amar Nath, plaintiff. This consisted of an area of 27 kanals 19 marlas. The fact that this area included 7 marlas which is now in dispute, does not show that there was any conscious admission by the defendant of the title of the plaintiff to the 7 marlas which form the subject matter of the present litigation. It was held in 66 I C 941² that :

Where a person wrongfully in possession admits to the rightful owner that he disclaims all interest in the property in his possession, but does not voluntarily abandon or relinquish possession, the admission does not affect the relation between them so as to convert what was previously adverse possession into possession of another character.

In the present case it is not necessary to affirm in full the proposition enunciated in 66 I C 941.² It is sufficient to hold that there was no conscious admission of the ownership of the plaintiff with respect to the site in dispute in the plaint of the pre-emption suit brought by Ram Rakha with respect of 27 kanals 19 marlas of land. It was next urged by the learned counsel for the appellant that each party was labouring under a mistake of fact, that at the time of the pre-emption suit the plaintiff was under the impression that the land in dispute belonged to him and the defendant was under the impression that the land in dispute was his property. It was maintained that in these circumstances

there was no conscious adverse possession by the defendant that the plaintiff's title to the land remained intact till 9th July 1920. Reference was made in this connexion to a Single Bench ruling of the Oudh Court reported as 66 I C 461,³ where it was held that:

Where the parties hold possession of wrong plots in ignorance of the title of the other party, then both must be held to be labouring under a mistake of fact and when restoration of one party takes place to his original position, he cannot recover from the other without surrendering the benefit which he derived under the mistaken act.

This ruling, in my opinion, has no relevancy to the facts of the present case. It was laid down by a Division Bench of the Punjab Chief Court in 46 I C 964⁴ that :

The criterion of adverse possession is whether a person possesses land claiming it as his own; if he does, he must be held to be in adverse possession.

By putting up a building on the site in dispute the defendant claimed this site as his own. His adverse possession started from that date, even though he may have been under the impression that the land belonged to him. The observations of their Lordships of the Privy Council in 61 Cal 262⁵ lead to the same conclusion. I am therefore of the opinion that in view of the findings of fact given by the learned District Judge, it must be held that the defendant was in adverse possession of the land in dispute from December 1919 till 8th July 1932. For the reasons given above, I affirm the decision of the Court below and dismiss this appeal. In view of all the circumstances of the case I leave the parties to bear their own costs in this Court.

W.D./A.L.

Appeal dismissed.

3. Maqbul Ahmad v. Farhat Ali, A I R 1922 Oudh 152=66 I C 461.

4. Allah Dad v. Fazal Dad, A I R 1918 Lah 308=46 I C 964.

5. Secretary of State v. Debendra Lal Khan, A I R 1934 P C 23=147 I C 545=61 I A 78=61 Cal 262 (P C).

A. I. R. 1937 Lahore 812

YOUNG, C. J. AND MONROE, J.

Mumtaz Bank, Ltd. (in liquidation, by Official Liquidator) — Appellant.

v.

Sayed Masud Ali Chishti (Objector) — Respondent.

Letters Patent Appeal No. 3 of 1936, Decided on 20th April 1937, from order of Jai Lal, J., D/- 19th November 1935.

2. Abdul Rasheed v. Janki Das, A I R 1922 Oudh 24=66 I C 941.

Company—Shares—Transfer and allotment of—Distinction between—Allotment is in respect of unappropriated shares while transfer is of shares already allotted.

An allotment of shares is an act of the Company by which the applicant for shares becomes the holder of unappropriated shares: while shares standing in the name of *A* cannot be allotted to *B* by the Company even with *A*'s consent, such shares may be transferred by *A* to *B*, the Company's powers of interference in respect of such transfer being determined by its Articles of Association. [P 813 C 2; P 814 C 1]

Madangopal — for Appellant.

I. K. Kaul — for Respondent.

Young, C. J.—These are appeals under the Letters Patent from the judgment of a Single Judge of this Court, sitting in appeal from the District Judge, Lahore. The Mumtaz Bank, Ltd. was ordered to be wound up by the learned District Judge, and the name of Syed Masud Ali Chishti was placed on the list of contributories; he filed an objection alleging that the one hundred shares standing in his name had been duly transferred to two persons one called Mohammad Abdulla and the other Taj Din, 50 each. In his judgment the learned District Judge directs attention to two important points: (a) No instrument of transfer such as is required by the Articles of the Company was executed in either case; (b) neither Mohammad Abdullah nor Taj Din made an application to the Company to have the shares registered in his name.

What the learned District Judge found did happen was this: The objector wanted to get rid of his shares and the shares were surrendered to the Bank in the expectation that they might later be allotted to Mohammad Abdulla and Taj Din; the Directors sanctioned an allotment but there was no evidence that Mohammad Abdulla or Taj Din wanted to have the shares allotted to them; there was no instrument of transfer, stamped and signed by the transferees. The learned Judge held that the surrender was illegal and that there was certainly no transfer duly made as alleged by the objector. The learned Appellate Judge distinguished between the two cases. He also discussed some facts, which, by reason of the view that the learned District Judge took of the illegality of the so-called surrender, it was unnecessary for the latter to consider. For the purpose of settling a dispute between rival factions among the Directors, a meeting of the Board was held on 22nd May 1930 and it was then decided that Masud

Ali's shares should be transferred to Mohammad Abdulla and another gentleman, 50 shares to each, and it was recorded that the purchasers (though the name of one was not mentioned) had paid Rs. 250 each.

On the same day Masud Ali signed two transfer forms—each for 50 shares—the shares are not identified by their numbers and though the name Mohammad Fazil appears in the space designed for the transferee's signature, there is written over it in red ink, "Transferee's name withheld", these transfers are not stamped (and, we may add, neither are nor ever were of any legal significance whatever). On 30th May 1930 at a meeting of the Board of Directors, the resolution of 22nd May 1930 was affirmed and the transfer of 50 shares in the name of Mohammad Abdulla, retired Engineer of Pasrur was sanctioned. On 10th October 1930 a return of allotment was sent to the Registrar of Joint Stock Companies in which Mohammad Abdulla's name appeared as allottee (not, as stated by the learned Appellate Judge, as transferee) of 50 shares. The learned Appellate Judge found that it did not appear that 50 of Masud Ali's shares had been allotted by the Bank to another person and he held that in respect of these shares Masud Ali still remained a share-holder. He held that the remaining 50 shares had been transferred to Mohammad Abdulla and that in the peculiar circumstances of the case he (i. e., Masud Ali) ceased to be a share-holder in respect of these shares on 30th May 1930, the date on which the transfer legally took place.

Against this order both the Official Liquidator and Masud Ali appealed. In our opinion, the learned Appellate Judge was correct in holding that in respect of the first 50 shares Masud Ali continued to be a member of the Company, and was incorrect in holding that in respect of the remaining 50 a transfer had taken place. Misunderstanding seems to have arisen in this case by a failure to distinguish between a transfer and an allotment. The document sent to the Registrar of Joint Stock Companies was a return of allotments, this return was made pursuant to S. 104, Companies Act, 1913, and ought to have been made in respect of each set of shares allotted within one month after allotment: an allotment of shares is an act of the Company by which the applicant for shares becomes the holder of

unappropriated shares: shares standing in the name of *A* cannot be allotted to *B* by the Company even with *A*'s consent, such shares may be transferred by *A* to *B*, the Company's powers of interference in respect of such transfer being determined by its Articles of Association. What the objector has relied on in the present case is a transfer by him to Mohammad Abdulla, and in our view the sole question is whether there was a transfer to him. Article 30 of the Articles of Association provides that: "The instrument of transfer of any share shall be executed by both the transferor and the transferee", etc.

It is therefore essential that there should be an instrument of transfer, i. e., a written instrument purporting to transfer shares from one person to another. The only document produced as an instrument of transfer of Masud Ali's shares is the transfer form which has already been mentioned. It is clear therefore that these shares have not been transferred to Mohammad Abdulla. This finding is suf-

ficient to dispose of the case. But it appears also from the evidence that the case put forward by the objector is false. His own witness Dr. Sultan Muhammad, Secretary of the Company, swore that the shares were not, as alleged by the objector and recorded in the minutes of 22nd May 1930, sold to Mohammad Abdulla and Taj Din, that though the shares were allotted to them, they did not pay anything for them and that attempts to get money from them made by the Bank failed. Taj Din was already a share-holder, but there is nothing to show that Mohammad Abdulla is a real person.

There is a further point which throws doubt on this whole transaction. The name of the transferee which has been struck out in the transfer form is Muhammad Fazil Naik. The share certificate of Masud Ali is an exhibit, on the back of it, there is a space for noting any transfer: there are two entries, the first struck out with the words "withheld 27th March 1931" overwritten:

Certification No.	Date of transfer	Name of transferee	Distinctive numbers	Date of meetings	Passed by
186	23-3-1931	B. Mohd. Fazil Naik.	934-1033	23-3-1931	Board of Directors.
186	8-6-1931	Khan Niamat Ullah Khan.	934-1033	8-6-1931	Do.

The application for the winding up of the Company was made on 25th May 1931. No explanation of these entries has been given; they are inconsistent with the alleged transfer to Mohammad Abdulla and Taj Din; and there can be no doubt that the forms of transfer which have been produced relate not to transfers to Mohammad Abdulla and Taj Din, but to an intended transfer to Mohammad Fazil Naik which was never carried out. The most favourable view towards the objector that receives support from the record is that it was represented to him that Mohammad Abdulla and Taj Din would take over his shares and had paid for them. If the objector did receive Rs. 500 as consideration for a transfer, the money did not come from Mohammad Abdulla and Taj Din; it was Malik Lal Khan, who paid, if the objector's evidence is believed, and Malik Lal Khan has not been called as a witness.

We allow the appeal of the Official Liquidator, dismiss the appeal of Masud Ali, the objector, and restore the judgment

of the learned District Judge. Masud Ali will pay the costs of the Official Liquidator of the appeal to the learned Single Judge and of both appeals under the Letters Patent.

K.B./A.L.

Appeal allowed..

* A. I. R. 1937 Lahore 814

COLDSTREAM AND DIN MOHAMMAD, JJ.

Dittu Ram Idan — Assessee —

Petitioner.

v.

Commissioner of Income-tax, Lahore—
Opposite Party

Civil Ref. No. 12 of 1937, Decided on 28th April 1937, made by Commissioner of Income-tax, Punjab, North West Frontier and Delhi Provinces, Lahore, D/- 11th February 1937.

* (a) Income-tax Act (1922), S. 66 (3)—
Assessee when submitting return under S. 22 claiming certain deductions on ground that deductions represented irrecoverable loans—
Claim disallowed—Reference under S. 66 (3)

—Form in which question of law arising in such case should be put stated.

Where an assessee when submitting a return under S. 22, Income-tax Act, claims certain deductions from the profits shown in his accounts on the ground that those deductions represented irrecoverable loans, and after the claim is disallowed by the Income-tax Officer the case is referred under S. 66 (3) to the High Court, the proper form in which a question of law arising out of such case should be put is as follows: "Whether the Income-tax Commissioner was upon the evidence obliged in law to allow the deduction and if not whether he has in arriving at his decision departed from or misapplied the principles which in law govern the matter": *A I R 1931 Cal 683 (S B), Foll.* [P 815 O 2]

(b) **Income-tax—Determination as to when debt became bad.**

The Income-tax Officer is the sole arbiter to determine when a debt became bad: *A I R 1932 P C 178, Rel. on.* [P 816 O 1]

(c) **Income-tax—Assessee claiming deduction for irrecoverability of certain loan—Onus.**

Where an assessee claims a deduction on account of the irrecoverability of a certain loan, the onus lies upon him to prove that the loan had become bad in the year of account: *A I R 1931 Cal 683 (S B) and 2 I T C 236, Foll.* [P 816 C 2]

D. N. Aggarwal — for Petitioner.

S. M. Sikri for *J. N. Aggarwal* — for Opposite Party.

Din Mohammad, J.—This is a reference under sub-s. (3) of S. 66, Income-tax Act. The facts bearing upon the question of law involved in this case are very simple. The firm Dittu Ram Idan submitted a return under S. 22, Income-tax Act, and claimed certain deductions from the profits shown in their accounts, on the ground that those deductions represented irrecoverable loans. The Income-tax Officer, however, disallowed their claim and the Assistant Commissioner on appeal agreed with him. The Commissioner refused to refer the case under sub-s. (2) of S. 66 on which a mandamus was issued by this Court requiring the Commissioner to state the case on the question which was formulated in the following terms:

Whether there was any material for the finding as regards items (e), (i) and (m) as set out in the appellate order.

In the statement of the case submitted by the Commissioner, he has suggested that the question should be amended as follows:

"Whether the above three claims were established by evidence so cogent that as a matter of law it was impossible for the Assistant Commissioner not to hold them proved."

In a similar case reported in 5 I T C 303,¹ Sir George Rankin, C. J., in concurrence with his two colleagues, altered the form of the question in the following manner:

Whether the Income-tax Commissioner was upon the evidence obliged in law to allow the deduction and if not whether he has in arriving at his decision departed from or misapplied the principles which in law govern the matter.

We consider that the form proposed by Sir George Rankin is the only proper form in which a question of law arising out of such cases can be put and as it is open to this Court to decide the questions of law arising out of the case submitted by the Commissioner and as in our view this is the only proper question which arises out of it, we propose to decide the question of law in the form in which the question had been formulated by Sir George Rankin in 5 I T C 303.¹

Item (e) involves a sum of Rs. 2,232 said to have been due from one Nizam-ud-Din. This item was rejected by the Income-tax Officer on the ground that the item did not represent an irrecoverable loan but represented a voluntary remission. The Assistant Commissioner agreed with this decision. The Commissioner, however, in disagreement with the opinion expressed by both these officers, has expressed his willingness to make further enquiries in the matter holding that the balance due was not a friendly gift but an irrecoverable loan. He has also indicated certain points which he desires the Assistant Commissioner to determine in connection with this matter. The assessee does not seriously object to this course being adopted. We accordingly hold that so far as item (e) was concerned, the Income-tax Officer was obliged in law to allow the deduction, and had in arriving at his decision misapplied the principles which in law govern the matter. This, however, does not preclude the Commissioner from making further enquiry into the matter on the lines indicated by him.

Item (i) represents a debt of Rs 9,250 which was due to the assessee from Dewan Chand-Maya Ram of Kasur. The debtor was adjudicated an insolvent on 13th December 1930, and was ordered to obtain his discharge within two years. In fact

1. *Binraj Hukumchand v. Commr. of Income-tax*, *A I R 1931 Cal 683=134 I C 933=58 Cal 1446=54 C L J 550=35 C W N 589=5 I T C 303 (S B).*

he obtained a conditional discharge on 26th April 1933. Unfortunately neither the assessee made a correct statement before the Income-tax authorities nor did the Assistant Commissioner properly appreciate the distinction between 'adjudication' and 'discharge'. The Income-tax Officer had in the assessment year remarked that the debtor had been adjudged insolvent on 13th December 1930, and was discharged "after a year or so". He consequently came to the conclusion that the assessee could have written off this item then and as he did not do so he was not entitled to claim this deduction in the accounting year. Referring to this part of the Income-tax Officer's order, the Assistant Commissioner observed as follows:

The facts, as stated in the assessment order, are not in dispute. . . . This certificate clearly shows that the debtor Dewan Chand was discharged on 13th December 1930. The assessee attaches undue importance to the fact that Dewan Chand had been called upon to render accounts of his income quarterly. This does not, however, change the fact that the discharge was granted to him in December 1930 and that the amount became bad at that time. It should have been claimed as a bad debt in that year.

It would be obvious that this proceeds on entire misconception of facts. If the facts as stated in the assessment order were not disputed before the Assistant Commissioner, they nowhere stated that the debtor had been discharged on 13th December 1930, as misread by the Assistant Commissioner. Further, the condition referred to in the Assistant Commissioner's order was imposed upon the debtor at the time when he was granted a conditional discharge, i. e. on 26th April 1933, and this being so, this condition could not have been in existence on 13th December 1930, as wrongly assumed by the Assistant Commissioner. Both the Income-tax Officer and the Assistant Commissioner have stressed the point that the assessee could claim this deduction long before the accounting year, but both have adduced reasons which are undoubtedly wrong. In these circumstances, their finding of fact is vitiated and cannot therefore be maintained. But, as under the Privy Council judgment reported in 6 I T C 453,² the Income-tax Officer is the sole arbiter to determine when a debt became bad, we are not in a position to give our own find-

ing in this matter. We accordingly remit this portion of the case back to the Commissioner with direction that fresh finding on the issue may be arrived at on correct materials. In this view of the case it will not be necessary to answer the question relating to this item.

Item (m) relates to a sum of Rupees 7,161.1.3 being a bad debt in the account of Dhanna Ram. Machhi Ram. Here, too, the debtor was adjudicated an insolvent and trustees were appointed to administer his estate in the interest of his creditors. On 16th December 1931, they issued a final distribution list on the basis of which the assessee is alleged to have received a sum of Rs. 329.9.0 on 30th July 1932, i. e., during the accounting year. He was, however, called upon by the Income-tax Officer to explain why payment had been delayed in his case and he failed to produce either the trustees or any other reliable evidence which could throw light on this matter. As laid down in 5 I T C 303¹ and 2 I T C 236,³ where an assessee claims a deduction on account of the irrecoverability of a certain loan, the onus lies upon him to prove that the loan had become bad in the year of account. As stated above, there is not a shred of evidence on the record in this respect and the Income-tax Officer was accordingly justified in holding that the assessee had failed to prove that he was entitled to claim this deduction in the accounting year. We accordingly answer the question relating to this item against the assessee, in other words, our answer would be that the Income-tax Officer was justified in disallowing the deduction and that he did not depart from or misapplied the principles which govern the matter. There will be no order as to costs.

D.S./R.K.

Case remitted.

3. Lala Puran Mal v. Commr. of Income-tax, Punjab, (1924) 2 I T O 236.

A. I. R. 1937 Lahore 816

TEK CHAND, J.

A. R. Dower — Plaintiff — Appellant.
v.

Sohan Lal Anand and others —
Defendants — Respondents.

Second Appeal No. 1124 of 1936, Decided on 6th April 1937, from decree of Addl. Dist. Judge, Lahore, D/- 20th August 1936.

2. Commr. of Income-tax C. P. & Berar v. S. M. Chitnavis, A I R 1932 P O 178=137 I C 772=59 I A 290=28 N L R 205=6 I T O 453 (P C).

(a) Negotiable Instruments Act (1881), S. 20—Applicability—S. 20 does not apply to cheque as it does not require stamp — Blank cheque drawn dishonoured by Bank — “Holder in due course” of such cheque cannot hold drawer liable for amount of cheque on dishonour.

Section 20, Negotiable Instruments Act, does not apply to cheques as a cheque does not require any stamp. [P 818 C 1]

Where therefore a blank cheque drawn by a person is dishonoured by the Bank, the “holder in due course” of such cheque cannot hold the drawer thereof liable for the amount stated therein on the dishonour of such cheque, inasmuch as the cheque is not an inchoate stamped instrument. [P 818 C 1]

(b) Contract — Novation — Breach — On accounts Rs. 2,974 found due on pronote on certain date—Promisee thereon agreeing to accept Rs. 2,500 in full satisfaction if paid forthwith—Promisor paying Rs. 2,000 immediately and handing over cheque for Rs. 500 drawn by third person — On dishonour of cheque by Bank, suit by promisee to recover whole amount in balance due on pronote — Promisee held was entitled to it.

On a certain date on taking accounts on a pronote, Rs. 2,974 were found due from the promisor. On that date the parties arrived at a settlement whereby the promisee agreed to accept Rs. 2,500 in full satisfaction if the amount was paid forthwith. The promisor paid Rs. 2,000 immediately and for remaining amount of Rs. 500 the promisor delivered to the promisee a blank cheque drawn by a third person for the said amount. The cheque was dishonoured by the Bank and on such dishonour the promisee sued the promisor for the whole of the amount in balance due from the promisor on the date of the settlement :

Held : that inasmuch as the whole of the amount agreed upon in the settlement was not paid forthwith, the consideration for the settlement had failed and the promisee was entitled to recover the whole amount due on the original pronote as the original loan remained intact.

[P 818 C 2]

Indar Dev for Achhru Ram and Manohar Lal Sachdeva — for Appellant.

Din Dayal Kapur — for Respondent (Kidarnath).

Judgment.— This second appeal arises out of a suit for recovery of Rs. 1,248.2.0 instituted by A. R. Dawar against Sohan Lal Anand, Kidar Nath and Pyare Lal Anand, defendants 1 to 3. The trial Judge passed a decree for Rs. 500 with proportionate costs against Sohan Lal and Kidar Nath, but dismissed the suit against Pyare Lal Anand. Kidar Nath alone appealed to the Additional District Judge, who accepted his appeal and dismissed the suit against him. The plaintiff has come in second appeal. Sohan Lal and Pyare Lal have

been served but are not present. The appeal is opposed by Kidar Nath.

The facts found are that Sohan Lal had borrowed from the plaintiff Rs. 2,000 on a promissory note dated 9th October 1931, and subsequently he raised a further loan of Rs. 685 orally from him. These loans carried interest at 10 per cent. per annum. On 3rd March 1933 the sum of Rs. 2,974 was due on these transactions by Sohan Lal to the plaintiff when a settlement was arrived at between them, whereby it was agreed that if the sum of Rs. 2,500 was paid to the plaintiff forthwith, he would forgo the balance. Sohan Lal had Rs. 2,000 only with him at the time. He had, however, in the meantime approached Kidar Nath for accommodation, and the latter had given him a blank cheque, duly signed by him, authorizing him to fill in the amount and the name of the payee. Accordingly at the time of the settlement, Sohan Lal handed over the cheque to the plaintiff and asked him to fill the blanks in the cheque making it payable to himself in the sum of Rs. 500. In due course, the cheque was presented by the plaintiff to the Bank but was dishonoured. Accordingly on 31st January 1934 the plaintiff brought a suit for recovery of Rs. 1,248.2.0 being the amount of the balance due on the original account, together with interest thereon upto the date of the suit.

The trial Judge found that Pyare Lal was not a party to this transaction at all, and he discharged him from all liability. In this appeal, Pyare Lal has been impleaded as a respondent, but no arguments were addressed to me by the appellant's counsel asking any relief against him. As regards the other two defendants, the learned trial Judge was of opinion that in view of the settlement above referred to, their liability was limited to Rs. 500. Sohan Lal was held liable as the principal, and as against Kidar Nath it was found that the plaintiff, being the “holder in due course” of the cheque, was entitled to claim the amount thereof under the provisions of S. 20, Negotiable Instruments Act. On appeal, the learned Additional District Judge has held that Kidar Nath was not liable, firstly because in the plaint no claim had been made against him on the ground that the plaintiff being the “holder in due course” of a negotiable instrument, was entitled to recover the amount of the

cheque from the maker under S. 20, and secondly because S. 20 was not applicable as it related to documents "stamped in accordance with law". The document in dispute in this case was a cheque, which under the law did not require any stamp and was not stamped. For these reasons it was held that S. 20 did not apply and accordingly Kidar Nath was exonerated from all liability. Before me, no serious attempt has been made by the learned counsel for the appellant to argue that S. 20 covered a case of this kind. That section lays down that:

Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in British India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument to any holder in due course for such amount . . .

Admittedly, in the present case the cheque was not an inchoate stamped instrument and therefore S. 20 is obviously inapplicable. The learned counsel, however, argued that Kidar Nath is liable upon the "general principles of the law of estoppel", he having drawn a blank cheque and delivered it to Sohan Lal authorizing him to fill in the blanks and the latter having asked the plaintiff to fill in the blanks by entering his own name as the payee and the sum of Rs. 500 as the amount payable, Kidar Nath was estopped from denying his liability, as it was on the representation contained in the blank cheque drawn by Kidar Nath that the plaintiff had entered into the settlement with Sohan Lal agreeing to receive Rs. 2,500 only instead of Rs. 2,974 which was the amount due on that date. This aspect of the case does not appear to have been put before the Courts below. Mr. Indar Deo has drawn my attention to the last two lines of para. 9 of the plaint where it was stated that defendant 2 (Kidar Nath) is in particular liable to the extent of Rs. 500 being the amount of his dishonoured cheque. In my opinion, this statement in the plaint does not cover the case as now put by the learned counsel before me. I therefore decline to adjudicate upon it. On these findings, the decision of the lower Appellate Court dismissing the suit against Kidar Nath must be upheld.

At the same time, I do not see why a decree for the full amount due on the original transaction should not have been passed against Sohan Lal. It was not denied by Sohan Lal that the sum of Rs. 2,974 was due by him to the plaintiff on 3rd March 1933 when the settlement above-mentioned was arrived. The plaintiff agreed to receive Rs. 2,500 in case this sum was paid to him forthwith. Sohan Lal paid him Rs. 2,000 only, and for the balance he handed over a cheque for Rs. 500 drawn by Kidar Nath. This cheque was dishonoured and Rs. 2,500 was not paid in full. The consideration for the settlement thus failed and therefore Sohan Lal's liability to pay the full amount due upon the original promissory note and the loan orally taken remained intact. In these circumstances, a decree for Rs. 1,248-2-0 should have been passed against Sohan Lal. It is no doubt true that the plaintiff did not file an appeal to the District Court, asking for a decree for the additional amount against Sohan Lal, nor did he file any cross-objections asking for this relief; but at that time he was obviously satisfied with the decree of the trial Judge making Kidar Nath liable for Rs. 500 in accordance with the terms of the settlement. There is, however, no bar to my passing a decree for this amount under O. 41, R. 33, Civil P. C. Sohan Lal is a party to this appeal; he was served with the notice of this appeal, but has not chosen to appear.

I accept this appeal to this extent that in lieu of the decree passed by the lower Courts, I grant the plaintiff a decree against Sohan Lal for Rs. 1,248-2-0, with future interest at six per cent. per annum on this amount from the date of the suit till realization with proportionate costs in all Courts. The decree of the lower Appellate Court dismissing the suit against Kidar Nath and Pyare Lal is maintained. These respondents will bear their own costs in all Courts. Before executing the decree against Sohan Lal, the appellant shall pay additional court-fee on the difference between the sum decreed (Rs. 1,248-2-0) and Rs. 500 on which he has already paid court-fee.

K.B./A.L.

Appeal accepted.

A. I. R. 1937 Lahore 819

DALIP SINGH AND SKEMP, JJ.

Mt. Kanwal Shri — Defendant —
Appellant.

v.

Babu Lal, Plaintiff and another,
Defendant—Respondents.

First Appeal No. 325 of 1936, Decided on 15th June 1937, from decree of Senior Sub.Judge, Delhi, D/. 11th April 1935.

(a) Appeal—Application to appeal in forma pauperis dismissed as time-barred on 30th April 1936—Application on same day for extending time for paying court-fee on memorandum of appeal—Application granted on 12th June 1936, and time to pay court-fee extended up to 29th June 1936 — Court-fee paid—Preliminary objection that appeal was time-barred, as at date of order extending time there was no appeal before High Court —Order of 12th June 1936 extending time held had impliedly found that there was appeal—This order was binding on parties.

A preliminary mortgage decree was passed in favour of the mortgagee. The judgment-debtor appealed in forma pauperis to High Court. On 30th April 1936 his application to appeal in forma pauperis was dismissed as barred by time. On the same day he applied under S. 151, O. 7, R. 11 and S. 107, Civil P. C., for extending time for paying court-fee on the memorandum of appeal filed along with the application to appeal in forma pauperis. On 12th June 1936, a Division Bench of the High Court permitted him to pay court-fee and printing fee by 29th June 1936, otherwise the appeal would stand dismissed. The court-fee was duly paid. A preliminary objection was taken that in the circumstances the appeal was barred by time, because at the date of the order extending time there was no appeal before High Court at all but only an unstamped piece of paper, the memorandum of appeal; therefore, no time could be extended and that anyhow the appeal remained barred by time even if the Court passed an order extending time:

Held: that the order of the Division Bench of 12th June 1936 impliedly held that there was an appeal and that time should be extended up to 29th June 1936. This order was not ex parte and therefore was binding on the parties. [P 819 C 2; P 820 C 1]

(b) Mortgage—Equitable — Can be created in Delhi.

An equitable mortgage can be created in the Province of Delhi: *A I R 1930 Lah 920, Foll.*

[P 820 C 1]

(c) Transfer of Property Act (1882), S. 53 —Person indebted to B and other creditors making gift of property to third person—Subsequent to gift, person treating property as his own and few months after, mortgaging property to B — Gift held either fictitious or intended to defeat or delay creditors.

A person who was indebted to B and several other creditors made a gift of his property to a third person. Thereafter he dealt with the property as if it were his own and a few months after the gift mortgaged the property to B:

Held: that in these circumstances the only inference was that either the gift was wholly fictitious or that it was intended to defeat or delay creditors and in particular to defraud B, the mortgagee. [P 820 C 1, 2]

Dev Raj Sawhney, R. L. Anand I and Mohammad Alam—for Appellant.

Shamair Chand and Parkash Chand—for Respondents.

Dalip Singh, J.—The plaintiff in this case brought a suit on the basis of an equitable mortgage by deposit of title deeds on 24th November 1922. A short pedigree-table

Jamna Das = Mt. Gaindo

|

Rajindar Kumar=Kanwal Shri

will show the relationship between the defendants: One Jamna Das, who was the owner of this property, married Mt. Gaindo. He adopted a son Rajindar Kumar who died during the pendency of the suit and who was married to one Kanwal Shri. Various defences were taken, but the trial Court held that there had been an equitable mortgage as alleged by the plaintiff in his favour by Jamna Das and that the amount claimed by the plaintiff was due under the said equitable mortgage and therefore it passed a preliminary mortgage decree in favour of the plaintiff. Kanwal Shri appealed in forma pauperis to this Court. On 30th April 1936 her application to appeal in forma pauperis was dismissed as barred by time. On the same day, she applied under S. 151, O. 7, R. 11 and S. 107, Civil P. C., for extending time for paying court-fee on the memorandum of appeal filed along with the application to appeal in forma pauperis. On 12th June 1936, a Division Bench of this Court permitted her to pay court-fee and printing fee by 29th June 1936, otherwise the appeal would stand dismissed. The court-fee was duly paid.

A preliminary objection has been taken that, in the circumstances, the appeal is barred by time, because at the date of the order extending time there was no appeal before this Court at all but only an unstamped piece of paper, the memorandum of appeal; therefore, no time could be extended and that anyhow the appeal remained barred by time even if the Court passed an order extending time. This preliminary objection was over-ruled on the short ground that the order of the Division Bench of 12th June 1936 impliedly held that there was an appeal and that

time should be extended up to 29th June 1936. This order was not *ex parte* and therefore binds the parties.

Turning now to the merits, the first point argued before us by the learned counsel for the appellant was that there was no sufficient proof of an equitable mortgage at all. I have no hesitation in holding in agreement with the trial Court that the evidence of P. W. 2, the plaintiff himself, together with P. W. 3, the plaintiff's munim, corroborated by the evidence of P. W. 1 and P. W. 4, who appear to be disinterested and by the production of the title-deeds by the plaintiff and further corroborated by the fact that Jamna Das was indebted to the plaintiff at the time, sufficiently proves the factum of the deposit of title-deeds by way of equitable mortgage.

It was next contended that even if the factum was proved, there could be no equitable mortgage in the Province of Delhi. On this point there is a Division Bench ruling reported as 11 Lah 564.¹ I have again no hesitation in agreeing with all respect with that ruling and holding that there is no force in the contention of the learned counsel.

The third point contended was that there was a gift on 18th June 1922 by Jamna Das in favour of his adopted son Rajindar Kumar and therefore on 24th November 1922, Jamna Das had no title to convey to the present plaintiff and hence the mortgage was bad. As regards this point, the plaintiff pleaded that the gift in favour of Rajindar Kumar was a sham transaction and in any case was fraudulent, intended to defeat and delay creditors and in particular to defraud the present transferee. Here again I have no hesitation in holding in agreement with the trial Court that this transaction was either a wholly fictitious transaction or that it was intended to defeat and delay creditors in general and to defraud the present transferee in particular. It is proved that Jamna Das was indebted to the plaintiff and to other persons at the time of the alleged gift to Rajindar Kumar. It is further proved that thereafter he dealt with the property as if it were his own. It is also proved that in November, that is, within five months of the gift,

he deposited the title deeds of the property with the present plaintiff. In these circumstances, it seems to me that the only inference to be drawn is that, as held by the trial Court, either this transaction was wholly fictitious or that it was intended to defeat and delay creditors and in particular to defraud the present alienee. Hence the transaction is liable to be set aside or considered void at the instance of the present alienee.

The last point urged by the learned counsel was that there was no proof that a certain sum owed by Jamna Das to the plaintiff, for which interest was being charged at ten annas per cent. per mensem, was transferred to another account on which interest was charged at one rupee per mensem with the authority of Jamna Das. There is the sworn evidence of the plaintiff that this was done at the instance of Jamna Das. There is nothing improbable in that evidence and as remarked by the trial Court the question of the amount due was not seriously disputed before it. I would, therefore, agree with the trial Court in holding that the amount due on the mortgage is also sufficiently proved. I would therefore dismiss the appeal with costs.

Skemp, J.—I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 820

DALIP SINGH AND SKEMP, JJ.

Lal Chand — Defendant — Appellant.
v.

Raman Shah — Plaintiff — Respondent.

First Appeal No. 358 of 1936, Decided on 14th April 1937, from decree of Senior Sub-Judge, Jhelum, D/. 9th June 1936.

Limitation Act (1908), S. 20 — Mere payment of amount towards debt, without specifying whether by way of interest or part payment of principal, does not save limitation — Creditor can however appropriate such payment towards principal or interest, but such appropriation must be before limitation.

The mere fact of payment of an amount towards a debt which is not specified to be either by way of interest or by way of part payment of principal does not save limitation. Such a payment is merely a general payment unspecified on account and does not comply with the requirements of the statute. The creditor can appropriate such payment either towards interest or part payment of principal and the fact of appropriation would make it equivalent to payment

1. Ralli Brothers v. Punjab National Bank Ltd., A I R 1930 Lah 920=129 I O 21=11 Lah 564=31 P L R 934.

towards interest or part payment of principal. But in order to save limitation the appropriation by the creditor must be made within the period of limitation: *A I R 1935 All 946 (F B), Foll.*

[P 822 C 1; P 823 C 1]

M. C. Mahajan and Achhru Ram —
for Appellant.

J. N. Aggarwal and Shamair Chand —
for Respondent.

Dalip Singh, J.—The plaintiff in this case brought a suit for recovery of money on the basis of a pro-note dated 4th February 1930. In the plaint he specified certain earlier pro-notes and certain later pro-notes as well as two items of dasti account, all of these being mentioned in detail at page 17 of the paper book, the beginning of the judgment of the learned trial Court. The plaintiff specified that the two pro-notes subsequent to 4th February 1930 were not matters in suit and would be sued on later. The pro-notes earlier than the pro-note of 4th February 1930 had, according to him, been discharged by certain payments. The plaintiff also specified certain payments made by the defendant. Inter alia he specified the payment of Rs. 100 on 24th January 1933. This payment was endorsed on the back of the pro-note and according to the pleadings in para. 7 of the plaint, saved limitation. There were two items amounting together to Rupees 6,834.6.0 paid on 7th October 1933 and an item of Rs. 1,505.5.9 paid, according to the plaint, on 22nd January 1936. This payment had, according to the plaint, been utilized partially for discharge of the dasti items of Rs. 200 and 500, dated 28th May 1931 and 24th August 1931. The rest had been given credit for and a suit was brought for a sum of Rupees 11,463.8.0. The prayer was for a decree for this amount, consisting of principal and interest, with costs and for interest from date of suit to date of realization.

The defendant took various pleas. The chief plea however was that the suit was barred by limitation and the payment of Rs. 100 was never as a matter of fact made at all though the endorsement on the back of the pro-note was admitted to be in the defendant's hand-writing. As regards the sum of Rs. 6,834.6.0, the defendant pleaded that the sum of Rs. 7,463 had really been paid on this account and therefore he should have got credit for that amount and not for Rs. 6,834.6.0. As regards the dasti items of Rs. 200 and

500, he pleaded that the plaintiff could not have discharged them by appropriation from the item of Rs. 1,505.5.9 as that item had been specifically appropriated by the debtor for discharge of the pro-note and that, in any event, the sum of Rs. 1,505.5.9 had been paid not on 22nd January 1936 but on 19th October 1935.

Other issues do not now concern us and need not be referred to. The trial Court held that the plaintiff's suit was not barred by limitation holding that Rs. 100 had been paid as part payment of principal but not as payment of interest as such. He held that Rs. 500 and Rs. 200 had been correctly appropriated by the plaintiff, that Rs. 7,463 had not been proved by the defendant, that the plaintiff's kachi rokar was badly kept and had blank spaces in it, and therefore decreed the plaintiff's suit with half costs against the defendant with future interest at 6 per cent. per annum till date of realization. The defendant has come in appeal and the main point contended before us has been, as before, that the suit is barred by limitation.

The learned counsel for the appellant has contended, firstly, that the fact of the payment of Rs. 100, which admittedly is the only item that saves limitation, is not proved. Upon this point, we have the statement of the plaintiff that the sum was duly paid as entered in the endorsement on the back of the pro-note and the statement of the defendant and his munim who appeared as P. W. 2 that the item of Rs. 100 was not paid. The defendant in this case is a business man and a trader and I do not think that the mere statement by himself and his munim rebuts the presumption raised against him by the fact of the endorsement of his own hand-writing on the back of the pro-notes. The learned counsel for the defendant suggested that the entry was made merely in order to save limitation but that no cash passed. I am quite unable to see why the plaintiff, who undoubtedly stood to lose at least Rs. 100 by this procedure, should have agreed to any such procedure being adopted, more especially when the defendant was obviously in a position without any inconvenience to pay Rs. 100. I, therefore, would hold that the factum of the payment of Rs. 100 is duly proved. It has not been disputed before us that the endorsement is in the hand-writing of the defendant.

The next question that arises is whether, under S. 20, Limitation Act, this endorsement saves limitation. Upon this point the contention of the learned counsel for the appellant is as follows: He contends that it has been held by the trial Court that this sum of Rs. 100 was not paid by way of interest as such. He contends also that it was not paid by way of part payment of principal. His contention on this point is, following the view of the majority in the Allahabad ruling reported in 58 All 261,¹ that the mere fact of payment of an amount which is not specified to be either by way of interest or by way of part payment of principal does not save limitation. Such a payment is merely a general payment unspecified on account and does not comply with the requirements of the statute. He concedes, following again the view of the majority in the Allahabad case, that if the creditor appropriates such a payment towards principal, then in the case of a payment on account of this kind the fact of appropriation would make it equivalent to a part payment of the principal, but he strongly contends that in this case the creditor had made no such appropriation at any time until 18th December 1935 at the earliest, or, as he contends, really not earlier than the plaint which was dated 24th January 1936. He contends that there is no pleading to the effect that this was a part payment of principal, that there is no oral evidence that at any time before the plaint it was appropriated by the creditor as such part payment, that there is no documentary evidence that the creditor at any time treated it as such, and that therefore any appropriation which was made, having been made beyond limitation, the limitation on the original debt was not saved.

In reply, the learned counsel for the respondent was unable to show us that there was any specific pleading on the subject at all. In para. 7 of the plaint it is merely generally stated that the endorsement saved limitation without specifying that the payment was by way of interest as such or was by way of part payment of principal. So far as the oral evidence is concerned, there is not one word on the subject at all to which the learned counsel could draw our attention. So far as the documentary evidence is concerned, the

learned counsel relied on Ex. D-2, which is printed at page 35 of the paper book. Ex. D-2 was the statement of accounts that was admittedly sent by the plaintiff to the defendant shortly before the suit on 18th December 1935. The learned counsel contended that, at page 36 of the paper book, interest for 35 months less seven days had been allowed on Rs. 100 and this proves conclusively that the creditor had treated the sum of Rs. 100 as principal. The learned counsel was compelled to concede that the statement made by D. W. 2, Godar Mal, page 11 of the paper book, that this account had been copied from the plaintiff's khata was not strictly correct. As the learned counsel for the appellant contended, it appears to be a statement of account drawn up from items entered in the khata. The plaintiff himself in his evidence at page 13 of the paper book stated:

Whatever items are paid to defendant they are debited to defendant's general account and similarly whatever payments are made by defendant, they are credited to his general account.

A comparison of Ex. D-2 with the sum arrived at in the plaint and the methods of appropriation and of reckoning of interest given in the plaint show clearly that Ex. D-2 was not drawn up in accordance with any khata account but was merely prepared for the purposes of the suit. There is no evidence other than that of Godar Mal that this account was prepared from the khata and that this account corresponds to the entries in the khata. In fact the last entry at page 38 of a date which corresponds to 27th July 1931 and which follows entries in December 1935 clearly shows that this was not a copy of any such account in the khata and the learned counsel for the respondent very properly conceded that this was so. This being so, the mere fact that in this account the plaintiff allowed interest on Rs. 100 would not prove that before this date, namely 18th December 1935, he had appropriated the sum of Rs. 100 to part payment of the principal in the pro-note account of the defendant.

The learned counsel for the respondent next relied on the plaint as showing that the plaintiff must have treated this Rs. 100 as a part payment of the principal. Conceding for the moment that the plaint does show Rs. 100 being treated as part payment of the principal, there is nothing to show that it was so treated earlier

1. Udeypal Singh v. Lakshmi Chand, A I R 1935 All 946=159 I O 387=58 All 261=1935 A L J 1029 (F B).

than the plaint itself and it is asking altogether too much for the learned counsel for the respondent to urge that the fact that the plaintiff so treated it on 18th December 1935 and on 24th January 1936, proves that he must have treated it in the same way earlier, because if that was so, there would be no question of any limitation arising in any suit of this kind whatever, for the plaintiff could show that in his plaint he had treated the item as either payment of interest as such or as part payment of principal. I do not therefore think that there is any force in this contention and the position appears to be that a certain sum was paid as on account and was never appropriated either by the debtor or by the creditor either to interest or to part payment of principal until the date of suit or earlier than 18th December 1935.

Now, the limitation on a pro-note is three years from the date of the pro-note, namely, 4th February 1930 and would have expired on 4th February 1933. It appears to me that the contention of the learned counsel for the appellant is correct that such a payment must be appropriated before limitation in order to save limitation. If such a payment only becomes a payment towards the principal by reason of the appropriation, it is obvious that before the appropriation it is not a part payment of the principal. That being so, the suit is not shown to have been within limitation and therefore the plaintiff's suit fails and must be dismissed with costs.

It is unnecessary for us to give further findings for the purposes of this appeal, but the matter may go further and I think it would be advisable to record our findings on the other points raised. It has not been pressed by the learned counsel for the respondent that the items of Rs. 200 and Rs. 500 could have been discharged by appropriation from the item of Rupees 1,505-5-9. By the entry as shown at p. 34 of the paper book, the debtor had appropriated this sum towards the principal amount due under the pro-note and this was admitted by the creditor as shown by the endorsement printed at p. 35. Therefore, this item could not be appropriated towards the discharge of the amounts paid dasti. On the question of the date of this item, the learned counsel for the respondent similarly did not press the point that the date should be 19th

October 1935 instead of 22nd January 1936. Both these points are therefore decided in favour of the defendant-appellant.

As regards the items of Rs. 15 and Re. 1-8-0 which the defendant claimed in addition, there is a statement made by Devi Das. The item of Rs. 15 is also evidenced by a document printed at p. 32 of the paper-book. This item is signed on behalf of the plaintiff by Durga Das, and the statement of P. W. 2, Devi Das, is that Durga Das was a servant of the plaintiff. This evidence stands un rebutted and therefore I would hold that the defendant had succeeded in proving the payment of Rs. 15. As regards the item of Re. 1-8-0, it is similarly evidenced by a document printed at page 33 and the evidence of Devi Das (P. W. 2). There is no rebuttal evidence and I do not see why this amount should not be allowed to the defendant-appellant. As regards the item of Rs. 7,463, there is no document: there is only the statement of Devi Das besides that of the defendant himself that Rs. 7,463 were as a matter of fact paid. The statement of Devi Das does not seem to be very credible that having told the plaintiff to appropriate the sum towards the pro-note and the plaintiff having informed him that he had credited Rs. 6,834 towards the defendant's loan account in suit and the rest to Mandi Baha-ul-din account, he made no protest at all but left the matter. The statement of the defendant that he received this money in payment of a mortgage is not supported by any documentary evidence which obviously could be forthcoming if the statement were true. I therefore hold that this item is not proved by the defendant-appellant.

For the reasons already given, the suit fails on the question of limitation and this appeal is accepted with costs of this Court. In the trial Court the parties will bear their own costs. As regards the cross-objections they are dismissed, parties bearing their own costs.

Skemp, J.—I agree. I agree with the majority of the Judges in 58 All 261.¹ Sulaiman, C. J. pointed out that the Courts had long attached importance to the words "paid as such" qualifying interest in S. 20, yet at the time of the amendment of 1929 the substantive section was left unchanged. This argument seems to me to dispose completely of the view

expressed by Thom, J. that the words "as such" are redundant, and that the clause as it stands is an example of sloppy draftsmanship which must not be construed literally. I agree with the classification of payments made by Sulaiman, J., and further that not all payments must be of interest as such or of principal. It may be allocated to neither one nor the other.

S.C./R.K.

*Appeal allowed.***A. I. R. 1937 Lahore 824**

DIN MOHAMMAD, J.

Ata Mohammad and others —

Plaintiffs.

v.

Madari and others — Defendants.

Civil Ref. No. 26 of 1936, Decided on 23rd December 1936, made by Commissioner, Jullundur Division, D/- 14th August 1936.

Punjab Tenancy Act (16 of 1887), Section 77 (3) (g) — Occupancy holding transferred—Transferee ripening his title because "landlord" not contesting within period of limitation—Dispossession by some proprietors only — Suit for possession is triable by Civil Court.

Where the transferee of the occupancy holdings has ripened his title to the same because the landlords had failed to contest the transfer within the period provided by Art. 120, Lim. Act, and then the transferees were dispossessed by some of the proprietors only :

Held : that the suit for possession was properly triable by a Civil Court as the dispossessors were not "landlords" constituting an entire proprietary body : *A I R 1928 Lah 895, Rel. on.*

[P 824 C 2 ; P 825 C 1]

*D. N. Aggarwal — for Plaintiffs.**J. R. Agnihotri — for Defendants.*

Order. — The facts giving rise to this reference are these : On 2nd July 1935, Ata Muhammad and Fazal, sons of Mutsaddi Khan, instituted a suit in the Court of the Subordinate Judge, Dasuya, against Madari and seven others for possession of land measuring 35 kanals 9 marlas. They alleged that Madari, who was an occupancy tenant of the land in suit, had sold his holding to their father on 20th March 1925, and that since then they had been in physical occupation of the land. They further averred that they had been dispossessed by Madari in conspiracy with the other defendants about 20 days prior to the institution of the suit. They relied upon an entry in the jamabandi for the year 1933-34 which showed that Ata Muhammad and Fazal were cultivating

the land as tenants-at-will under Madari, who was described as an occupancy tenant. With their plaint they also produced a registered sale deed which purported to have been executed by Madari in favour of Mutsaddi Khan. The defendants resisted the suit on various grounds. Among other things, they contended that the suit was not cognizable by a Civil Court. The Subordinate Judge took up this question first and holding that the suit was triable by a Revenue Court, returned the plaint for presentation to the proper Court. It appears that he was mainly influenced by the fact that the question of validity of the transfer of the occupancy rights would arise in the case and as that matter is cognizable by Revenue Courts only, he thought that the present suit was also cognizable by a Revenue Court.

After hearing counsel on both sides, I have come to the conclusion that this suit is triable by a Civil Court. The alienation, which forms the basis of the plaintiffs' claim, evidently took place in 1925 and the period for challenging it on behalf of the landlords has long expired. There is abundant authority in support of the proposition urged by the plaintiffs that to a suit by a landlord challenging any transfer of an occupancy right in contravention of the provisions of the Tenancy Act, Art. 120, Lim. Act, applies and that consequently a suit should be brought within six years from the date of the sale : *see 1 P R 1898 Rev.¹ 7 P R 1905 Rev.² and 1 P R 1916 Rev.³* This being so, I do not consider how the status of the plaintiffs can now be challenged. Their transfer has been validated by the lapse of time and the landlords must now treat it as an accomplished fact.

The position therefore is this: The plaintiffs, who were in occupation of the land, allege that they have been dispossessed by Madari and seven other persons. These defendants do not constitute the entire proprietary body and therefore in the light of the remarks made by Dalip Singh, J. in *A I R 1928 Lah 895⁴*, the

1. *Jiwan Singh v. Maharajah Jagat Singh*, (1898) 1 P R 1898 Rev.

2. *Kuria v. Nanak*, (1905) 7 P R 1905 Rev=68 P L R 1906.

3. *Labha v. Tulsi*, (1916) 1 P R 1916 Rev=34 I O 523=3 P W R 1916 Rev.

4. *Diwan Singh v. Ralla*, *A I R 1928 Lah 895*=110 I O 598.

defendants are not the "landlords." Consequently, on the allegations of the plaintiffs, the suit is not triable by a Revenue Court. It may be remarked that not only the Revenue Court came to this conclusion but even counsel for both the parties had admitted before it that the suit lay in a Civil Court. Accordingly, under S. 99 (2), Punjab Tenancy Act, I order the Civil Court to proceed with the suit. No order as to costs.

B.D./R.K.

Order accordingly.

A. I. R. 1937 Lahore 825

ADDISON AND DIN MOHAMMAD, JJ.

Raja Rajinder Chand — Defendant — Appellant.

v.

Mian Brahm Chand, Plaintiff and others, Defendants — Respondents.

Letters Patent Appeal No. 73 of 1936, Decided on 4th February 1937, against judgment of Agha Haidar, J., D/- 12th March 1936.

Punjab Laws Act (4 of 1872, as amended by Punjab Descent of Jagirs Act, 4 of 1900), S. 8-A (b)—Successor of jagir cannot by his own will interfere with amount of maintenance payable to other members of family under order of Government.

The power of fixing the maintenance payable to the other members of the family of the last or previous holders of the assignment vests in the Government and not in the successor to the assignment and when once this power is exercised by the competent authority, the successor cannot interfere with it. The sums payable by way of maintenance are no doubt open to revision on the opening of every succession but the power of such revision vests in the Government and not in the successor. [P 825 C 2; P 826 C 1]

J. N. Aggarwal and *D. N. Aggarwal* — for Appellant.

Badri Das and *Gulla Ram* — for Respondents.

Judgment. — The facts of this case are set out at length in the judgment under appeal and need not be recapitulated here. The short question that requires determination in this case is whether a successor to a jagir can by his own *ipse dixit* curtail the amount of maintenance payable to the other members of the family under the orders of the Government. The law applicable to such cases is contained in S. 8-A (b), Punjab Laws Act, 4 of 1872. This amendment was introduced, for the

first time, by the Punjab Descent of Jagirs Act (4 of 1900). The material portion of that section reads as follows :

8-A. When the Government makes any declaration under S. 8, it may, by Notification in the Local Government Gazette, direct that the rule of descent thereby declared to prevail shall be subject to the following conditions or either of them, namely :

(b) That any successor to the assignment shall, if the Government so require, make such provision out of the assignment as the Government may consider suitable for the maintenance of the widow or widows (if any) and other members of the family (if any) of the last or any previous holder of the assignment.

As we read the section, the power of fixing the maintenance payable to the other members of the family of the last or previous holders of the assignment vests in the Government and not in the successor to the assignment and that when once this power is exercised by the competent authority, the successor cannot interfere with it.

The history of this jagir shows that it was originally conferred on Raja Sir Yudhbir Chand in 1846. In 1852 a change was introduced in the tenure of the jagir in that the rule of primogeniture was made applicable with this reservation : that the other brothers of the successor to the assignment were to receive by way of maintenance a sum equivalent to 3/16th share of the nominal annual value of the entire jagir. In 1892 the same rule prevailed. In 1904, Notification No. 136 dated 14th July 1904 was issued by the Punjab Government under S. 8 declaring that in respect of succession to the assignment in question, the rule of descent already in force would continue. On the same day, another Notification was issued under S. 8-A, Punjab Laws Act, as amended by Punjab Act (4 of 1900) directing that the rule of descent shall be subject to the conditions (a) and (b) specified in the said section and to the Proviso thereof.

The plaintiff's father was under the order of the Government in enjoyment of Rs. 1,200 per annum by way of maintenance until his death which took place in 1900. The plaintiff was only about 4 years old when his father died. It appears that some time in 1904 the tahsildar of the district made certain enquiries from the then successor to the assignment concerning the amount of maintenance allowed to the different members of the family and

was informed that the allowance granted to the plaintiff had been reduced to Rs. 820 per annum. About 12 years later, a certain official of the State recorded a note saying that the matter of fact was that the allowance payable to the plaintiff had been reduced to Rs. 600 per annum. The plaintiff continued to receive this amount without protest even after attaining majority until 1933 when he instituted the present suit. Counsel for the appellant has all along admitted that the plaintiff is neither barred by the law of limitation nor by the rule of estoppel. In these circumstances, the conclusion is irresistible that the reduction introduced in the amount of maintenance payable to the plaintiff was ultra vires and the plaintiff is entitled to the relief claimed in the plaint.

The sums payable by way of maintenance are no doubt open to revision on the opening of every succession but the power of such revision vests in the Government and not in the successor. To enforce the order of the Government in favour of the plaintiff is not in any way to encroach upon the authority of the Government. We accordingly dismiss this appeal and affirm the decision of the learned Judge of this Court. Parties will bear their own costs throughout.

S.O./R.K.

*Appeal dismissed.***A. I. R. 1937 Lahore 826****COLDSTREAM AND BHIDE, JJ.***Gulab Das — Appellant.*

v.

Foja Singh and others — Respondents.

First Appeal No. 2235 of 1935, Decided on 8th December 1936, from decree of Sikh Gurdwaras Tribunal, D/- 27th September 1935.

Punjab Sikh Gurdwaras Act (8 of 1925), S. 16 (2) (iii)—Dharamsala founded by Udasis, used as resting place and for langar—Endowments by Sikhs—Granth Sahib read every day—Hindu Gods not worshipped nor Hindu scriptures read — Institution held Sikh Gurdwara.

A Dharamsala was founded by Udasis and many of its subsequent managers were also Udasis. Yet it was used as a resting place and a langar was maintained. It was endowed by Sikh Sardars and Granth Sahib was read every day and pictures of Sikh Sardars were hung round the wall. No Hindu Gods were worshipped or Hindu scriptures read:

Held: that the institution was a Sikh Gurdwara. [P 326 C 2]

Jagan Nath Aggarwal and Asa Ram Aggarwal — for Appellant.

V. N. Sethi — for Respondents.

Coldstream, J. — This is an appeal by Gulab Das, Mahant of an institution known as Santpuri Dharamsala in Gandiwind, a village in Tahsil Tarn Taran of Amritsar District against a unanimous judgment of the Sikh Gurdwaras Tribunal declaring the institution to be a Sikh Gurdwara and dismissing the appellant's petition submitted to the Local Government under S. 8, Sikh Gurdwaras Act. It is contended before us that the decision is against the evidence which shows that the principal purpose for which the institution was founded was not public Sikh worship but the accommodation and feeding of fakirs and travellers. Stress was also laid on the fact that the founder or first manager of the institution was an Udasi and that his successor and the majority, if not all, of his successors, have been Udasis. It is not disputed that the Granth Sahib has always been recited in the institution, but it is argued that the mere reading of the Granth Sahib in an institution by Udasis, who themselves reverence the book, does not justify the inference that the institution was founded for public worship by Sikhs.

We have been taken through all the evidence and after considering it in the light of the criticisms addressed to us by appellant's counsel, I have no doubt of the correctness of the Tribunal's conclusion that the institution was founded for public worship by Sikhs and was used for such worship at the times mentioned in Cl. (iii) of sub-s. (2) of S. 16, Sikh Gurdwaras Act

It is true that the first manager of the institution was Hira Das, an Udasi. According to the petitioner's evidence, he founded the Dharamsala about the year 1832. Subsequent managers, as already noticed, have also been Udasis but it was very common, if not usual, for Sikh Dharamsalas to be managed by Udasis who were regarded by the Sikhs as their priests and employed as such.

That the feeding of travellers and fakirs was one of the purposes for which the Sikh Dharamsalas (which were partly religious and partly charitable institutions) were founded cannot be disputed, but the fact that a particular institution was a resting place and a langar as well as one in which the Granth Sahib was recited

will not exclude the possibility of that institution having been founded and subsequently used for public Sikh worship. No doubt the evidence that the Granth Sahib has from earliest times been read in a Dharamsala will not by itself be conclusive evidence that the Dharamsala is a Sikh Gurdawara. There is ample authority for this proposition, but there are cases in which such evidence is of very great importance. It might, indeed, be the determining factor in arriving at a conclusion regarding the purpose for which a particular institution was founded.

It appears that when this Dharamsala was founded, it was at the same time endowed with revenue free land by the lambardars of the village or by them and Maharaja Ranjit Singh. The proprietors of the village are Sikhs. During the course of an enquiry into the conditions of this assignment, begun in 1850, Sant Das, a chela and attorney of Hira Das, in answer to the question whether the Dharamsala was a resting place for travellers or whether it was meant for some other purpose, stated that the Dharamsala was meant for the reading of the Granth Sahib (O. 1). In another statement recorded on 19th September 1852 (O. 2), Sant Das described his occupation as reciter of the Granth. The strong probability, in view of all this evidence, is that the Dharamsala was founded for Sikh worship and that it was so used from the time of its foundation by the villagers who had endowed it, if not themselves founded it.

There is a samadh of Hira Das in or attached to the institution, but there is no authority of which I am aware supporting the contention of the appellant's counsel that an institution containing a samadh cannot be a Sikh Gurdwara, although no doubt the worship of a samadh is opposed to orthodox Sikhism. There is no documentary evidence indicating that there have ever been any objects of public worship in the institution other than the Granth Sahib, although, admittedly, there are pictures of Sikh Sardars on the walls surrounding the samadh and it is also admitted that people bow to the samadh. Of the worship of any Gola Sahib, there is no reliable evidence, nor is it proved that the Hindu Gods have been worshipped in the Dharamsala or the Hindu scriptures read. The reading of Granth Sahib was going on in 1852 (O. 5) and 1891 (O. 11). In 1890 Mahant Chetan

Das accepted a gift of land on behalf of the institution in the name of the Guru Granth Sahib (O. 10 and O. 20). There is no evidence to show that any change in the form of worship in the institution took place after 1890, and I agree with the Tribunal in finding that this documentary evidence is good corroboration of the respondents' oral evidence that public worship by Sikhs continued until 1926. I would dismiss the appeal with costs accordingly.

Bhide, J.—I agree.

B.D./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 827

JAI LAL, J.

Gumani Shah—Defendant—Petitioner.

Hukam Chand — Plaintiff —

Respondent.

Civil Revision Petn. No. 602 of 1936, Decided on 18th December 1936, against decree of Senior Sub-Judge (First Class), Attock at Campbellpur, D/- 15th June 1936.

Acknowledgment — Debt not specified in acknowledgment — Only one debt existing between parties — Acknowledgment will extend limitation period.

A debtor had acknowledged a debt in a letter to his creditor without specifying the particular debt, but only one debt existed between the debtor and the creditor:

Held: that the acknowledgment would serve to extend period of limitation: 17 All 198 (P C), *Disting.* [P 828 C 1]

Ram Lal Anand I — for Petitioner.

S. L. Puri, M. L. Puri and M. L. Whig — for Respondent.

Order.—The only question in this petition for revision is whether a letter, dated 11th August 1932 (Ex. P. 3) is a sufficient acknowledgment of liability within S. 19, Limitation Act, to extend time for the institution of the suit. The Courts below have held that it is a sufficient acknowledgment of liability. The only ground on which this conclusion is attacked is that the letter does not specify the debt in respect of which the acknowledgment was made. In support of this contention reliance is placed on a judgment of the Judicial Committee of the Privy Council in 17 All 198.¹ In that case the Court of Wards had given a notice to the creditor

1. *Beti Maharani v. Collector of Etawah*, (1895) 17 All 198=22 I A 31=6 Sar 551 (P C).

mentioning the liability of the ward to him and it appears that there were more than one debts due to the creditor. It was held that it was not certain to which of these debts the acknowledgment related.

In the present case, the letter was written to one Chuni Lal who, it has been found on evidence, was a partner with the plaintiff and it is not established that there was any other liability either in favour of the plaintiff or in favour of Chuni Lal. There being only one debt due to Chuni Lal or to the plaintiff or to both jointly, there can be no manner of doubt that the letter related to the debt in dispute. There is no ambiguity in the matter, and in my opinion the Privy Council judgment is not applicable to the facts of this case. I dismiss this petition for revision with costs.

B.D./R.K.

Petition dismissed.

A. I. R. 1937 Lahore 828

TEK CHAND, J.

Mitha and others — Appellants.

v.

Remal Dass and others — Respondents.

Second Appeal No. 1719 of 1935, Decided on 7th December 1936, from order of Dist. Judge, Multan, D/- 25th May 1935.

Compromise Decree—Relief against penalty—Court can relieve defaulting party only if decree-holder enforces penalty, but cannot do so where he merely withdraws concession given to judgment-debtor — Condition in compromise decree held not penal.

It is settled law that where a decree is passed as a result of an agreement between the parties, it does not stand on a higher footing than the agreement which preceded it and therefore the Court has the power to relieve the defaulting party from the consequences of the default; but the Court does not possess unrestricted power in the matter, inasmuch as it cannot interfere with the effect of the default, if as a result thereof the decree-holder seeks merely to take away the concession which had been given to the judgment-debtor. If, on the other hand, as a result of the default the decree-holder attempts to realise more than was originally due to him, in other words if he is enforcing a penalty, then the Court is entitled to step in and to give relief to the judgment-debtor against the forfeiture: *A I R 1933 Lah 23* and *A I R 1931 Lah 696, Rel. on.*

[P 829 C 1, 2]

There was an agreement between A and B whereby B was to take possession of A's land and repair the old well or to sink a new one and make land culturable within ten years and after fulfilling these conditions B was to be the owner of

half the land. B remained in possession for 20 years but did not fulfil the conditions. A brought a suit for possession which was compromised and according to the terms of compromise decree two years more were allowed to B to fulfil the conditions and on non-fulfilment A had a right to eject B by taking execution proceedings. B having failed to fulfil the terms, A applied for execution. The lower Court held that the condition in compromise decree was penal:

Held: that the condition embodied in the compromise decree was not penal. A was merely withdrawing the concession given to B and was enforcing his original right and in doing so it could not be said that he was attempting to get more than what he was entitled to at the institution of suit. [P 829 C 2]

Shamair Chand — for Appellants.

Hargopal — for Respondents.

Judgment. — This second appeal arises from certain orders passed in execution proceedings. The relevant facts are that the respondents-decree-holders are the owners of 214 kanals of land. On 24th July 1910 the predecessors-in-interest of the appellants took the land from the owners as adhlapidars. On that date an agreement was executed between the parties by which the appellants undertook to repair the old well or sink a new one and to make the entire land culturable within ten years. It was agreed that if they fulfilled these conditions within the period specified, they would become owners of one-half of the entire land. The defendants accordingly entered into possession of the land in 1910. It appears however that they did not comply with the conditions within the specified period. Indeed until 1931 they had neither repaired the old well nor sunk a new well, nor made the land culturable. Accordingly, on 30th April 1931, the respondents brought a suit against the appellants for possession of the land on the ground that the latter had not complied with the conditions of the grant and were not entitled to continue in possession. On 22nd July 1931 the suit was settled by a compromise, and in accordance with its terms a decree was passed. In the compromise it was stated that the plaintiffs (original owners) had allowed a further period of two years to the defendants to repair the existing well or sink a new well, and put the same in working order. The defendants also undertook to construct a sahal and palla for the plaintiffs on the land in dispute at their own expense, and to reclaim the uncultivated land. It was further provided that if within the period of two years the

defendants failed to make the well fit for the purpose of cultivation or to build a sahal or a palla or reclaim the land, the plaintiffs would be entitled to eject them by taking out proceedings in execution of the decree and that the defendants shall have no concern with the ownership of the land in question. Certain terms were also settled with regard to the payment of the costs of the suit, but they need not be set out here as they are not material for the point now in dispute.

After the expiry of two years from the date of the compromise decree, on 31st July 1933, the decree-holders applied for execution, alleging that the compromise had not been fulfilled. The executing Court found that the condition that if the judgment-debtors failed to comply with the conditions of the compromise within two years, possession of the land would be surrendered to the decree-holders was penal and ought to be relieved against under S. 74, Contract Act. On the merits he found that the defendants had brought a portion of the land under cultivation, though not the whole of it, and therefore the equitable order to pass was that the decree-holders be put in possession of the best half of the land, the remaining half be allowed to remain with the judgment-debtors. The decree-holders appealed to the District Judge, who held that the condition in the compromise decree as to the surrender of the land to the plaintiffs in the event of the judgment-debtors' failure to carry out the conditions within two years was not penal, and that it was not open to the Court to relieve the judgment-debtors from the effects of their default. He further found as a fact that the figures given by the executing Court in its judgment as to the area brought by the judgment-debtors under cultivation were incorrect. Before him it was admitted by both parties that the sahal and the palla had not been constructed at all. On these findings the learned Judge accepted the decree-holders' appeal.

The judgment-debtors have come in second appeal and the sole point argued before me is that the condition in the compromise decree was penal. It is settled law that where a decree is passed as a result of an agreement between the parties, it does not stand on a higher footing than the agreement which preceded it and therefore the Court has the power to relieve the defaulting party from the

consequences of the default; but the Court does not possess unrestricted power in the matter, inasmuch as it cannot interfere with the effect of the default, if as a result thereof the decree-holder seeks merely to take away the concession which had been given to the judgment-debtor. If, on the other hand, as a result of the default the decree-holder attempts to realise more than was originally due to him, in other words, if he is enforcing a penalty, then the Court is entitled to step in and to give relief to the judgment-debtor against the forfeiture: *see* 140 I C 225¹ and A I R 1931 Lah 696.²

Applying these principles to the present case, there is no doubt that the condition embodied in the compromise decree was not a penal one. As already stated, the land belongs to the decree-holders. The judgment-debtors took possession of it in 1910 agreeing to sink a well and make it culturable within ten years, on doing which they were to become owners of one-half. They, however, failed to carry out any of the conditions and yet remained in possession for the stipulated period. The decree-holders allowed them to continue in possession for a further period of ten years, but during this period also the judgment-debtors did not carry out their obligations. In 1931, therefore, the original owners were entitled to get back the land and for this purpose they brought a suit. At the request of the judgment-debtors, however, they gave them another two years to carry out the terms of the original grant and to build a sahal and palla. They failed to carry out these conditions either during this period. In these circumstances, the decree-holders were merely withdrawing the concession which they had given to the judgment-debtors and were enforcing their original rights, and in doing so it cannot be said that they were attempting to get more than what they were entitled to at the institution of the suit. I hold, therefore, that the learned District Judge came to a correct conclusion in the case.

Mr. Shamair Chand as a last resort urged that on equitable grounds some concession should have been shown to the judgment-debtors as they had spent some money and labour in making a portion of

1. Jhanda Singh v. Piara Singh, A I R 1933 Lah 23=148 I C 225=33 P L R 1026.

2. Jawala Ram v. Mathra Das, A I R 1931 Lah 696=132 I C 580=32 P L R 945.

the land culturable. He was, however, unable to point out the exact extent of the area brought under cultivation or the amount spent by his clients. The judgment-debtors had no right to the land originally. They remained in possession for more than twenty-three years, and if they have spent any money or labour, they have been amply compensated by their long possession. The appeal fails and is dismissed with costs.

S.C./D.S.

*Appeal dismissed.***A. I. R. 1937 Lahore 830**

ADDISON AND DIN MOHAMMAD, JJ.

In the matter of

Ram Rakha Mal & Sons Ltd., Amritsar
— Assessee.

v.

Commissioner of Income-tax, Lahore.

Civil Ref. No. 9 of 1936, Decided on 23rd December 1936, referred by Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, Lahore, D/- 20th February 1936.

(a) Income-tax Act (1922), Ss. 25-A and 26—Interpretation.

So far as the scheme of the Income-tax Act goes, each section deals only with the matters specified therein and goes no further and each section completely covers the matter with which it deals. S. 25-A of Income-tax Act applies only to those cases where the question involved is one of pure and simple disruption of a Hindu undivided family unattended by conversion or transformation into a new entity. It is on this account that sub-s. (1) of S. 25-A limits the enquiry to be made by an Income-tax Officer to the solitary question, whether separation of the members of a Hindu undivided family has taken place and the family property has been partitioned. The remaining two sub-sections are merely complementary of the first sub-section and deal with only those matters which arise therefrom. In the same manner, S. 26 is intended to meet completely those cases which are specified in sub-ss. 1 and 2 thereof respectively, in whatever way the situation envisaged there may arise. If, therefore, in the place of a Hindu undivided family, which is a person, a new firm is constituted or a new company brought into existence, which again is a person, it cannot be urged that the provisions of sub-s. (1) or sub-s. (2), as the case may be, are not attracted simply because there exists a section which expressly deals with the disruption of a Hindu undivided family.

[P 833 C 1]

(b) Income-tax Act (1922), Ss. 25-A and 26—Hindu undivided family and limited company are mutually exclusive—Without disruption, conversion of Hindu undivided family into company in its entirety is inconceivable.

A Hindu undivided family and a firm or a limited company are mutually exclusive and cannot co-exist, the main feature of a Hindu undivided family being jointness of tenancy with a right of survivorship amongst its constituents and the chief characteristic of a firm or a company being separateness of interest and no survivorship. Therefore, without disruption the conversion of a Hindu undivided family into a firm or a company in its entirety is inconceivable and so long as it remains undivided, the question of succession to it as a whole by another entity does not arise.

[P 833 C 2]

(c) Income-tax Act (1922), S. 26 (2)—Partial succession to Hindu undivided family is possible and legal—Company can be assessed to extent of business to which it succeeds.

A partial succession to a Hindu undivided family is not repugnant to any notion of law. A Hindu undivided family is a different person altogether from a company; its rights, its obligations, its privileges and its constitution are altogether different from the rights, obligations, privileges and constitution of a company and as it is possible under the Income-tax law that person conducting several businesses may be succeeded in a particular business which is divisible from the other businesses of his, a Hindu undivided family as a person can in the matter of such business be succeeded by a company to that extent. The assessment can be made upon the company to that extent to which it is found in fact to have actually succeeded to those businesses which are separable from the rest: *Case law discussed.*

[P 835 C 1, 2]

(d) Income-tax Act (1922), Ss. 22 and 34—Notice—No fresh notice upon successor is necessary—Proceedings started against predecessor continue against successor even if predecessor ceases to exist.

The Income-tax Act does not contemplate any fresh notice to be served upon the successor, inasmuch as the proceedings once started against the predecessor continue against the successor even if the predecessor has ceased to exist. In the absence of any clear direction to the contrary, no obligation is imposed upon by the Income-tax Department in this behalf.

[P 836 C 1]

(e) Income-tax Act (1922), S. 66—Whether party has discharged onus is question of fact.

The question whether a party has discharged the onus or not is a question of fact and therefore cannot be raised before the High Court under S. 66, Income-tax Act: *A I R 1930 P C 91* and *A I R 1918 P C 92, Rel. on.*

[P 836 C 1]

(f) Income tax—Computation of income—Method.

The income is to be computed with reference to the position at the time it was earned, although by S. 26, Income-tax Act, the charge of tax computed on that basis is laid upon some one else.

[P 836 C 1, 2]

(g) Income-tax Act (1922), S. 66—Officer exercising discretion not arbitrarily—High Court will not interfere.

If an officer vested with the discretion to do or not to do a particular thing does not misdirect himself in law, or in other words, does not exercise his discretion arbitrarily, High Court will not be justified in interfering with it: *A I R 1917 P C 156, Rel. on.*

[P 836 C 2]

(b) Income-tax Act (1922), S. 30 (2) — Appeal admitted—New matter raised in form of additional ground of appeal cannot be admitted afterwards.

An Assistant Commissioner has no authority under sub-s. (2), S.30 of Income-tax Act, to admit a new matter raised in the form of additional ground of appeal after an appeal has once been admitted, whether within the period prescribed therefor, or after its expiry. All that he can do under this enabling provision is to admit an appeal for the first time even if it is presented after the period prescribed therefor. [P 836 C 2]

Kirpa Ram Bajaj — for Assessee.

J. N. Aggarwal, S. M. Sikri and

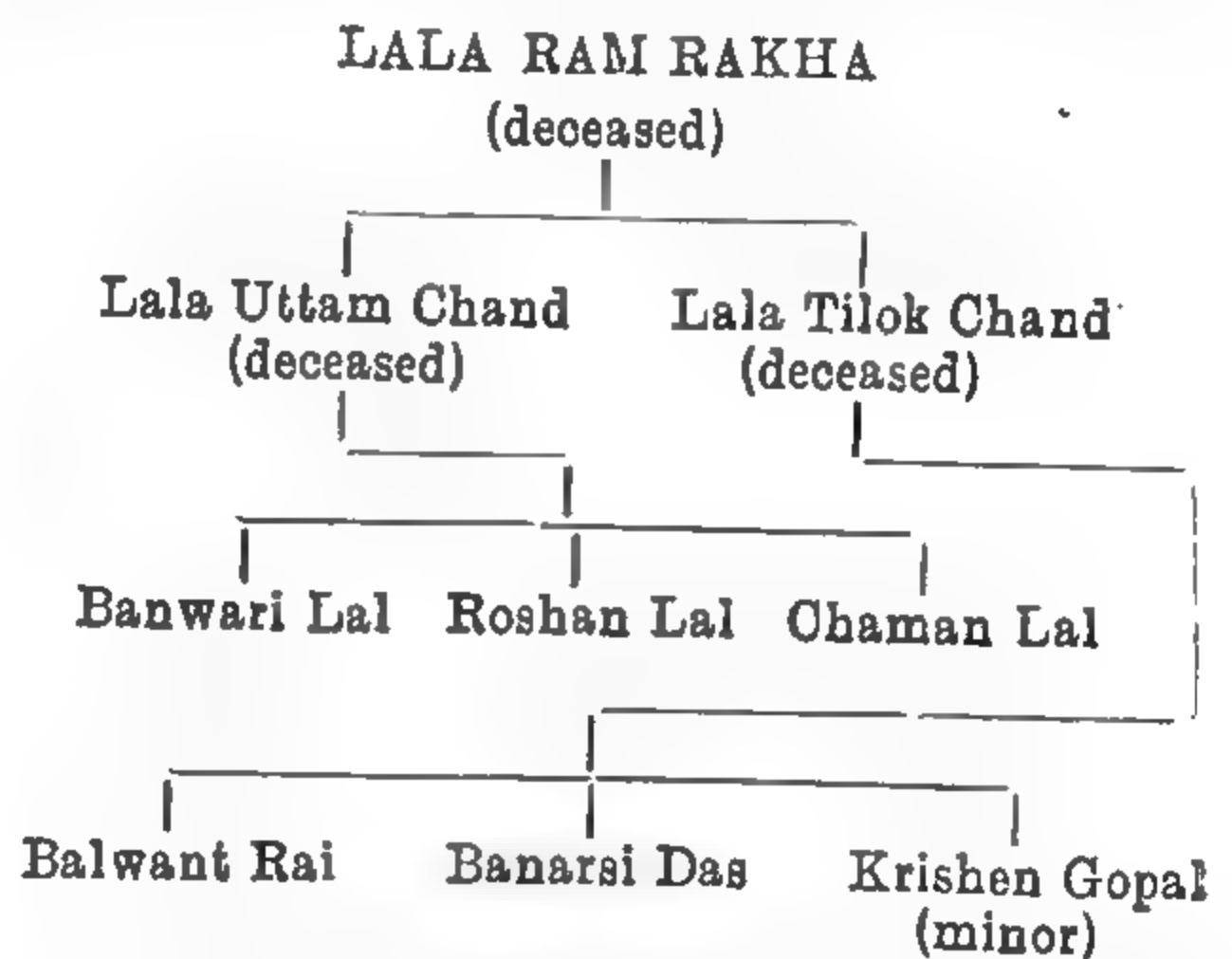
M. M. Aslam Khan — for I. T. Commr.

Din Mohammad, J. — This is a case stated by the Commissioner of Income-tax under S. 66 (2), Income-tax Act, referring the following questions of law arising out of the appellate order of the Assistant Commissioner of Income-tax in the matter of the assessment of Messrs. Ram Rakha Mal and Sons Limited for 1933.1934:

(1) Was there any material on which the Income-tax Officer could find that the assessee company succeeded to the business of the family? (2) In view of the finding under S. 25-A that the Hindu undivided family had not discontinued for the purposes of the Act, should assessment be made upon the company which was found in fact to have actually succeeded to the business? (3) Is the successor company liable to be charged under S. 26 in respect of assessment made during 1934.1935 for 1933.1934, under S. 34, upon the predecessor family's income of the "previous year" 1932.1933? (4) The assessee company having succeeded to the business in issue after notice duly served under S. 34 upon the predecessor, is the company liable to be assessed without further direct service under the section upon the company? (5) Was it possible in law for the Income-tax Officer to hold that the assessee had not discharged the onus upon him of establishing his claim to deduction of Rs. 2,748 (credited to accounts of members of the family and their wives) as being interest upon capital borrowed within S. 10 (2) (iii)? (6) Were the salary payments attributed to members of the income-earning family, a proper deduction from the income assessed in the charge of the successor under S. 26 (2)? (7) Was it possible in law for the Income-tax Officer to hold that the assessee had not dis-

charged the onus upon him of establishing his claim that the amount of Rs. 1,218 at the debit of Narain Singh fell irrecoverable in "the previous year"? (8) In the matter of interest from mortgage in account Rani Harnam Kaur appealed upon grounds 12, 13 and 14, was the contention raised by affidavit, filed at hearing on 10th July 1935 out of the ordinary time-limit provided in S. 30 (2) validly refused as being a new contention, not raised either at assessment or in the said grounds?

In order to realise fully the true implications of the first three questions of law stated above, it will be necessary briefly to state the facts of the case. The pedigree of the family with which we are concerned is as follows:



This family constituted a Hindu undivided family and had been assessed to income-tax as such until the time the present dispute arose. Until 1923.24 the business of the family was done in the name of Ram Rakha Mal-Tilok Chand. Subsequently, the business was conducted under the style of Ram Rakha Mal and Sons (hereinafter called the assessee). It appears that in 1933.34 no notice was served on the assessee calling upon him to furnish the usual return. On 16th May 1934, notice was for the first time issued to the assessee under sub-s. (2) of S. 22 read with S. 34, Income-tax Act. On 18th July 1934, the family converted itself into a private limited company under the style of Ram Rakha Mal and Sons Limited, all the adult male members of the family becoming the share-holders of the said company. On 20th August 1934, the assessee furnished a return showing a loss of Rs. 49,132-6-9. On 18th November 1934, another return was furnished showing the same amount of loss.

During the course of the assessment proceedings, the assessee represented that the family had disrupted virtually in 1922, but definitely on 18th June 1934, since when the business of the family had been transferred to a limited company. Thereupon the Income-Tax Officer issued notices under S. 25-A to the members of the family and held an inquiry as provided for in sub-s. (1) of that section. He however came to the conclusion that the assets of the family had not been transferred to the company in their entirety nor had they been divided in any manner either in the account books of the family or in the books of the company and that the most that could be said was that the family was in the process of partition. He accordingly held that the family should be deemed for the purposes of the Act to continue to be a Hindu undivided family. This order was made on 14th February 1935. Simultaneously, an assessment order was made on the same date and the assessee was for the purposes of the income-tax of the assessment year treated as a limited company, having succeeded to the business of the Hindu undivided family and thus being liable to be assessed as a limited company, presumably under the provisions of sub-s. (2) of S. 26, Income-tax Act. From this order, the assessee preferred an appeal to the Assistant Commissioner raising various points of law arising from the case. The Assistant Commissioner with a slight modification in the estimate of income upheld the order of the Income-tax Officer. The assessee then moved the Commissioner who as stated above has eventually referred the questions of law as set forth above with his opinion thereon.

The first two questions of law referred to us can be disposed of together. They rest on the determination of the main question whether in face of the finding of the Income-tax Officer that the Hindu undivided family was still in the process of partition and had not disrupted, the assessee could be treated as a limited company for the purpose of assessment. The assessee contends that sub-s. (3) of S. 25-A is conclusive on this matter, and that when once an Income-tax Officer finds that the family has not been partitioned, the only order that he can lawfully make is the one contemplated by that section and the assessee cannot but be treated as a Hindu undivided family. He

further urges that even if it be held that the family has been replaced by a company in any way, sub-s. (2) of S. 26 does not apply, as in the first instance no change of ownership takes place in the circumstances within the meaning of sub-s. (2) of S. 26, and secondly, the notion of partial succession is repugnant to law. As against this, it has been urged on behalf of the Commissioner that in spite of a finding under sub-s. (3) of S. 25-A, if a Hindu undivided family carrying on business as such is found to have been succeeded by any other person contemplated by law, sub-s. (2) of S. 26 comes into play. It is further added that in the case of an assessee conducting two or three separate businesses, succession is possible to a particular business which is separable as a whole from the other activities of the assessee.

This necessitates a close examination of S. 25-A and S. 26. S. 25-A is headed "Assessment after partition of a Hindu undivided family". Sub-s. (1) of that section provides for a claim being made by any member of a Hindu family hitherto assessed as undivided, that a partition has taken place among the members of such family. As soon as such a claim is made, the Income-tax Officer is enjoined to make an inquiry into the matter. If he arrives at the conclusion that the claim as made is substantiated, he is required to pass an order to that effect and make the assessment in accordance with sub-s. (2) of that section; on the other hand, if he finds that the claim is not established and he does not consequently pass the order referred to above, sub-s. (3) makes it incumbent upon him to treat the family as a Hindu undivided family.

Section 26 is divided into two sub-sections. Sub-s. (1) is headed "Change in constitution of a firm" and sub-s. (2) is headed "Change of ownership of business". Sub-s. (1) provides for those cases where a change has occurred in the constitution of a firm or a new firm is constituted, and sub-s. (2) deals with the situation when it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person. 'Person' as defined in Cl. (9) of S. 2, Income-tax Act includes a Hindu undivided family, and 'person' as defined in the General Clauses Act, 1897 includes any company, or association or body of individuals, whether incorporated or not.

Considering that in the matter of the interpretation of statutes, our first effort should be to reconcile the various provisions of an enactment with one another and to assign to the clear words of a statute the meaning which they ordinarily carry and thinking at the same time that the Legislature has not been guilty of redundancy of expression or repetition of subjects, the irresistible conclusion to which we are driven is that so far as the scheme of the Act goes, (a) each section deals only with the matters specified therein and goes no further, and (b) each section completely covers the matter with which it deals. S. 25-A in our view applies only to those cases where the question involved is one of pure and simple disruption of a Hindu undivided family unattended by conversion, or transformation into a new entity. It is on this account that sub-s. (1) of S. 25-A limits the enquiry to be made by an Income-tax Officer to the solitary question, whether separation of the members of a Hindu undivided family has taken place and the family property has been partitioned. The remaining two sub-sections are merely complementary of sub-s. (1) and deal with only those matters which arise therefrom. If it is further borne in mind that it is not impossible that a Hindu undivided family may disrupt without transforming itself into a firm or converting itself into a Company, the interpretation put by us upon this section does not appear to be unreasonable.

In the same manner, S. 26 is intended to meet completely those cases which are specified in sub-ss. (1) and (2) thereof respectively, in whatever way the situation envisaged there may arise. If therefore in the place of a Hindu undivided family, which is a person, a new firm is constituted or a new Company brought into existence, which again is a person, it cannot be urged that the provisions of sub-s. (1) or sub-s. (2), as the case may be, are not attracted, simply because there exists a section which expressly deals with the disruption of a Hindu undivided family.

The only question therefore that requires determination in this connexion is whether a Hindu undivided family, so long as it remains undivided, can convert itself into a firm, or be succeeded by a Company, or whether it must cease to exist or, in other words, disrupt itself entirely before it can take a new shape in its entirety. In our

view, a Hindu undivided family and a firm or a limited Company are mutually exclusive and cannot co-exist, the main feature of a Hindu undivided family being jointness of tenancy with a right of survivorship amongst its constituents and the chief characteristic of a firm or a Company being separateness of interest and no survivorship. We are accordingly of opinion that without disruption the conversion of a Hindu undivided family into a firm or a Company in its entirety is inconceivable and that so long as it remains undivided, the question of succession to it as a whole by another entity does not arise.

In the present case there is a clear finding of the Income-tax Officer that the family is still in the process of partition and that there has not been complete partition in the eye of the law. In these circumstances, we consider that it could not be held that the family had been entirely replaced by a limited Company. The matter however does not end here. It is contended on behalf of the Commissioner that the family in this case can still be treated as having been succeeded by a limited Company to the extent that it is admitted to have been replaced by a limited Company. He urges, as remarked before, that partial succession is not unknown to law and refers in this connexion to 3 I T C 341,¹ 3 I T C 441,² 6 I T C 92³ and 6 I T C 271.⁴ In 3 I T C 341¹, on a partition of a Hindu undivided family the assessee got the family business as his share, the other co-parceners, the assessee's sons, relinquishing their rights therein and starting a separate business of their own. The assessee continued to carry on the business under the old name and style, retaining the account books with the right of realizing the business's outstanding amounts. In those circumstances, it was held by a Division Bench of this Court that there was no discontinuance of the business within the meaning of S. 25, sub-s. (3), Income-tax Act, and that as a result

1. *Kalu Mal Shori Mal v. Commr. of Income-tax, Punjab*, A I R 1929 Lah 461=117 I C 228=3 I T C 341.

2. *Arunachalam Chettiar v. Commr. of Income-tax*, A I R 1929 Mad 769=122 I C 793=57 M L J 300=3 I T C 441 (F B).

3. *Commr. of Income-tax v. Best & Co., Ltd.*, A I R 1932 Mad 434=138 I C 485=55 Mad 832=64 M L J 15=6 I T C 92.

4. *Sind Light Ry. Co., Ltd. v. Commissioner of Income-tax, Bombay*, A I R 1932 Sind 189=138 I C 673=27 S L R 47=6 I T C 271.

of the partition, the assessee succeeded to the family business within the meaning of S. 26.

In 3 I T C 441,² a Special Bench of the Madras High Court held that S. 26 was applicable to the case of an assessee, a member of a Hindu undivided family (which owned a share in a foreign money-lending business), who got inter alia the family interest in the foreign business as his share in the partition of the family. Sir C. V. Kumaraswami Sastriar, who delivered the judgment, remarked :

Prior to the partition all the members of the joint family constituted a firm. By reason of the partition certain members who constituted the firm ceased to have interest in the firm and their interest by reason of the partition devolved on the person or persons to whom their share in the business have been allotted.

In 6 I T C 92,³ Messrs. Best & Co. Ltd. had sold one of their businesses to a new Company floated for acquiring that business as a going concern.

In 6 I T C 271,⁴ the Sind Light Railway Company was the assessee. It had constructed on Government land two light railways in pursuance of two separate agreements with the Government of India. Some time later, Government took over one of the railways and paid the Company 60 per cent. of the income for nine months as profit and compensation. It was held by the learned Judicial Commissioners of Sind that the Government had succeeded to the Company's separate and distinct business within the meaning of S. 26, sub-s. (2), and consequently the Company was not assessable on the profits made for the period of nine months.

It would appear that these cases do not throw any light on the question at issue before us, inasmuch as in the first two cases partition had already taken place and in the last two cases the assessee was not a Hindu undivided family.

The assessee, on the other hand, contends that in the first instance partial partition and partial succession are not recognized by Hindu law, and secondly if a Hindu undivided family is succeeded by a Company wholly or partially, no change of ownership takes place within the meaning of sub-s. (2) of S. 26. The assessee has not cited any authority in support of his first contention, nor has he developed this point in the course of his arguments, while in connexion with his second contention he has relied on a recent decision

of the Madras High Court in O. P. No. 285 of 1935 as well as 9 I T C 64.⁵

The question that was referred to the Special Bench in O. P. No. 285 of 1935 was: Whether when all the members of a Hindu undivided family, after separation and partition, constitute themselves into a firm in order to continue the business hitherto carried on by an undivided family, assessment of the total income of the undivided family up to the date of separation and partition should be made (a) on the firm carrying on the business as successors of the undivided family within the meaning of S. 26 (2), Income-tax Act, or (b) on the members aforesaid as if no separation or partition had taken place according to S. 25-A, Income-tax Act. Relying on a previous judgment of their own Court reported in 70 M L J 13,⁶ the learned Judges held that the word 'succession' as used in S. 26 (2) connoted a transfer of ownership which could not be predicated of a succession by a firm to a Hindu undivided family which already owned the business. The answer they therefore gave to the question propounded was that the assessment must be in accordance with S. 25-A, sub-s. (2), Income-tax Act. With all respect, we are not prepared to endorse this opinion.

Sitting as a Division Bench, we recently disposed of a case in which a similar question arose and we came to the conclusion that where a Hindu undivided family is found to have disrupted and to have been replaced by a new firm, the case is taken out of the pale of S. 25-A and is governed by S. 26 : See 8 I T C 380.⁶ Later, the same principle has been re-affirmed by a Full Bench of this Court, though worded differently, in Civil Reference No. 11 of 1936.⁷ The principle enunciated in these cases gains support from 2 I T C 338⁸ where a Division Bench of the Allahabad High Court in a case in which a certain firm first carried on busi-

5. *Jupudi Kesava Rao v. Commr. of Income-tax*, A I R 1936 Mad 67 = 159 I C 840 = 59 Mad 377 = 70 M L J 13 = 9 I T C 64 (S B).

6. *Beli Ram and Brothers v. Commr. of Income-tax Punjab N. W. F. & Delhi Provinces*, A I R 1935 Lah 681 = 160 I C 617 = 8 I T C 380.

7. *Mitter Chand-Lakhmi Das v. Commissioner of Income-tax*, Reported in A I R 1937 Lah 172 = 167 I C 36 = ILR (1937) Lah 189. (FB).

8. *In the matter of Nehal Chand Kishorilal*, A I R 1927 All 397 = 102 I C 189 = 49 All 611 = 25 A L J 366 = 2 I T C 338.

ness in the capacity of a Hindu undivided family and was later converted into a partnership with specified shares, *held* that the registered firm on the date that it was constituted became the successor of the Hindu undivided family in the carrying on of the business. Similarly in 1 T C 343, decided by the High Court of Justice in England, it was held in a case where a private partnership had been converted into a company with limited liability, that such conversion created a succession contemplated by law. In the course of his judgment Grove, J. remarked as follows:

There was undoubtedly a change in the partnership and a very important change when the concern was converted from an ordinary partnership into a limited liability company.

The other case relied on by the assessee reported in 9 I T C 64⁹ is also distinguishable. There a notice had been served on G as manager of a Hindu undivided family. G died during the assessment proceedings leaving a son who continued to carry on the family business. A question arose whether the assessment could be made under S. 26, sub-s. (2). It was held that in the circumstances of the case the assessee, who was already a partner-owner of the business becoming entitled to the family business by survivorship, had not succeeded to the business within the meaning of S. 26 (2), and hence was not liable to be assessed thereunder. Though the authorities cited for the commissioner do not afford any help to him, yet on general principles we are disposed to agree with the contention raised by him that partial succession to a Hindu undivided family is not repugnant to any notion of law.

Under Hindu law, a Hindu undivided family can through its karta alienate a part of its property to a stranger without affecting its own status in any manner. The alienee can even claim partition on the basis of his own acquisition. If an alienation can be made to a stranger, we do not consider that a replacement by a stranger cannot take place. As already observed, a Hindu undivided family is a different person altogether from a company; its rights, its obligations, its privileges and its constitution are altogether different from the rights, obligations, privileges and constitution of a company, and as it is possible under the Income-tax law that a person conducting several businesses

may be succeeded in a particular business which is divisible from the other businesses of his, a Hindu undivided family as a person can in the matter of such business be succeeded by a company to that extent. This conclusion in our view does not come into clash with the conclusion at which we have arrived above that in case a finding is arrived at by an Income-tax Officer that a family has not disrupted, a Hindu undivided family is to be deemed to continue to be a Hindu undivided family. The question of rate was also raised in the course of arguments but that need not be discussed at length, as it is concluded by the decision of their Lordships of the Privy Council in 52 Bom 123.⁹ Even the language of sub-s. (2) itself is clear on the point. The assessment on the successor is to be made as if he had been carrying on the business, profession or vocation throughout the previous year and as if he had received the whole of the profits for that year.

Our answer to question No. (1), therefore, is that there was no material on which the Income-tax Officer could find that the assessee company succeeded to the business of the family in its entirety; and our reply to question No. (2) is that though the Hindu undivided family in this case had to be deemed to be an undivided family in face of the finding that no disruption had taken place, the assessment could be made upon the company to that extent to which it was found in fact to have actually succeeded to those businesses which were separable from the rest.

Question 3.—In view of our answers to the first two questions, the answer to this question need not detain us long. The language of sub-s. (2) of S. 26 is too plain in this respect to require further elucidation. Our answer to this question therefore is that the limited company to the extent that it succeeds to the Hindu undivided family is liable to be charged as a successor in respect of the 1933-34 assessment made during 1934-35 under S. 34.

Question 4.—This question relates to the validity of the assessment in the absence of a formal notice served on the successor. The

9. Commr. of Income-tax Bombay v. Western India Turf Club, A I R 1928 P C 1 = 106 I C 642 = 55 I A 14 = 52 Bom 123 (P C).

assessee contends that inasmuch as before the assessment was made, the person on whom the notice had originally been served ceased to exist, though partially, and another person came into being in relation to those separable businesses to which he had succeeded, no order could be made qua the latter without serving upon him a fresh notice under S. 22 or S. 34. Apart from the fact that this objection was not raised at the time of the assessment and could not be raised before the Assistant Commissioner as a matter of right, there is no substance in it even on the merits. The Income-tax Act does not contemplate any fresh notice to be served upon the successor, inasmuch as the proceedings once started against the predecessor continue against the successor even if the predecessor has ceased to exist. In the absence of any clear direction to the contrary, no obligation is imposed upon the department in this behalf. We accordingly hold that no fresh notice was necessary in the case of the successor who will now be liable as such to the extent indicated above.

Questions 5 and 7 are questions of fact and cannot be raised before us. The only objection covered by these questions is that the Income-tax Officer was not right in holding that the assessee had failed to discharge the onus that lay upon him. There is abundant authority for the proposition that the question whether a party has discharged the onus or not is a question of fact. In 11 Lah 199,¹⁰ the Appellate Court had come to the conclusion that the onus upon the appellant had not been discharged and their Lordships of the Privy Council, relying on a previous judgment of their own in 46 Cal 189,¹¹ observed that the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact. It may also be remarked in this connection that the assessee gave up Question 7 before us.

Question 6 must be answered in the negative. The Commissioner had discussed the matter fully in the opinion submitted by him on that question, and we do not find any such flaw in the reasoning em-

ployed by him as to justify a different answer. We entirely agree with him that "the income is to be computed with reference to the position at the time it was earned, although by S. 26 the charge of tax computed on that basis is laid upon some one else."

Question 8: The only matter referred to us in this question is whether the Assistant Commissioner validly refused to entertain a new contention not raised either at the assessment or in the grounds of appeal submitted to him. First, on the authority in 104 P R 1917,¹² we consider that if an officer vested with the discretion to do or not to do a particular thing does not misdirect himself in law, or in other words, does not exercise his discretion arbitrarily, we will not be justified in interfering with it. Secondly, on the interpretation that we put upon the relevant provision of sub-s. (2) of S. 30, we are of opinion that an Assistant Commissioner has no authority under that sub-section to admit a new matter raised in the form of an additional ground of appeal after an appeal has once been admitted, whether within the period prescribed therefor, or after its expiry. All that he can do under this enabling provision is to admit an appeal for the first time even if it is presented after the period prescribed therefor.

At first sight, this proposition may look startling, but a reference to the provisions relating to appeals under the Code of Civil Procedure will make our meaning clear. The period of limitation for presenting such appeals is prescribed in the Schedules appended to the Limitation Act. In the main Act, S. 5 has been enacted to confer authority upon the Appellate Courts to admit appeals in certain circumstances even after the expiry of the period of limitation prescribed therefor. In spite of the power so vested in the Appellate Courts, the Legislature has specifically provided in R. 2 of O. 41, Civil P. O., for the admission of additional grounds of appeal and has enabled the appellants to urge any ground not taken before by leave of the Court. The discretion vested in the Courts in this matter is not circumscribed within those limits, within which it is hedged under S. 5, Limitation Act. No such provision, however, has been made in the Income-tax Act, which relating to the matters ex-

10. *Wali Mahomed v. Mahomed Bakhsh*, A I R 1930 P C 91=122 I O 316=57 I A 86=11 Lah 199 (P C).

11. *Nafar Chandra Pal v. Shukur Sheikh*, A I R 1918 P C 92=51 I O 760=45 I A 183=46 Cal 189 (P C).

12. *Brij Indar Singh v. Kanshi Ram*, A I R 1917 P C 156=42 I O 43=44 I A 218=45 Cal 94=104 P R 1917 (P C).

pressly dealt with therein is self-contained. It would be clear therefore that when once a memorandum of appeal has been put in under S. 30, no new matter can be raised afterwards. We accordingly hold that the Assistant Commissioner's refusal which is being challenged in this question was warranted by law.

We answer the questions propounded by the Commissioner accordingly. As a result, the assessee, in answer to Questions 1, 2 and 3 will be liable to be assessed as a limited Company in relation only to his jewellery businesses in Lahore, which have been admitted before us to have been transferred to the company, and for the rest the assessee will be treated as a Hindu undivided family. The answer to all other questions will go against the assessee. In view of the peculiar circumstances of the case, we leave the parties to bear their own costs.

S.O./D.S. *Answered accordingly.*

A. I. R. 1937 Lahore 837

TEK CHAND AND ABDUL RASHID, JJ.

Mt. Dhapan and another — Defendants
— Appellants.

v.

Sri Ram — Plaintiff — Respondent.

Second Appeal No. 283 of 1937, Decided on 10th June 1937, from decree of Dist. Judge, Karnal, D/- 8th December 1936.

Mortgage—Adverse possession—Mortgagee not holding land adversely—His subsequent conduct not creating belief in mortgagor's mind of his holding land adversely—Mortgagee cannot deprive mortgagor of his land and alter his title as such.

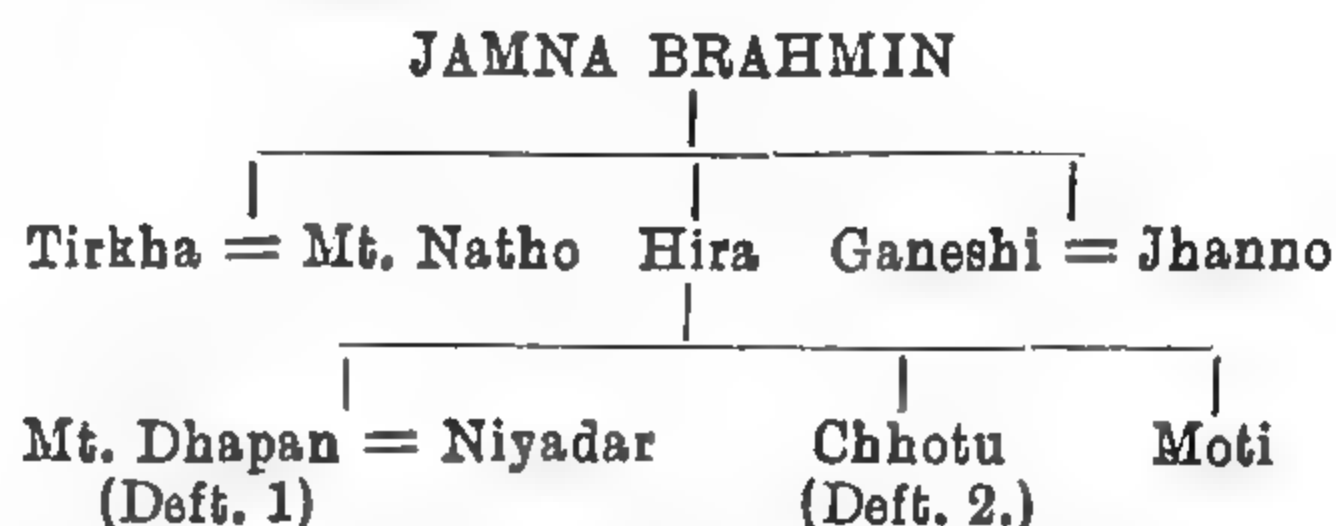
In order to deprive the mortgagor of the property, the mortgagee must clearly evince his intention of holding the land adversely to the mortgagor and must do some act as a manifestation of that intention to the knowledge of the mortgagor. But where the conduct of the mortgagee not only does not manifest any intention of holding the land adversely to the mortgagor, on the other hand his entire conduct induces a belief in the mind of the mortgagor that he is merely holding it as a mortgagee, he cannot alter the character of his original title nor can he rely on a possession adverse to the mortgagor to deprive him of his right to redeem the property : 65 P R 1908, *Rel. on*; 27 P L R 235; 232 P L R 1911 and A I R 1925 Lah 53, *Disting.*

[P 838 C 2;
P 839 C 1]

Shamair Chand — for Appellants.

Faqir Chand Mital — for Respondent.

Abdul Rashid, J. — The following pedigree table is necessary for the purposes of this appeal :



In the year 1890-91 Tota Jat gifted the land in dispute, comprising an area of 8 bighas 13 biswas, in favour of Tirkha by way of charity. On 20th October 1898, Mt. Natho, the widow of Tirkha, mortgaged this land to Sri Ram plaintiff for Rs. 400 without possession. It was stipulated that, if the mortgagor failed to redeem the land within a period of five years, it would be considered to have been sold to Sri Ram for the sum of Rs. 400 and interest due thereon. On 4th February 1902, Mt. Natho made a report to the Patwari stating that she had sold the land in dispute to Sri Ram plaintiff for Rs. 637. This sum of Rs. 637 was made up of the old mortgage debt of Rs. 400 and the interest due thereon. The parties appeared before the Revenue Officer on 9th May 1902, and Mt. Natho made a statement that she had sold the land to Sri Ram for Rs. 637. Hira, her husband's brother, objected saying that Mt. Natho had not received any consideration. The Revenue Officer was of the opinion that no mutation of sale could be sanctioned as the period of five years had not elapsed since the execution of the mortgage deed dated 20th October 1898. He therefore ordered that a mutation be entered in the name of Sri Ram as a mortgagee with possession on the statement of Mt. Natho, the mortgagor.

On 12th February 1903 Hira, reversioner of Mt. Natho's husband, instituted a suit against Sri Ram and Mt. Natho for a declaration that the mortgage deed executed on 20th October 1898, in respect of which mutation had been sanctioned on 4th February 1902 for Rs. 637, was without consideration and necessity and shall not affect his reversionary rights after the death of the mortgagor. In her written statement, Mt. Natho supported Sri Ram by stating that the mortgage was for consideration and necessity, and was binding on her and the reversioners of her husband. It was not stated in this written

statement that she had sold the land in dispute to Sri Ram. A separate written statement was filed by Sri Ram on 22nd May 1903. He stated that the mortgage was for consideration and necessity and was binding on Hira. He further alleged that the plaintiff was not entitled to any relief until he had repaid the entire mortgage debt, amounting to Rs. 637. Sri Ram made no allegation in his written statement that the land had been sold to him by Mt. Natho on 4th February 1902. L. Behari Lal, Munsiff, dismissed Hira's suit on 15th August 1903, on the ground that the mortgage in dispute had been created by Mt. Natho for valid necessity. Mt. Natho died in 1905. The land was thereupon mutated in the name of Hira who was shown as the mortgagor, Sri Ram being shown as the mortgagee. Hira died on 20th December 1918, and the land was mutated in the name of Mt. Dhapan, Chhotu and Moti. These three persons were shown as mortgagors and Sri Ram was shown as mortgagee in the revenue papers. Sri Ram continued to be shown as mortgagee of the land till 24th November 1933, when the present suit was instituted by him. It appears that the defendants had agreed to sell the land in dispute to Harphul and Chhotu Jats for Rs. 2,700 in October 1933, and this compelled the plaintiff to bring the present suit. The case of the plaintiff is that he purchased the land from Mt. Natho on 4th February 1902, and that he is the owner thereof. In the alternative, it is pleaded by him that if the sale be treated as invalid, he has been holding the land adversely from 4th February 1902 and has become the owner thereof by adverse possession. The trial Court dismissed the plaintiff's suit. On appeal the suit was decreed by the lower Appellate Court. The defendants have preferred a second appeal to this Court.

The sole question for consideration in this appeal is whether the plaintiff has been in adverse possession of the land in dispute from 4th February 1902. The facts alluded to above show that originally he was a mortgagee of this land without possession. In 1902 Mt. Natho agreed to sell the land to him for the sum of Rs. 637 consisting of the said mortgage debt, and a report to that effect was made to the revenue authorities, but the Revenue Officer refused to sanction mutation so far as the sale was concerned and treated the

transaction as a mortgage with possession for Rs. 637. From 1902 to 1933, Sri Ram, plaintiff, was shown as a mortgagee with possession, and Mt. Natho and later on the reversioners of her husband were throughout shown as the owners of the land in suit. The written statements put in by Mt. Natho and Sri Ram in the suit brought by Hira show conclusively that Sri Ram submitted to the position assigned to him by the order of the Revenue Officer dated 9th May 1902. He regarded himself not as an owner but merely a mortgagee in possession. He did not lodge any appeal against the order of the Revenue Officer. He did not institute any suit to establish a sale in his favour.

When Hira challenged the mortgage by means of a civil suit, Sri Ram did not take up the position that he had purchased the land in 1902: he contented himself with pleading that Hira was not entitled to any relief until the sum of Rs. 637 had been paid to him. It must be remembered that even though Hira only challenged the mortgage as being without consideration and necessity, the plaintiff could get that suit dismissed by pleading that there was no subsisting mortgage and that he had become the owner of the land in dispute on account of the sale having taken place in his favour in the year 1902. The conduct of Sri Ram from 1903 upto the time of the institution of the present suit shows in unmistakable terms that he regarded himself as a mortgagee of the land in dispute, and gave the reversioners of Mt. Natho the impression that he was a mere mortgagee and not the owner of the land.

It was held by a Division Bench of the Punjab Chief Court in 65 P R 1908¹ that a mortgagee, by conditional sale who is in possession of the property, cannot, by obtaining a decree in an illegal foreclosure proceeding or by asserting himself to be the proprietor and thereby obtaining mutation to that effect in his favour, alter the character of his original title, nor can he rely on a possession adverse to the mortgagor to deprive him of his right to redeem the property. In order to deprive the mortgagor of the property the mortgagee must clearly evince his intention of holding the land adversely to the mortgagor and must do some act as a manifestation of that intention to the knowledge of the

1. Indar v. Assa Singh, (1908) 65 P R 1908=90 P L R 1908=113 P W R 1908.

mortgagor. The conduct of Sri Ram from 1903 to 1933 not only does not manifest any intention of holding the land adversely to the mortgagor; on the other hand his entire conduct induced a belief in the mind of the mortgagor that he was merely holding it as a mortgagee. The learned counsel for the respondent contended that as an oral sale had taken place in his client's favour on 4th February 1902, he entered into possession as an owner, and that, thereafter his proprietary possession would continue, unless there was an explicit agreement between the parties that in future he would hold the land as a mortgagee. This argument in my opinion ignores entirely the attitude adopted by Sri Ram plaintiff in his litigation with Hira in 1903. As mentioned already, it appears that after 9th May 1902 Sri Ram reconciled himself to the order made by the Revenue Officer and regarded himself as a mortgagee with possession, the mortgage debt being Rs. 637.

Sri Ram appeared as a witness in the present case, and was compelled to admit during the course of cross examination that at the time of the attestation of the different Jamabandis and the settlement records he was present. In the entries recorded therein he was shown as a mortgagee of the land in dispute. He took no steps from the year 1903 upto the year 1933 to get these entries rectified by having himself entered as an owner of the land in dispute. It was only when Mt. Dhapan and Chhotu entered into an agreement to sell the land for Rs. 2,700 in favour of Harphul, Chhotu and Jage Ram that he tried to secure the land for himself by posing as the owner. The learned counsel for the respondent referred to a number of rulings, such as (1926) 27 P L R 235,² 232 P L R 1911³ and 79 I C 39.⁴ All these cases are however distinguishable as in these cases the possession was obtained by the person claiming to be the owner in assertion of his proprietary rights and there was no subsequent conduct on his part showing that his rights fell short of full proprietary rights. In the present case, even if it be held that Sri Ram obtained possession of the land in

dispute under an alleged oral sale by Mt. Natho, his subsequent conduct is incompatible with his ownership.

For the reasons given above I would accept this appeal, set aside the judgment and decree of the learned District Judge and restore that of the trial Court dismissing the suit. Having regard to all the circumstances of the case I would leave the parties to bear their own costs throughout.

Tek Chand, J.—I agree.

R.W./R.K.

Appeal accepted.

A. I. R. 1937 Lahore 839

DALIP SINGH AND SKEMP, JJ.

Sardar Sahib Sardar Khazan Singh—
Appellant.

v.

*Ralla Ram and another—*Decree-holders
—Respondents.

Letters Patent Appeal No. 151 of 1936, Decided on 16th June 1937, from order of Jai Lal, J., D/- 11th July 1936, reported in *A I R 1937 Lah 419*.

Specific Relief Act (1877), S. 55—Decree granting mandatory injunction against certain person—Execution of decree on ground of infringement of terms of decree—Person can plead that subject matter forming ground for mandatory injunction no longer exists; 39 P L R 712=*A I R 1937 Lah 419, Reversed.*

It is always open in a decree granting an injunction against a certain person when execution is taken out of that decree on the ground that that person has infringed the terms of the decree, to take as his defence that the subject matter which formed the grounds for the mandatory injunction no longer existed and therefore that it was impossible for him to infringe the terms of any decree. [P 840 C 2]

A window in respect of which a right of easement existed and a mandatory injunction was granted from interfering with its enjoyment was 4 feet in length and 2 feet in breadth and situated at a height of 10 feet from the ground. The window was subsequently changed to 4½ by 2½ feet dimensions and raised to a height of 16 feet from the ground when the house was re-built:

Held: that the alteration in the location and dimensions of the window was such that the old easement pertaining to the old window could not continue for the benefit of the new window: 26 Bom 374, *Rel. on*; 39 P L R 712=*A I R 1937 Lah 419, Reversed.* [P 840 C 2]

Charn Singh — for Appellant.

Shamair Chand — for Respondents.

Dalip Singh, J.—In 1905 one Gokal Shah and one Khushal Shah obtained a mandatory injunction against one Khazan

2. *Jowahar v. Amar Chand*, (1926) 27 P L R 235=93 I C 934.

3. *Jiwa Khan v. Lakhmi Chand*, (1911) 232 P L R 1911=11 I C 429=146 P W R 1911.

4. *Munna Lal v. Hamid Lal*, A I R 1925 Lah 53=79 I C 39.

Singh to the effect that they had acquired certain easements with respect to various parnalas, roshandan and windows existing in their respective houses and that therefore Khazan Singh could not build on his open site in such a fashion as to prejudice the rights of easements which had been acquired by Khushal Shah and Gokal Shah. The decree went on to state in what way Khazan Singh could build on his open site without infringing the various prescriptive rights enjoyed by Khushal Shah and Gokal Shah. Khushal Shah died and was succeeded by his son Ralla Ram. Ralla Ram purchased the house of Gokal Shah. He thus stood in the shoes both of Khushal Shah and Gokal Shah. In 1931 Ralla Ram brought the present applications for execution of the decree passed in 1905 alleging that Khazan Singh had built on his site in a manner which he was not allowed to do by the terms of the decree in 1905 and had thereby interfered with the prescriptive right enjoyed by the houses of Khushal Shah and Gokal Shah to both of whom Ralla Ram himself was the successor. Various defences were taken and various pleas urged which now no longer concern us. The trial Court held that the easements in both houses had been extinguished by change in the location of the ventilators, windows and parnalas, also that the applications were barred by time and hence dismissed both the applications. On appeal the learned District Judge held that the easement had been extinguished by change in location and dimension of the windows and therefore qua the window the question of limitation was immaterial. As regards the parnalas however he held that the applications were within time. He proceeded however to dismiss the appeals in both the applications.

So far as the application qua Gokal Shah's house was concerned, the matter went no further, but so far as the application qua Khushal Shah's house was concerned a second appeal was lodged in this Court. The learned Judge sitting in Single Bench who heard this appeal came to the conclusion that the findings of the Courts below were findings of fact and could not be disturbed, but that as a decree had been passed prescribing the terms on which Khazan Singh could build on his open site, all that the executing Court could now do was to fix its mind on the conditions as they existed in 1905 without regard to the

question whether those conditions now existed or not and proceed to determine whether the present building infringed any prescriptive rights, had the window and the parnalas existed now as they existed in 1905. He therefore accepted the appeal and remanded the case for disposal back to the trial Court. From this decision a Letters Patent appeal has been taken in this Court and we have heard the arguments of the learned counsel for the appellant and of the respondent. The facts are a little difficult to ascertain from the judgment of the trial Court or the District Court, because the Courts were dealing with the two houses of Khushal Shah and Gokal Shah together but it has been now conceded before us by the learned counsel on both sides and by the representatives of the parties who are present that so far as Khushal Shah's house is concerned, there was in it in 1905 one window in the second storey and one parnala in the roof of the second storey. We are therefore only concerned with these two matters in this Letters Patent appeal.

So far as the judgment of the learned Judge of this Court is concerned, it appears to me that it is always open in a decree granting an injunction against a certain person when execution was taken out of that decree on the ground that that person has infringed the terms of the decree, to take as his defence that the subject matter which formed the grounds for the mandatory injunction no longer existed and therefore that it was impossible for him to infringe the terms of any decree. In the particular case before us, the question is whether the window and the parnala are so changed by reason of re-building or re-placing of them that the old easement which formed the subject of the mandatory injunction no longer exists. The question therefore is essentially one of fact. Now the facts as ascertained in this Court are that the window originally was of the following dimensions: 4 feet length and 2 feet width. It was situated at a height of 10 or 11 feet from the ground. The present window is of the following dimensions: 4½ feet length by 2½ feet breadth and is situate at a height of 16 feet from the ground. It seems to me that both the location and the dimensions of the window have been altered in such a fashion that it is impossible to say or hold that the old easement pertaining to the old window continues for the bene-

fit of the new window. If authority were needed for this proposition, it can be found in 26 Bom 374¹ where the matter is discussed in the judgments of both the learned Judges who delivered judgment in that case.

So far however as the parnala is concerned, the old parnala was in the second storey and was situate at the height of 22 feet from the ground. The present parnala is also situate in the second storey and the height of the story is now 26 feet from the ground. Of course it is impossible to lay down any general rule as to what difference of height in a parnala should be reckoned as substantially increasing the burden of the servient tenement and thereby either extinguishing the easement or furnishing ground for a counter injunction against the dominant tenant, but in the circumstances of this particular case I cannot see that the raising of the height by 4 feet can possibly be held to have so materially increased the burden on the servient tenement as to extinguish the easement.

So far as the parnala in the first storey of the present building is concerned, there can be no question as it has been admitted before us by both parties that no such parnala existed at all in 1905. There can be therefore no question of any easement with respect to it nor of any infringement of the decree which was passed in 1905. I would therefore accept this appeal and hold that the plaintiff's application qua the window is no longer good in the case of Khushal Shah's old house now represented by Ralla Ram's new house. As regards the parnala, if that parnala has been blocked as held by the Courts below, which has not been contested before us, by the building of the wall called D L by the learned District Judge, then the execution application is good qua the parnala and it will be for the trial Court to determine with reference to these facts whether that wall should be demolished or whether the respondent Khazan Singh should provide some means for taking the water of this parnala on to his own house or land and disposing of it as before. The parties will bear their own costs throughout so far as the application qua Khushal Shah's old house, now Ralla Ram's new house, is concerned. The order of costs qua

Gokal Shah's house is of course not disturbed.

Skemp, J.—I agree.

K.B./R.K.

Appeal allowed.

A. I. R. 1937 Lahore 841

BHIDE, J.

Suraj Mal — Petitioner.

v.

Babu Ram and others — Respondents.

Civil Misc. Petn. No. 225 of 1937, Decided on 11th May 1937, for staying execution proceedings in the Court of Senior Subordinate Judge, Delhi.

Execution — Stay — Minor's estate under management of District Judge — The only creditor executing his decree by attachment and sale of minor's property — Stay of sale pending appeal by minor should be granted without insisting on fresh security.

Where the estate of the minor is under the management of the District Judge and there are no other creditors of the minor except the decreeholder executing his decree by attachment and sale of the minor's property, the stay of sale should be granted by allowing the property to remain under attachment pending the appeal filed by minor against decree under execution, without insisting on any other security.

[P 841 C 2; P 842 C 1]

R. L. Anand I — for Petitioner.

Darbari Lal and Mela Ram —

for Respondents.

Order. — This is an application for stay of execution of a decree for Rupees 13,305-12-3 with costs and interest obtained by the plaintiff-respondent against the petitioner who is a minor. The respondent seeks to sell a house belonging to the petitioner and attach a sum of about Rs. 6,000 (six thousand), which is lying in deposit with the Imperial Bank of India. The application purported to be made under S. 151, Civil P. C., but this was due to the fact that the petitioner's appeal had not been admitted when the petition was presented. The petition can be however treated to be one under O. 41, Rr. 5 and 6 as requested.

Order 41, R. 6 seems to be inapplicable as no application for stay of sale was made to the executing Court. As regards O. 41, R. 5, the sale can be stayed on furnishing security. But the learned counsel for the petitioner has requested that the house and the sum of Rs. 6,000 may remain under attachment during the pendency of the appeal and that this will form adequate security. The estate of the minor is under the management of the District Judge now and it is stated that

1. *Bai Hariganga v. Trikamlal*, (1902) 26 Bom 374=4 Bom L R 84.

there are no other creditors of the minor. It is further stated that it will be difficult for the minor petitioner to find any other security. In view of all the circumstances, the request made on behalf of the minor petitioner seems reasonable. I accordingly direct that house and the deposit in the Imperial Bank may be attached, but the property should not be sold or delivered till disposal of the appeal. I further direct that the appeal should be expedited.

B.D./R.K.

Order accordingly.

A. I. R. 1937 Lahore 842

MONROE, J.

Messrs. Tikam Chand. Bhag Chand —
Defendants—Appellants.

v.

Firm Kakhan Lal-Din Dayal —
Plaintiffs—Respondents.

Second Appeal Nos. 183 and 184 of 1937, Decided on 1st July 1937, from decree of Addl. Dist. Judge, Delhi, D/. 5th November 1936.

(a) Practice—Appeal — Alternative plea — Failure to prove claim for damages based on re-sale — Alternative plea for damages on basis of market price cannot be taken in appeal.

Where in a case for damages for breach of contract a party claims damages on the basis of a re-sale and fails to prove it, it cannot in appeal set up an alternative claim for damages on the basis of a market price. [P 842 O 2]

(b) Contract—Breach — Word 'deposit' implies forfeiture in case of breach.

The use of the word 'deposit' in contract implies an agreement that the sum deposited may be forfeited in case of breach by the depositor: *A I R 1919 All 265*; *Howe v. Smith, (1884) 27 Ch D 89* and *Collins v. Stimson, (1883) 11 Q B D 142, Rel. on.* [P 842 O 2]

M. C. Mahajan and J. L. Kapur —
for Appellants.

M. C. Sud — for Respondents.

Judgment. — These appeals arise out of a suit relating to an agreement for the sale and purchase of 220 bales of yarn, the vendors being the appellants in both the appeals. The respondents contracted to purchase 220 bales in July 1933 at the rate of Rs. 2-15-6 per bundle and paid a sum of Rs. 950 by way of deposit for which credit was to be given on completion. The respondents as plaintiffs, alleged that the appellants supplied 52 bales and failed to deliver the rest and that the respondents cancelled the contract on 30th August 1933: the respondents claimed Rs. 2,000 damages (including the sum of Rs. 950 paid as deposit) for breach of con-

tract. The appellants alleged that they were ready to perform the contract but the respondents broke the contract and refused to take delivery at the proper time.

The trial Judge held that the respondents were guilty of a breach and the appellants were ready to perform the contract: the breach was failure to deposit Rs. 15 per bale according to the terms of the contract, which was a condition precedent. He dismissed the respondents' suit. He also dismissed the counter-claim on the ground that the appellants had not made a valid re-sale of the goods. Both sides appealed to the Additional District Judge, Delhi. He gave a decree to the respondents for Rs. 950, the deposit. On the appellants' claim he held that the respondents failed to take delivery of the goods at the due time, but that the alleged re-sale of the goods had not been proved and therefore the claim for damages failed and he dismissed the present appellants' appeal. So far as the appellants' claim for damages is concerned, I am bound by the findings of fact and I uphold the decision of the learned Judge. The appellants claimed damages on the basis of a re-sale which they failed to prove: they cannot now set up an alternative claim for damages on the basis of the market price.

On the question of the deposit, I think that the learned Judge has fallen into serious error. He states that if there had been an agreement as to forfeiture, it must have been specifically pleaded, and was not. This is a narrow view of the pleading: the appellants throughout alleged that the sum of Rs. 950 was a deposit and they refused to return it on that ground. The learned Judge also says that there is nothing on the record to show that the deposit was in the nature of earnest money and therefore this deposit was on the same footing as an advance. In the appellants' letter of 13th July 1933, which contains their offer, the payment of a deposit, so described, is made a condition precedent. There is no suggestion that this sum was to be only an advance on the purchase money and in my opinion the description as 'a deposit' is conclusive. The use of the word 'deposit' implies an agreement that the sum deposited may be forfeited in case of breach by the depositor. The learned Judge has identified an advance on foot of purchase money with a

deposit and in my opinion this view is incorrect : the cases cited by him in both of which the word used was 'advance', only show that an advance of purchase money can be recovered. For the meaning and effect of the word 'deposit' I may refer to 41 All 324¹ and (1884) 27 Ch D 89² as well as the discussion by Bowen, L. J. in (1883) 11 Q B D 142.³

I hold that the appellants were entitled to forfeit the deposit of Rs. 950. I therefore allow the appellants' appeal (No. 184 of 1937) against the decree for Rs. 950 and dismiss the respondents' suit. I dismiss the appeal (No. 183 of 1937) relating to the appellant's counter-claim for damages. The respondents will pay the costs of the appellants in all Courts in Appeal No. 184 of 1937.

S C./R.K.

Order accordingly.

1. Mohammad Habib-ullah v. Mohammad Shafi, A I R 1919 All 265=50 I O 948=41 All 324=17 A L J 309.
2. Howe v. Smith, (1884) 27 Ch D 89=53 L J Ch 1055=50 L T 573=32 W R 802=48 J P 773.
3. Collins v. Stimson, (1883) 11 Q B D 142=52 L J Q B 440=48 L T 828.

A. I. R. 1937 Lahore 843

BHIDE, J.

Ram Labhaya and another —

Plaintiffs — Appellants.

v

Panna Lal — Defendant—Respondent.

First Appeal No. 224 of 1936, Decided on 8th February 1937, from order of Senior Sub-Judge, Sialkot, D/- 21st August 1936.

Civil P. C. (1908), Sch. 2, Para. 17—Agreement to refer dispute relating to division of property of deceased testator to arbitration—Subsequent proceedings by one of parties for letters of administration of will of deceased—Application by rest under Sch. 2, Para. 17, during administration proceedings, to file agreement regarding arbitration is quite competent—Proper course for Court is to stop administration proceedings till application under Sch. 2, Para. 17 is decided.

A private tribunal such as an arbitrator cannot oust the jurisdiction of Courts, but the rule applies only when the matter to be decided by the arbitrator is identical with the matter to be decided by the Court. [P 844 O 1]

Parties A, B and C interested in the estate left by the deceased entered into an agreement to refer their dispute relating to the division of the estate to the arbitration. C subsequently applied for letters of administration regarding a will left by the deceased. A and B applied under Sch. 2, Para. 17, Civil P. C., for filing the agreement regarding reference to arbitration. It was contended for C that application under Sch. 2, Para. 17, could not be entertained :

Held : that the Court dealing with the application for letters of administration had simply to decide whether the will was duly executed, while the arbitrator had to divide the property according to the rule agreed to by the parties. There was thus no conflict of jurisdiction between the arbitrator and the Court. The proper course for the Court was to stay its proceedings until the question of the validity of the agreement to refer the dispute to arbitration was decided in the proceedings under Sch. 2, Civil P. C. : A I R 1922 Lah 369 ; A I R 1923 Bom 365, Rel. on ; A I R 1934 Lah 887 and A I R 1935 Lah 916, Disting. [P 844 O 1, 2]

J. N. Aggarwal — for Appellants.

M. C. Mahajan and H. R. Mahajan — for Respondent.

Judgment.—This appeal arises out of a dispute relating to the property of one Pandit Banshi Ram who died on 15th June 1936. Pandit Banshi Ram left three sons, namely Ram Labhaya and Charan Das by one wife and Panna Lal by another wife. On 29th June 1936, these sons entered into an agreement to refer their dispute relating to the division of the estate left by Banshi Ram to the arbitration of Lala Amin Chand. Subsequently however on 7th July 1937, Panna Lal applied for letters of administration with respect to a will left by Banshi Ram. On 9th July 1936, Ram Labhaya and Charan Das presented an application under Sch. 2, Para. 17, Civil P. C., to the Senior Subordinate Judge Sialkot, for filing the agreement regarding reference to arbitration. One of the contentions raised by Panna Lal was to the effect that the application could not be entertained as the proceedings on the application for letters of administration had already commenced and were pending. The learned Senior Subordinate Judge upheld this contention and dismissed the application. From this decision, the present appeal has been preferred.

The sole point for decision is whether the pendency of the proceedings on the application for letters of administration was a bar to the entertainment of the application under Sch. 2, Para. 17, Civil P. C., referred to above. The learned Senior Subordinate Judge has relied on A I R 1934 Lah 887¹ and A I R 1935 Lah 916,² but in my opinion these authorities do not support the view taken by

1. Gopi Ram Guranditta Mal v. Pokhar Das, A I R 1934 Lah 887 = 154 I O 7 = 37 P L R 138.
2. Ghanesham Dass-Goverdan Dass v. Tek Chand, A I R 1935 Lah 916 = 157 I O 867 = 17 Lah 291=38 P L R 636.

him. It is correct that a private tribunal such as an arbitrator cannot oust the jurisdiction of Courts, but the rule applies only when the matter to be decided by the arbitrator is identical with the matter to be decided by the Court : *see* 3 Lah 296.³ In the present instance, the Court dealing with the application for letters of administration had simply to decide whether the will was duly executed by Banshi Ram while the arbitrator had to divide the property according to the Chundawand rule as agreed to by the parties. It is true that Panna Lal had raised a plea that the agreement was not binding on him as it was entered into under influence and this matter had to be considered by both the Courts. But this does not mean that there was any conflict of jurisdiction between the arbitrator and the Court. The question of the validity of the agreement was to be decided by the Court before the dispute could be referred to arbitration.

It was conceded by the learned counsel for the respondent that it was open to the parties to enter into an agreement for division of the property by arbitration contrary to the directions in the will and if in fact they had entered into any such agreement, the will would be superseded by the agreement and no letters of administration could be granted. All that can be reasonably urged in the circumstances is that an issue arose as regards the validity of the agreement of reference to arbitration, which was to be decided by both the Courts and there was thus a conflict of jurisdiction between the Courts. But there was, I think, no conflict of jurisdiction as between the Courts and the Arbitrator. The proper course for the Court dealing with the application for letters of administration in the circumstances would have been, I think, to stay its proceedings until the question of the validity of the agreement to refer the dispute to arbitration was decided in the proceedings under Sch. 2, Civil P. C., for this was the main issue in the latter proceedings and it had to be decided before making a reference to arbitration. If the agreement is valid and supersedes the will, the proceedings regarding letters of administration would be obviously futile. It appears that an application for stay of

proceedings relating to the application for letters of administration was made by the present appellants, but was rejected. The appellants did not apparently appeal or apply for revision of this order; but it is still open to them to request the Court to postpone issue of the letters of administration at any rate till the question of the validity of the agreement to refer the matter to arbitration is decided in the proceedings under Sch. 2, Civil P. C.

The facts of the present case are very similar to those reported in a Division Bench ruling of the Bombay High Court reported as 73 I C 415,⁴ cited for the appellants and that ruling appears to me to support the appellants fully. In my opinion there was no conflict of jurisdiction as between the arbitrator and the Court in this case and the application under Sch. 2, Civil P. C., was maintainable. I therefore accept this appeal and setting aside the order of the learned Senior Subordinate Judge remand the case to him for re-decision. Costs to follow final decision. Parties are directed to appear before the learned Senior Subordinate Judge on 23rd February 1937.

V.B.B./R.K.

Case Remanded.

4. Shankar Ramchandra v. Ramchandra Ananji, A I R 1923 Bom 365=73 I C 415 = 25 Bom L R 437.

*** * A. I. R. 1937 Lahore 844
SPECIAL BENCH**

YOUNG, C. J., ADDISON
AND DIN MOHAMMAD, JJ.

*Syed Mohammad Habib, Publisher of
Daily Siyasat, Lahore — Petitioner.*

v.

Emperor.

Criminal Case No. 9 of 1936, Decided on 19th February 1937.

(a) Press (Emergency Powers) Act (23 of 1931 as amended by Act 23 of 1932), S. 7 (3) — Notice annexed with translation of whole article is sufficient even though no specific words are described in it.

Where a notice issued under S. 7 (3), Press (Emergency Powers) Act as amended by the Criminal Law Amendment Act is annexed with a translation of the whole article, the notice is in sufficient compliance with the requirements of law and does not become defective merely because it does not describe the words, signs or visible representations coming within the mischief of S. 4 (1) (d). [P 845 O 2]

* * (b) Press (Emergency Powers) Act (23 of 1931 as amended by Act 23 of 1932), S. 7 (3) — Offending article published during

3. Jai Narain Babu Lal v. Narain Das Jaini Mal, A I R 1922 Lah 369 = 69 I C 583 = 3 Lah 296.

office of previous publisher — Successor in office can be ordered to deposit security.

If a newspaper contains words coming within the mischief of S. 4, Press (Emergency Powers) Act, it does not matter who the publisher happens to be at the time of the notice under S. 7 (3) of the Act. A change of publisher after the newspaper has inserted the offending article makes no difference and the new publisher can be required by the Local Government to deposit the amount.
[P 846 O 1]

* * (c) Press (Emergency Powers) Act (23 of 1931 as amended by Act 23 of 1932). S. 7 (1) and (3)—Powers of Magistrate and Local Government are not dependent upon each other—Magistrate not taking security under S. 7 (1) from publisher—Local Government is not debarred from proceeding under S. 7 (3).

The Magistrate and the Local Government are completely independent of each other with respect to the functions exercised by each under the Press (Emergency Powers) Act. It is for the Magistrate and for him alone to decide what he is to do and it is for the Local Government to decide what it is to do, each acting within the respective powers conferred upon them within the Act.

The fact therefore that a Magistrate does not require security under S. 7 (1) of the Act from a publisher cannot debar the Local Government from taking action under S. 7 (3) if it considers fit to take action under the powers given to it under S. 7 (3): *A I R 1935 Lah 338 (S B), Explained.*
[P 846 C 1, 2]

M. M. Aslam Khan — for Petitioner.

Dewan Ram Lal (Government Advocate)— for the Crown.

Young, C. J.—Syed Inayat Shah was printer and publisher of the newspaper styled the Urdu Daily Siyasat, Lahore. On 15th October 1936, his brother Syed Mohammad Habib appeared before the Magistrate under the provisions of S. 7 (1), Press (Emergency Powers) Act and made the necessary declarations that he was the printer and publisher of the said newspaper. The Magistrate did not require him to deposit security. On 24th October 1936 the Punjab Government issued a notice under sub-s. (3) of S. 7 of the Act to Syed Inayat Shah calling upon him to deposit security to the amount of Rs. 3,000 as a particular article published in the issue of 8th October 1936 contained words of the nature described in Cl. (d) sub-s. (1) of S. 4, Press (Emergency Powers) Act. Apparently the Government did not then note that he had ceased to be the publisher. Accordingly, on 7th November 1936, the Government issued a similar notice under sub-s. (3) of S. 7 of the Act to Syed Mohammad Habib alias Habib Shah as he was the publisher of the newspaper and he has put in this

petition under S. 23 of the Act, asking this Court to set aside the order demanding Rs. 3,000 as security from him under S. 7 (3).

It was first objected that the notice was defective as it did not describe the words, signs or visible representations coming within the mischief of S. (4) (1) (d). There is no force in this contention as a translation of the whole article was annexed to the notice and this was sufficient compliance with the requirements of the law in this respect. It was next argued that the Local Government had no power to issue a second notice to Syed Mohammad Habib, seeing that it had already issued a notice to his brother Syed Inayat Shah. The first notice was obviously a mistake and of no effect as Syed Inayat Shah was not the publisher of the paper at the time of the notice. The second notice was, therefore, the only valid notice, the first being a piece of waste paper. Thirdly, it was argued that the notice could not be issued to Syed Mohammad Habib as, on 8th October 1936, his brother Syed Inayat Shah was the publisher of the newspaper. This contention must be again repelled. Sub-s. (3) of S. 7 runs as follows :

Whenever it appears to the Local Government that a newspaper published within its territories, in respect of which security under the provisions of this Act has not been required, or having been required has been refunded under sub-s. (2), contains any words, signs or visible representations of the nature described in S. 4, sub-s. (1), the Local Government may by notice in writing to the publisher of such newspaper, stating or describing such words, signs or visible representations, require the publisher to deposit with the Magistrate within whose jurisdiction the newspaper is published, security to such an amount not being less than five hundred or more than three thousand rupees, as the Local Government may think fit to require.

The meaning of this section is clear. It is that when a newspaper contains words coming within the mischief of S. 4, the Local Government may require, by notice in writing to the publisher of such newspaper security as set out in the section. In fact, it may be said that it is the newspaper which is penalised. This is further clear from the wording of S. 23 (1) of the Act which runs as follows :

... the publisher of a newspaper who has been ordered to deposit security under sub-s. (3) of S. 7 ... may, within two months from the date of such order, apply to the High Court to set aside such order and the High Court shall decide if the newspaper ... in respect of which the order was made, did or did not contain any words, signs or visible representations of the nature described in S. 4, sub-s. (1);

while under the provisions of S. 25 of the Act, the Special Bench can only set aside the order if it appears to it that the words etc. were not of the nature described in S. 4 (1). It follows that it does not matter who the publisher happens to be at the time of the notice, if the newspaper contained words coming within the mischief of S. 4. Clearly a change of publisher after the newspaper has inserted the offending article makes no difference; the new publisher can be required by the Local Government to deposit the amount. If this were not so, the object of enacting sub-s. (3) of S. 7 could always be set at naught by a change of publishers and the new publisher could only be required by the Magistrate under sub-s. (1) to give security to the extent of Rs. 1,000. Apart, however, from this absurdity, the law is quite clear that the publisher, no matter who he is at the time of the notice, can be required to deposit security if the newspaper contained any words coming within the mischief of S. 4.

Fourthly, it was argued that the Local Government had no power to act under sub-s. (3) of S. 7, seeing that the Magistrate under sub-s. (1) of the same section accepted on 15th October 1936 the declaration of Syed Mohammad Habib that he was the publisher without requiring security under that sub-section. In this connexion reference was made to 16 Lah 270,¹ where at p. 277 it is said that the District Magistrate under the Act is ordinarily an agent of the Government. The case itself does not afford any help in the decision of this case, but reliance is placed on the words already given. We however consider that the remark was not necessary for the decision of that case and is in the nature of an obiter dictum. Besides, it has been too broadly stated. A District Magistrate may be an agent of the Government when he is required to perform any functions on behalf of the Government in that capacity; but where he is invested with independent powers, he cannot be considered to be an agent of the Government in the discharge of those functions. It is clear from a perusal of the Act that the Magistrate and the Local Government are completely independent of each other with respect to the functions

exercised by each. It is for the Magistrate and for him alone to decide what he is to do and it is for the Local Government to decide what it is to do, each acting within the respective powers conferred upon them within the Act. The fact therefore that the Magistrate did not require security under S. 7 (1) on 15th October 1936 from Syed Mohammad Habib did not debar the Local Government from taking action under sub-s. (3) if it considered it proper to take action under the powers given to it under that sub-section. The Magistrate may not have been aware of the article at the time and the hands of the Local Government cannot be tied by his action if the Local Government takes action under sub-s. (3) of S. 7.

The last contention was that the article itself, though offensive, did not come within the mischief of S. 4 (1) (d) which runs as follows :

Whenever any newspaper contains any words, signs or visible representations which tend, directly or indirectly, to bring into hatred or contempt His Majesty or the Government established by law in British India or the administration of justice in British India or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Government

The article commences with a bitter attack upon His Excellency the Governor but it does not end there. It also brings into hatred or contempt the Government of India and the Local Government : *vide* the passage printed at p. 7, line 19 *et. seq.* of the paper book. Another such passage commences at line 28 of the same page. The third such passage is printed at lines 46 to 51. We have no hesitation in holding that the article as a whole and these passages in particular, tend directly and indirectly to bring into hatred or contempt the Government established by law in British India and the administration of justice in British India and to excite disaffection towards the said Government. This being so, the local Government had power to require the security in question. We therefore dismiss the application with costs. Counsel's fee Rs. 150.

K.B./R.K. *Application dismissed.*

1. *In the matter of Virjanand Printing Press, Lahore*, A I R 1935 Lah 338=1935 Or O 572 156 I O 674=16 Lah 270=36 Cr L J 971=37 P L R 107 (S B).

A. I. R. 1937 Lahore 847

TEK CHAND, J.

Mela Ram and another — Defendants-Appellants.

v.

Inayat Begam, Plaintiff and another, Defendant—Respondents.

Second Appeal No. 1558 of 1936, Decided on 18th February 1937, from decree of Dist. Judge, Gujranwala, D/. 24th August 1936.

Civil P. C. (1908), O. 21, R. 63—Gift of property by judgment-debtor to daughter after passing of decree — Property attached in execution—Daughter's objection dismissed—Suit under O. 21, R. 63 — Onus of proving bona fides of gift held lay heavily upon daughter—Remaining property of judgment-debtor being agricultural not available to creditors—Gift held not bona fide but made to defraud creditors.

Certain urban property of the judgment-debtor was attached in execution of the decree but was released as he agreed to pay the decree amount by instalments. After this the property was gifted by him to his daughter. The gift deed stated that it was made for the maintenance of the daughter as her relations with the husband were strained. It also stated that the possession of the property was given to the daughter. The property was again attached and the daughter objected to this; but her objection was dismissed. She then filed a suit under O. 21, R. 63, Civil P. C. The relations of the daughter with her husband were strained since long. The property was in possession of the tenants who paid rent to judgment-debtor and neither the daughter went in the witness-box nor led evidence to disprove this. The remaining property of the judgment-debtor was agricultural and as such was not available for sale in execution of the decree :

Held : that the onus lay heavily upon the daughter to prove not only the factum of the gift but also to establish its bona fides and show that it was not made to defeat and delay the creditors of the donor especially as she was unsuccessful objector in execution proceedings and she failed to do so. [P 848 C 1]

Held further : that the gift being of the entire attachable and saleable property of the judgment-debtor made at the time when he was in debt, was obviously not bona fide and was made to defeat and delay the creditors of the donor. [P 848 C 2]

Lal Chand Malhotra — for Appellants.*Shabir Ahmed* — for Respondents.

Judgment. — The appellant had two money decrees for Rs. 500 and Rs. 400, respectively, against Hakim Ali Gujjar of Mauza Dhama, District Gujrat (defendant 2). In execution of these decrees, he attached a shop and a vacant site situate at Karimpura, a suburb of Lala Musa, alleging that they were the property of the judg-

ment-debtor. Proceedings for execution of the two decrees had been taken in the Court of Lala Raghunath Lal and Sayyed Latif Shah, Subordinate Judges, respectively. In both cases Mt. Inayat Begam, daughter of the judgment-debtor, objected alleging that by a deed executed and registered on 3rd July 1934, the attached shop and site, together with two other shops and four houses, also situate at Karimpura, had been gifted by the judgment-debtor to her, and that they were not liable to attachment and sale in execution of the decrees obtained by the appellant against the judgment-debtor. After enquiry, both the Subordinate Judges, Lala Raghunath Lal and Sayyed Latif Shah, dismissed the objection, holding that the transfer by Hakim Ali in favour of Mt. Inayat Begam was gratuitous and had been made collusively with the intention of defeating and delaying his creditors. Mt. Inayat Begam instituted a suit under O. 21, R. 63, Civil P. C. for a declaration that the shop and the site in question were her property and could not be attached and sold in execution of the decree. The decree-holder denied the plaintiff's claim and pleaded that the alleged gift was fraudulent and not binding on him.

The only issue framed in the case was : Was any gift made by Hakim Ali in favour of the plaintiff, Mt. Inayat Begam and was it validly made? Onus of proof on plaintiff. The Subordinate Judge, Chaudhri Aziz Ahmad, held the issue unproved, and finding that the gift was not bona fide and had been made to defraud the creditors, he dismissed the suit. The plaintiff went in appeal to the District Judge, who accepted the appeal and decreed the suit granting the plaintiff the declaration asked for. The decree-holder has preferred a second appeal, and it has been contended on his behalf that the decision of the learned District Judge is vitiated by his omission to consider material evidence on the record and by his having approached the case from an erroneous legal standpoint.

The deed of gift by Hakim Ali in favour of the plaintiff is dated 3rd July 1934. The decree of the appellant had been passed against Hakim Ali much earlier. Indeed it is admitted that execution of these decrees had been taken out before 1934, and the shop in dispute had actually been attached. After the attachment the judg-

ment-debtor appeared in Court, paid Rs. 100 and undertook to pay the balance in a short time. On this undertaking, the decree-holder agreed that the attachment be raised and the shop released. Very soon afterwards however, the judgment-debtor executed the deed in question gifting his particular shop and two other shops, four houses and a site situate in Karimpura, to this daughter, the plaintiff. The reason for the gift, as given in the deed, was that the relations between Mt. Inayat Begam and her husband had been strained, that she had been living with her father and that the latter wanted to make provision for her, lest after his death his sons might decline to maintain her. In the deed of gift it was stated that possession of the property had been given to the donee. The decree-holder, however, denied this fact and led evidence to prove that the gifted property had been in actual possession of tenants since long before the execution of the deed of gift, and that these tenants were still paying rent to Hakim Ali. No effort was made by the plaintiff to prove the contrary. None of the tenants of the property comprised in the gift was examined at the trial nor any rent-deed in favour of the plaintiff produced. Indeed, the plaintiff herself did not go into the witness-box to swear to the transfer of possession to her. This is a very serious defect in her case, especially when it is borne in mind that she being the unsuccessful objector in execution proceedings and the plaintiff in the suit, the onus lay heavily on her to prove not only the factum of the gift, but also to establish its bona fides and show that it was not intended to defeat and delay the creditors of the donor. Again, it is admitted by Hakim Ali in his statement as a witness, that the plaintiff was married 11 or 12 years ago, that her relations with her husband had been strained from the very beginning and consequently she had been living with him ever since. It has not been explained why no provision was made for her before, and Hakim Ali suddenly thought of gifting to her all his urban property (which was the only property which could be made available for payment of his debts), so soon after a portion of this property had actually been attached in execution of decrees and had been released on his giving an undertaking that he would pay the decretal amount in instalments. All these important facts

appear to have escaped the notice of the learned District Judge.

The learned Judge has laid considerable stress on the statement of the judgment-debtor that he had 50 to 60 bighas of agricultural land, worth Rs. 8,000 to Rs. 10,000 besides four houses worth Rs. 4,000. The extent of the land, the houses and their value are stated by the defendants' witnesses to be much less. It is however not necessary to consider the question of valuation, as it is admitted that agricultural land could not be sold in execution of a decree under the provisions of the Punjab Alienation of Land Act. The houses are situate in Mauza Dhama and it is in evidence that they are occupied by the judgment-debtor and his family. Under the provisions of S. 35, Punjab Relief of Indebtedness Act, these houses are not liable to attachment in execution of a money decree except under certain conditions, which have not been proved to exist in the case. None of this property, whatever its value might be, was therefore available for the decree-holder appellant or the other unsecured creditors of Hakim Ali for satisfaction of their debts. The only property which could be attached and sold consisted of three shops, four houses and a site in Karimpura, and all these properties were gifted by Hakim Ali to his daughter by the deed in question. If he really wanted to make provision for his daughter, it has not been explained why he did not give a portion of his agricultural land to her.

The gift being of the entire attachable and saleable property of the judgment-debtor to his daughter, made at a time when he was in debt to the extent of Rs. 1,700 to unsecured creditors, besides certain sums due on mortgages, it is obvious that the transfer was not a bona fide transaction, but had been made to defeat and delay the donor's creditors. As stated already, the onus lay heavily on the plaintiff to prove the bona fides of the gift and she had failed to do so.

I accept the appeal, set aside the judgment and decree of the learned District Judge and restore that of the Court of first instance dismissing the plaintiff's suit with costs throughout.

S.O./R.K.

Appeal accepted.

A. I. R. 1937 Lahore 849

TEK CHAND, OFFG. C. J.

Maru — Plaintiff — Appellant.

v.

Abdul Rahim and others — Defendants
— Respondents.

Second Appeals Nos. 1539 to 1545 of 1936, Decided on 6th April 1937, from decree of Addl. Dist. Judge, Karnal at Ambala, D/- 15th July 1936.

Punjab Tenancy Act (16 of 1887), S. 50-A — Second suit in Civil Court is barred only on grounds fought in Revenue Court under Ss. 45 (6) and 50—Suit in Revenue Court under S. 50 dismissed—Second suit in Civil Court claiming possession on ground of ownership by prescription is not barred.

Section 50-A, Punjab Tenancy Act, must be read along with Ss. 45 (6) and 50, which are expressly mentioned in it, and the only reasonable interpretation which can be put on it is that a second trial between the parties is barred in the Civil Courts on the grounds on which they had fought it in the Revenue Court under S. 45 (6) or S. 50. Rejection by Revenue Court of the tenant's claim under S. 50 to contest his liability to ejectment on the ground that he is an occupancy tenant does not bar his suit in a Civil Court for possession of land on the ground that he has acquired ownership of the land by prescription: *A I R 1933 Lah 1016, Foll.*; *A I R 1935 Lah 719, Dissent.* [P 850 C 1, 2]

Shamair Chand — for Appellant.*Muhammad Amin Khan* —

for Respondents.

Judgment.—The facts of the case which has given rise to Second Appeals Nos. 1539 to 1545 of 1936 are as follows: The defendants, claiming to be landlords of the land in dispute, had notices for ejectment served on the plaintiffs under S. 45, Punjab Tenancy Act. In pursuance of these notices, the plaintiffs were ejected. They then brought suits for recovery of possession in the Revenue Court under S. 50, Punjab Tenancy Act, denying their liability to be ejected on the ground that they were occupancy tenants. These suits were dismissed. The plaintiffs have now sued in the Civil Courts for possession, alleging that they had become owners of the land by adverse possession and in the alternative claiming to be occupancy tenants. The suits were dismissed by the trial Judge on the preliminary ground that the Civil Court had no jurisdiction to entertain them by reason of the provisions of S. 50-A, Punjab Tenancy Act, which was added by (Punjab) Act 5 of 1929. The plaintiffs appealed to the District Court, but their appeals have been dismissed by the Additional District Judge.

1937 L/107 & 108

There can be no doubt as to the correctness of the decision of the Court below, so far as the alternative claim is concerned; and indeed this was frankly conceded before me by the learned counsel for the appellants. In 9 Lah 38,¹ a Full Bench of this Court had held in 1928 that under the law as it then stood, a Civil Court had jurisdiction to entertain and try a suit brought by a person who had been dispossessed from his tenancy after notice issued to him under S. 45, Tenancy Act, and who had been unsuccessful in a suit brought in the Revenue Court to contest his liability to ejectment, for possession of the land from which he had been ejected on the ground that he had a right of occupancy therein, but that the subsequent proceedings in the Civil Court would be regulated by the Proviso to sub-s. (3) of S. 77. It was to get rid of the effect of this decision, and to prohibit the same matter being agitated once again on the same grounds in the Civil Courts after it had been heard and decided in the Revenue Courts, that the Legislature enacted Act 5 of 1929, whereby S. 50-A was added to the Punjab Tenancy Act. That section laid down that:

No person whose ejectment has been ordered by a Revenue Court under S. 45, sub-s. (6), or whose suit has been dismissed under S. 50, may institute a suit in a Civil Court to contest his liability to ejectment, or to recover possession or occupancy rights, or to recover compensation.

Reading this section with S. 50, it is quite clear that a Civil Court has no jurisdiction to entertain a suit on the ground that the plaintiff is not liable to ejectment because he is an occupancy tenant, after he has unsuccessfully sued in the Revenue Courts under S. 50 to contest his liability on the same ground. The question, however, remains whether the bar applies equally if the suit in the Civil Court is based on the ground that the plaintiff had acquired ownership of the land in dispute by adverse possession. On this point there are two contradictory decisions by Single Benches of this Court. In *A I R 1933 Lah 1016*,² Dalip Singh, J. held that rejection by a Revenue Court of the plaintiff's claim to contest his liability to ejectment on the ground that he is an occupancy tenant would not bar his suit in a Civil Court for a declaration that he had acquired ownership of the land by prescription. He

1. *Cheta v. Baija*, *A I R 1927 Lah 452=105 I C 507=9 Lah 38=29 P L R 489 (F B)*.

2. *Sultan Mahmud v. Ahmad Khan*, *A I R 1933 Lah 1016=147 I C 521*.

expressed the opinion that S. 50-A had no bearing to a suit of this kind, it being inapplicable "as the suit in question was not of the class contemplated by that section". In A I R 1935 Lah 719³ Currie, J., without reference to the previous decision of Dalip Singh, J. which does not appear to have been brought to his notice, held that where a suit to contest liability to ejectment has been dismissed by the Revenue Court, a subsequent suit in a Civil Court is not competent, even though on the face of it the suit is one for a declaration that the plaintiff is owner by virtue of adverse possession, but is in substance one to contest their liability to ejectment.

The facts of the case decided by Dalip Singh, J. are not given in detail in the judgment as printed in the All India Reporter.* But on reference to the original record (Civil Appeal No. 1531 of 1932) I find that the point involved was substantially the same as in the case decided by Currie, J. in 1935. It appears that the defendants in that suit had got a notice of ejectment served on the plaintiffs under S. 45. The plaintiffs contested their liability to ejectment and within two months from the date of the service of the notice brought a suit under S. 45 (3) for cancellation of the notice and prayed that they be declared occupancy tenants. This suit was dismissed by the Revenue Court. A fresh notice for ejectment was then served on the plaintiffs, and they, instead of contesting the notice under S. 45 (3) or bringing a suit under S. 50 in the Revenue Court, sued in the Civil Court for a declaration that they were the owners of the land in dispute, having acquired title by adverse possession. As stated above, the learned Judge held that the suit was not barred by section 50-A.

It seems to me, with all respect, that the law has been laid down correctly by Dalip Singh, J. in the case cited. There is no doubt that S. 50-A is not very happily worded. But it must be read along with Ss. 45 (6) and 50, which are expressly mentioned in it, and the only reasonable interpretation which can be put on it is that a second trial between

the parties is barred in the Civil Courts on the grounds on which they had fought it in the Revenue Court under S. 45 (6) or S. 50. It is conceded that a Revenue Court has no jurisdiction to determine the question of the alleged acquisition of title by adverse possession. Therefore, in the suit under S. 50, even if the plaintiff had claimed to contest his liability to be ejected on the ground that he had acquired title by prescription, the Revenue Court would have had to decline to go into the question and the proper course for it would have been to refer the parties to a Civil Court. In this connection reference may be made to the decision of Mr. Miles Irving, Financial Commissioner, in 11 L L T 76,⁴ where he observed that "only a Civil Court can adjudicate finally on the question of adverse possession;" and

If in any case, e. g. suit by tenant to contest a notice of ejectment, it becomes necessary to determine the question of adverse possession, the proper course of the Revenue Court is to follow the procedure laid down in S. 98, Punjab Tenancy Act

and refer the parties to a civil suit. It was also held that if instead of following this procedure the Revenue Court has decided forthwith the question of adverse possession, its decision is without jurisdiction. It is also admitted by the learned counsel for the respondents that if, after notice under S. 45 had been served on the plaintiffs, they had not brought any suit under S. 45 (6) or S. 50 in the Revenue Court, it would have been open to them to sue in the Civil Court straight off on the strength of their alleged title acquired by adverse possession. If this is so, I do not see why the mere fact that a suit has been previously brought in a Revenue Court to contest their liability to ejectment on the ground that they were occupancy tenants, should bar the jurisdiction of Civil Courts to entertain the suit based on adverse possession, this matter being in the cognizance of Civil Courts alone. In support of his decision to the contrary, Currie, J. has referred to 3 P R 1895.⁵ But, if I may say so with all respect, a careful perusal of the judgment delivered in that case will show that it does not lay down that the Civil Court has no jurisdiction to entertain a suit like the one before us. On the other hand, the following passage in the judgment of Ben-

3. Mehar Khan v. Atta Muhammad Shah, A I R 1935 Lah 719=156 I O 592=16 Lah 1086=37 P L R 507.

* [The High Court Judgment did not give facts in detail nor were facts necessary for purposes of the report—Ed.]

4. Sadhu Ram v. Mehr Shah, 11 L L T 76.

5. Thakar Gir v. Bai Sakhi, (1895) 3 P R 1895.

ton, J. in that case (p. 16) makes it clear that such a suit is competent :

Sir Meredyth Plowden has pointed out that a person who has received notice of ejectment and who sues in the Revenue Court, either gets decrees protecting him, or he fails and is ejected. If he claims to be a proprietor it is still open to him to sue in the Civil Court and claim the land as a proprietor, if this be his contention. The difference between success and failure in the Revenue Court for such a person is that he appears in the Civil Court and contests his claim either with or without the vantage ground of possession which may be very important.

After fully considering the matter I am of opinion that the law was correctly laid down by Dalip Singh, J. in A I R 1933 Lah 1016,² which I respectfully follow, in preference to A I R 1935 Lah 719.³ I accordingly accept these appeals, set aside the judgment of the Courts below and remand the cases to the Court of first instance under O. 41 of R. 23, Civil P. C., for decision on the merits. Court-fee on each appeal will be refunded : other costs will be costs in the cause. Before concluding I wish to make it clear that in accepting these appeals I am merely deciding the question of jurisdiction, and this judgment should not be taken as containing the remotest indication of my opinion on the merits of the claims of the various plaintiffs. These are matters which will be decided by the trial Court on the evidence which might be produced before it.

S.C./D.S.

Cases remanded.

A. I. R. 1937 Lahore 851

TEK CHAND, OFFG. C. J. AND
ABDUL RASHID, J.

Firm Jowahir Singh-Sundar Singh —
Plaintiffs — Petitioners.

v.

Fleming Shaw and Co. Ltd., Amritsar
& *Karachi — Defendant — Res-*
pondent.

Civil Revn. No. 240 of 1937, Decided on
15th July 1937, from order of Sub-Judge,
First Class, Amritsar, D/- 27th February
1937.

(a) Arbitration — Dispute submitted to arbitration — Suit relating to same dispute filed in Civil Court — No order staying suit obtained — Civil Court alone must decide dispute and is not hampered by award by arbitration — Arbitration proceedings subsequent to suit are invalid — Party wishing to proceed with arbitration — Court may grant stay leaving parties to proceed with arbitration from the stage at which proceedings were at date of suit.

Where the same matter comes before two tribunals, a public tribunal appointed by the Sovereign and a domestic forum chosen by the parties, and no order is made staying the proceedings either under S. 19, Arbitration Act, or under Para. 2 of Sch. 2, Civil P. C., before the one or the other, the public tribunal alone must decide that matter and cannot be hampered by any adjudication thereupon made by the private tribunal. Neither can that adjudication be pleaded as a bar to the action nor can it be allowed to affect the merits of the decision given by the public tribunal. Thus the effect of the institution of the suit is that all proceedings before the arbitrators subsequent to the institution of the suit are invalid. But if after the institution of the suit a party still wishes to proceed with the arbitration, his remedy is to apply for stay, which the Court will grant, unless there are weighty reasons to the contrary, leaving the parties to proceed with the arbitration from the stage at which the proceedings were on the date of the institution of the suit : *A I R 1919 Sind 57, Dissent.; Case law discussed.* [P 856 O 1, 2; P 857 O 1]

(b) Arbitration Act (1899), S. 19 — Stay of suit — Order under S. 19 cannot be passed after award — Proper course is to plead award in bar of suit.

The object of passing an order staying the suit under S. 19, Arbitration Act, is to allow the parties to proceed with the arbitration. But if before the application for stay is made or has been disposed of the arbitrators have already made the award, there will be no point in making the stay order. In that event, the proper course for the opposite party would be to plead the award in bar of the suit and not to obtain an order staying the suit pending arbitration which had already terminated : *A I R 1919 Sind 57, Dissent.* [P 857 O 1, 2]

(c) Arbitration Act (1899), S. 19 — Stay of suit — Allegations of fraud, misrepresentation and coercion — Stay should be refused if they relate to root of agreement to refer to arbitration or refer to matters outside scope — The only forum is Civil Court.

If allegations of fraud and coercion go to the very root of the agreement to refer to arbitration, or if they relate to matters outside the scope of the submission, the only forum to decide that matter is the Civil Court. In either of these cases S. 19 will *ex necessitate rei* be inapplicable. If on the other hand, misrepresentation, fraud or coercion is alleged to have been committed in reference to matters which are sought to be proved in proof or disproof of the contentions of the parties relating to a dispute which has been, or can be, validly referred to arbitration in accordance with the original agreement, this will not necessarily be a ground for declining to stay the suit : *A I R 1922 Lah 369; A I R 1921 Cal 255 and A I R 1934 Sind 200, Rel. on.* [P 858 O 1]

(d) Arbitration Act (1899), S. 19 — Dispute submitted by defendant to arbitration under agreement — Suit relating to same dispute instituted in Civil Court by plaintiff — Application under O. 39, R. 1, Civil P. C., by plaintiff restraining arbitration to proceed — No order on application — Award delivered by arbitration — Application by defendant under S. 19 to stay suit — No written state-

ment or any other proceeding taken by defendant in suit relating to dispute filed by plaintiff — Award declared null and void, as no order under S. 19 obtained before award — Application of defendant under S. 19 held should not be dismissed but allowed to proceed.

The defendant submitted a dispute to the arbitration under an agreement to do so. The plaintiff instituted a suit in the Civil Court relating to the same dispute in breach of the agreement. The plaintiff subsequently filed an application under O. 39, R. 1, Civil P. C. for injunction, restraining the arbitration from continuing its proceedings, pending the suit. The arbitration proceedings continued in spite of this application, on which no order had been passed and an award was delivered. Subsequently during O. 39, R. 1, Civil P. C. proceedings, the defendant filed an application under S. 19, Arbitration Act, praying the stay of the suit, as the award had already been delivered. The defendant had taken no other proceeding or filed any written statement in the suit concerning the dispute. The award was declared null and void as an order staying the suit under S. 19 of the Act was not obtained before the award:

Held : that the declaration of the award null and void did not mean that the defendant's application under S. 19 should be dismissed. On the other hand the Court was bound to consider and decide it according to law. [P 858 C 2]

Dev Raj Sawhney — for Petitioners.

Norman Edmunds — for Respondent.

Tek Chand, Offg. C. J. — This is a petition for revision of the order of the Subordinate Judge, First Class, Amritsar, dated 27th February 1937 passed under S. 19, Arbitration Act 9 of 1899 staying a suit for rendition of accounts, which the plaintiff-petitioner had instituted against the defendant-respondent in his Court. The defendant, Messrs. Fleming Shaw & Co., Ltd. is a company incorporated in England and carries on business in various places in India. Its principal office in this country is at Karachi and it has an agency and an office at Amritsar, of which one Mr. Brine was the Manager during the period covered by the present dispute. The plaintiff firm Jawahar Singh-Sundar Singh is a firm of importers, piece-goods dealers and brokers, registered under the Partnership Act, having its Head Office at Amritsar. By an agreement dated 25th November 1927 (Ex. D.1) the defendant Company appointed the plaintiff firm as guarantee-brokers in Amritsar and throughout the Punjab :

In respect of all cotton and woollen piece goods, yarn and (hardware) sundries intended for, or ordered by the said merchants (defendant Company), or intended for or ordered by all indentors

or other persons through the said merchants during the continuation of the agreement.

The plaintiff firm guaranteed the full and due payment, performance and discharge to the defendant Company by all indentors or other persons of their liabilities, and it was to receive from the defendant commission at certain specified rates. The agreement was to remain in force, in the first instance, for 12 calendar months from 1st December 1927, and thereafter to continue for each subsequent year until terminated on three months' notice delivered by one party to the other. The defendant Company was to keep accounts of the transactions covered by the agreement; the accounts between the parties were to be made up once in every six months on 1st January and 1st July each year; and the final settlement was to be taken after the payment of all sums due under indents or orders covered by the guarantee. For the due fulfilment of the terms of the agreement, the plaintiffs deposited with the defendants the sum of twenty-five thousand rupees. Cl. 21 of the agreement (Ex. D.1) provided that all disputes between the parties touching any matter or thing arising out of the agreement or the construction thereof shall be referred to the arbitration of two European arbitrators, managers or assistants in firms, who are members of the Karachi Chamber of Commerce, resident of Karachi, and one to be chosen by each party.

In the event of one of the parties failing to name an arbitrator within seven days after receipt of notice from the other, the latter was empowered to nominate both arbitrators whose decision was to be final and binding upon the parties. All proceedings in connexion with the arbitration were to take place at Karachi and were to be "deemed to be within the provisions of the Arbitration Act 9 of 1899". It is common ground between the parties that the business under the agreement continued between them for more than seven years. In the cold weather of 1934-35 however, differences appear to have arisen and on 23rd January 1935 the defendant Company wrote to the plaintiff firm intimating that it had appointed Mr. Reed of Karachi as arbitrator and asking the plaintiff to nominate a European merchant of Karachi as the second arbitrator, as provided in Cl. 21 of the agreement. The plaintiff firm having failed to appoint the second arbitrator, the defendant's pleader at Amritsar sent a telegraphic reminder to the plaintiff

on 7th February 1935. The plaintiff firm sent no reply to this telegram till the 11th. In the meantime, on 9th February 1935, the firm instituted a suit against the defendant Company in the Court of the Subordinate Judge at Amritsar for rendition of accounts of the dealings under the guarantee agreement of 25th November 1927 (Ex. D-1). In the plaint it was averred that the plaintiff firm had at all times observed the terms of the agreement, that the accounts sent by the defendant Company to it were incomplete and incorrect, that the confirmation of these accounts given by Harbhajan Singh, one of the partners of the plaintiff firm, was based on inaccurate information supplied by the defendants, who had withheld and misrepresented material facts, that the defendant Company had wrongly debited the plaintiffs with the losses of transactions not covered by the agreement, especially those with one Hari Saran Chowkra, in respect of which a number of documents had been secured from Harbhajan Singh by fraud, misrepresentation, duress and undue pressure exercised by certain persons connected with the defendant Company.

On 22nd February 1935 the plaintiff firm presented an application under O. 39, R. 1, Civil P. C., for issue of an injunction to the defendant Company, restraining it from starting or continuing the arbitration proceedings at Karachi which it intended to take, as intimated in the telegram sent by the Company's pleader on 7th February 1935. This application came up for preliminary hearing before the Subordinate Judge on 23rd February 1935, who directed notice to issue to the defendant to appear on 9th March 1935 and show cause why the injunction asked for be not granted. This notice was served on Mr. Brine, the Amritsar Manager of the defendant Company, on 23rd February 1935. In the meantime on 11th February 1935 the plaintiff firm had replied by wire to the defendant's pleader's telegram of the 7th, intimating that a suit for rendition of accounts had been filed on 9th February 1935, and asking the defendant not to proceed with the arbitration which it was stated would be illegal.

Notwithstanding the receipt of this reply, and the service of notice of the application for injunction on its agency manager at Amritsar, the defendant Company proceeded with the arbitration. Purport-

ing to act under Cl. 21 of the agreement, the defendant on 8th February 1935 made a reference to Messrs. Leslie Reed and R. H. Martin of Karachi as arbitrators. These arbitrators fixed 25th February 1935 as the date of hearing, and later adjourned it to 8th March 1935. On that date Mr. Radhey Lal pleader for the plaintiff firm appeared before the arbitrators and lodged a protest questioning their jurisdiction to proceed with the arbitration after the institution of the suit at Amritsar, and raised various other legal objections to the proceedings before them. After making a statement to this effect, he withdrew. The arbitrators however proceeded ex parte, and on 9th March 1935 delivered an award directing the plaintiff firm to pay to the defendant Company the sum of Rs. 20,446-2-6 with interest at 6 per cent. per annum from 18th December 1934, and the costs of the reference.

As already stated, the Subordinate Judge at Amritsar had fixed the same date, i. e. 9th March 1935, for the hearing of the plaintiff's application under O. 39, R. 1, when the defendant Company was to show cause why an injunction should not issue directing it not to proceed with the arbitration. On 9th March the defendants duly appeared by a pleader who stated that arbitration proceedings had been held at Karachi on 8th March and that, therefore the plaintiff's application for issue of an injunction had become infructuous. The Subordinate Judge adjourned the further hearing of this application to 14th March to enable the defendant's pleader to ascertain if the arbitration proceedings were still going on or the award had actually been delivered. Before the adjournment of the case, however, the defendant's pleader filed an application under S. 19, Arbitration Act, praying that the suit be stayed as, in accordance with the provisions of clause 21 of the agreement (Ex. D-1), the dispute concerning the agreement had been referred to the arbitration of two European merchants at Karachi.

The matter came up before the Subordinate Judge on 14th March 1935, when the defendant's pleader intimated that the award had been delivered on 9th March. On this, the plaintiff's pleader admitted that his application for injunction had become infructuous and he withdrew it. The defendant's pleader, however, pressed his application under S. 19 for stay of the

suit. To this application the plaintiffs filed a lengthy reply on 28th March 1935, raising numerous objections. Thereupon the learned Subordinate Judge framed a preliminary issue: "Whether the suit should not be stayed for the reasons given in the plaintiffs' written statement?" Proceedings on this application dragged on till 27th February 1937 when, by the order under revision, the learned Subordinate Judge granted the application and stayed the suit under S. 19. He held that an award having been obtained on 9th March 1935, the present suit could not proceed "for even if the plaintiff got a decree it would be a nullity unless the award was set aside". He also held that, though the plaintiff in his plaint had pleaded fraud, coercion, etc., these questions "could not be raised in a suit for accounts" and therefore need not be decided. Finally he observed that in any case as at the time the plaintiff brought the suit "there was a submission pending before the arbitrators", therefore, S. 19 of the Act was applicable to the present suit. He accordingly passed an order staying the suit under that section.

Before us the plaintiff's learned counsel has urged the following four points: (1) That the defendants not having shown that all matters involved in the suit had been referred to the arbitrators, the suit should not have been stayed under S. 19, even if it was otherwise applicable; (2) that assuming that the arbitration covered the same points as those involved in the suit, the arbitrators became functi officio the moment the suit was instituted and all further proceedings taken by them, without an order of stay under S. 19 having been obtained, were illegal and the award delivered by them on 9th March 1935 is a nullity; (3) that, assuming that the award is valid, it having been delivered on 9th March 1935 after which the arbitrators had nothing more to do, the order passed by the lower Court on 27th February 1937 staying the suit under S. 19 is meaningless and illegal; and (4) that in any case the suit raised difficult questions of fact and law, particularly those relating to the losses incurred in the defendant's dealings with Hari Saran Chowkra with whom the plaintiff firm had no concern and in respect of which Ex. D.6 and certain other documents had been obtained from Harbhajan Singh, a partner of the plaintiff firm, by fraud, misrepresentation

and duress, exercised on him by certain persons connected with the defendant Company and therefore this was a fit case to be decided in Court and not by arbitration, and for this reason also this suit should not have been stayed.

Before deciding these points, it seems necessary to refer to certain well-established principles of law on which there is, or can be, no controversy. The general rule is that a party to a dispute has got the right to seek the assistance of Courts of law, constituted by established authority, to have his disputes settled according to law. This right inheres in every suitor and any agreement by which a party is restricted absolutely from enforcing his rights under or in respect of any contract by usual legal proceedings in ordinary tribunals is to that extent void, being opposed to public policy. This is enacted in S. 28, Contract Act. The law however permits the parties to make a valid agreement to have present or future disputes settled out of Court by private arbitration. This is clearly recognized in Exceps. 1 and 2 to S. 28, which specifically provide that that section does not render illegal a contract by which two or more persons agree that any dispute, which has already arisen, or which may arise hereafter, shall be referred to arbitration. But while this is so, the existence of a valid agreement to refer existing or future disputes to arbitration does not oust the jurisdiction of the Courts to entertain a suit relating to the matters agreed to be referred to arbitration. Nor can such agreement be pleaded as a conclusive bar to the suit, unless the submission to arbitration has actually resulted in the rendition of an award. Accordingly, it has been enacted in S. 21, Specific Relief Act, that no contract to refer present or future differences to arbitration shall be specifically enforced. But this does not mean that if a person, in breach of the agreement to refer to arbitration, institutes a suit in a Court, the opposite party is without a remedy. In such a case he may if he chooses apply for the stay of the suit pending arbitration, provided he does so at the earliest opportunity, and if there are no special reasons to the contrary, the Court will stay the suit. Provisions to this effect will be found in S. 19, Arbitration Act, as well as para. 18 of Sch. 2, Civil P. C.; the former Act applies only to Presidency towns or other local areas to which its

provisions have been made applicable by the Local Government. It is common ground between the parties that the present case is governed by the Arbitration Act. S. 19 of that Act reads as follows:

19. If any party to a submission, to which this Act applies, or any person claiming under him, commences any legal proceedings against any other party to the submission, or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings; and the judicial authority before which the proceedings are pending, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

It will be seen that the conditions which must be fulfilled before an application for stay can be made are: (1) that there must be a valid submission; (2) that legal proceedings in Court have been commenced by a party to the submission in respect of a matter agreed to be referred; and (3) that the application for stay is made by the opposite party before filing his written statement or taking other steps in the proceedings. If these conditions are fulfilled, the Court will grant the application and stay the suit so as to enable the parties to have the dispute settled by arbitration, unless of course the opposite party satisfies it that there are sufficient reasons to the contrary. If however the opposite party does not avail himself of the provisions of S. 19, or fails to apply under that section at the proper time, or where the application if made has been refused, the Court will proceed with the suit and its decision will be binding on the parties. And this is so not only where the action had been brought before the reference to arbitration, but also in cases where the arbitrators had been appointed before the institution of the suit and had actually entered upon their duties (but had not given the award) before that date. It is well-settled that the existence of the submission or the pendency of arbitration proceedings is no defence to an action in breach thereof, unless the stay is obtained in accordance with the provisions of S. 19, Arbitration Act (or Para. 18, Sch. 2, Civil P. C.) which correspond to S. 4, English Arbitration Act. The leading authority

on the subject is (1912) 3 K B 257,¹ where Fletcher Moulton, L. J. explained the law in the following terms at pp. 268-69:

The present position therefore of agreements to refer to private tribunals may be shortly expressed thus. The law will not enforce the specific performance of such agreements but if duly appealed to, it has the power, in its discretion, to refuse to a party the alternative of having the dispute settled by a Court of law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the Court has refused to stay an action, or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows therefore that in the latter case the private tribunal, if it has ever come into existence, is *functus officio*, unless the parties agree *de novo* that the dispute shall be tried by arbitration, as in the case where they agree that the action itself shall be referred. There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. To my mind, this is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted. Their jurisdiction is to hear and decide the matters of the action, and for a private tribunal to take that decision out of their hands, and decide the questions itself, is a clear ouster of jurisdiction. Therefore to hold that the private tribunal is still effective after the dispute has come before the Court, would be to say that, in all cases in which S. 4, Arbitration Act 1889 applies, the defendant may still force on an arbitration and, by obtaining an award from the arbitrators, oust the jurisdiction of the Courts to decide the question they have in hand. In each case where the Court has decided that it will retain in its own hands the decision of the case, there would thus be a race between it and a private tribunal, which should be the first to give a decision in the matter. The learned Judge has decided that, if during the pendency of the action an award is obtained from the arbitrator, it can be pleaded in bar to the action, or, in other words, the decision of the arbitrator, and not that of the Court, decides the rights of the parties. If this were good law, there would in every case be the race between the public and private tribunals which I have described, and the decision of the speediest would prevail. This would be ousting the jurisdiction of the Court in a most ignominious way.

It was accordingly held in that case that where an action has been commenced upon a contract containing a provision for reference to arbitration of any dispute arising under the contract and is pending, no application to stay the action having been made under S. 4, or such an application having been refused and award made by the arbitrator under the provision for reference upon the subject matter of the action, subsequent to the commence-

1. *Doleman & Sons v. Ossett Corporation*, (1912) 3 K B 257=81 L J K B 1092=107 L T 581=76 J P 457=10 L G R 915.

ment thereof, and without the consent of the plaintiff, is invalid and will not afford a defence to the action. The principle laid down in (1912) 3 K B 257¹ has been followed in numerous cases by this Court and other Courts in India. The leading case of this Court is 3 Lah 296,² where the proposition laid down in the above case was adopted as "resting upon sound principle, the validity of which could not be impeached," and it was observed :

It is clear that when the same matter comes before two tribunals, a public tribunal appointed by the Sovereign and a domestic forum chosen by the parties, and no order is made staying the proceedings before the one or the other, the public tribunal alone must decide that matter and cannot be hampered by any adjudication thereupon made by the private tribunal. Neither can that adjudication be pleaded as a bar to the action, nor can it be allowed to affect the merits of the decision given by the public tribunal.

The most recent instance of the application of this principle in this Court will be found in 17 Lah 291,³ where it was held that unless the action is stayed by the Court, any award given during the pendency of the suit will be null and void, as a private tribunal cannot oust the jurisdiction of the ordinary Courts. The question has been frequently considered in the Calcutta High Court where the same view has been taken in a series of cases: see 46 Cal 1041,⁴ 47 Cal 752,⁵ 47 Cal 849⁶ and 69 I C 863.⁷ The Madras High Court also has held in 41 Mad 115⁸ that a private reference to arbitration of a subject of a dispute does not prevent either party filing a suit in a Court of law in respect of the same matter ; and on the institution of the suit, the arbitrators become functi officio and any award by them made thereafter is without jurisdiction, unless of course stay of the suit had been obtained

at the earliest opportunity and before the award had been made.

The learned counsel for the respondent contended however that these decisions went much further than the rule laid down in (1912) 3 K B 257¹ and are based upon a misapprehension of the judgment of Fletcher-Moulton, L. J. in that case, and in support of his contention he relied upon a ruling of the Judicial Commissioners of Sind in 52 I C 130,⁹ which has been followed in subsequent decisions of that Court, reported in 80 I C 969¹⁰ and 87 I C 83.¹¹ In that case it was held that the mere fact of a suit being filed does not invalidate the arbitration proceedings. It was further held that an order under S. 19 can be made before, as well as after, the reference or award. After reading the leading judgment of Pratt, J. C. in that case, with the respect to which all judgments of that learned Judge are entitled, I find myself unable to accept his conclusion on both these points, in preference to the contrary decisions of the Lahore, Calcutta and Madras Courts, which as has been shown above, are based on principles, the correctness of which is beyond dispute. The learned Judicial Commissioner appears to have thought that as a result of the adoption of the opposite view, the provision for stay of the suit contained in S. 19, Arbitration Act (or Sch. 2, Para. 18, Civil P. C.) "would become unnecessary, and the arbitration proceedings and the agreement would be dead as soon as the suit was filed." But, if I may say so with all deference, this is by no means the case. If, after the institution of the suit, the opposite party still wishes to proceed with the arbitration, his remedy is to apply for stay, which the Court will grant, unless there are weighty reasons to the contrary. And as to the effect of the institution of the suit on proceedings already taken before the arbitrators, the correct position is thus explained by Mookerjee, J. in 47 Cal 849⁶ at p. 855 :

Consequently, when a reference to arbitration has been made and the private tribunal has come

2. Jai Narain Babu Lal v. Narain Das Jaini Mal, A I R 1922 Lah 369=69 I C 583=3 Lah 296.

3. Ghanesham Dass Gowerdan Dass v. Tek Chand, A I R 1935 Lah 916=157 I C 867=17 Lah 291=38 P L R 636.

4. Dinabandhu Jana v. Durga Prasad Jana, A I R 1919 Cal 479=51 I C 80=46 Cal 1041=29 O L J 399=23 O W N 716.

5. Ram Prosad Surajmull v. Mohan Lal Lachmi Narain, A I R 1921 Cal 770=60 I C 895=47 Cal 752=38 O L J 67.

6. Jokiram Kaya v. Ghaneshamdas Kedarnath, A I R 1921 Cal 244=61 I C 980=47 Cal 849=25 O W N 62.

7. Sarat Chandra Sen v. Rajkumar Mookerjee, A I R 1923 Cal 135=69 I C 863=35 O L J 482=26 O W N 967.

8. Appavu Rowther v. Seeni Rowther, A I R 1918 Mad 719=42 I C 514=41 Mad 115=33 M L J 177.

9. Khillooram Lokuram v. Louis Dreyfus & Co., A I R 1919 Sind 57=52 I C 130=13 S L R 8.

10. Tyebally Abdul Hussain v. James Finlay & Co., A I R 1924 Sind 105=80 I C 969=17 S L R 15.

11. Mitsui Bussan Kaisha, Ltd. v. Tataram Bhagwandas, A I R 1924 Sind 146=87 I C 88=17 S L R 228.

into existence, the effect of the institution of the suit is that from that very moment the arbitrators become *functi officio*, that is, their authority to deal further with the matter becomes extinguished. The institution of the suit cannot however retrospectively affect the validity of the reference which, when it was made, was in exact conformity with the agreement of the parties. If this view were not adopted, the result would follow that a party to a submission, who had appeared throughout and had taken his chance before the arbitrators might at the very last moment, when the award—possibly an adverse award—was about to be made, and when there would be no time left for his opponent to obtain a stay order, institute a suit and thereby render infructuous the entire proceedings. Such a conclusion cannot in our opinion be defended, either on principle, or on the authorities. In the case before us the arbitration proceedings were properly instituted and carried on till up to the moment of the institution of the suit; that suit could not, on any conceivable principle of law, relate back to the date of reference and affect the validity of the proceedings which had followed thereon.

It was accordingly held that all proceedings before the arbitrators subsequent to the institution of the suit were invalid, and the award given by them was held to be null and void. The award having been cancelled, the learned Judges then proceeded to consider whether, in the circumstances of that case, there were adequate grounds for not staying the suit, and finding for the defendant, they stayed the suit, leaving the parties to proceed with the arbitration from the stage at which the proceedings were on the date of the institution of the suit. With great respect, I consider that this case states correctly the true legal position and I am unable to follow the contrary decision in 52 I C 130.⁹

Nor can I accept the view of the learned Judicial Commissioner in the above case, that an order of stay can be passed under S. 19, Arbitration Act, even after the award had been given (*see* p. 134 of the Report). There is nothing in the section which would justify this conclusion. The object of passing an order staying the suit under that section is to allow the parties to proceed with the arbitration: But if before the application for stay is made or has been disposed of the arbitrators have already made the award (which according to the view of the learned Judicial Commissioner is valid), there will be no point in making the stay order. In that event, the proper course for the opposite party would be to plead the award in bar of the suit, and not to obtain

an order staying the suit pending arbitration, which had already terminated. The learned Judicial Commissioner has observed that the Lord Justices who decided (1912) 3 K B 257¹ "were of opinion that a stay order could be made not only after reference but even after award." With great respect, I may say that there is nothing in the judgments of the Lord Justices in that case to warrant this conclusion. Nor was the learned counsel for the respondent able to adduce any other argument in support of it.

Applying these principles to the case before us, it must be held that the award delivered on 9th March 1935 more than a month after the institution of the suit, is a nullity and that it cannot be pleaded by the defendant either to obtain a stay order under S. 19, or in bar of the suit. As pointed out already, the suit had been instituted in the Court of the Subordinate Judge at Amritsar on 9th February 1935. Notice of the institution of this suit had been served on Mr. Brine the local Manager of the defendant, on 23rd February 1935. If the defendant Company wanted to have the matter decided by the arbitrators and not by the Court, it should have obtained a stay order from the Court forthwith and then proceeded with the arbitration and obtained the award. In that event, the award would have been valid and binding. But instead of doing so, the defendant Company proceeded with the arbitration, and having obtained an award in its favour on 9th March, moved the Court several days later for stay of the suit under S. 19. The learned Subordinate Judge has granted the application being of the opinion that in the presence of the award, "any decree that the plaintiff might get in the suit will be a nullity." The correct legal position is however just the other way. The first ground on which the learned Judge has based his decision is therefore erroneous.

Counsel for the petitioner has further contended that the arbitrators had taken cognizance of matters which are not covered by the guarantee agreement Ex. D-1, e. g., those relating to losses alleged to have been incurred by the defendants in their dealings with Hari Saran Chowkra and in respect of which certain documents had been obtained by the defendants from one of the partners of the plaintiff firm by fraud, misrepre-

sentation and duress. He has urged that these matters are outside the submission and therefore within the exclusive cognizance of the Civil Court, and consequently no order staying the suit in so far as it relates to these matters could have been passed under S. 19. The learned Subordinate Judge has dealt with this part of the case very summarily. He has not gone into the merits of the objection, but has rejected it on the broad ground that "points of fraud or coercion could not possibly arise in a suit for rendition of accounts". It is hardly necessary to say that this proposition cannot be accepted as correct, in the wide terms in which it is expressed. It is settled law that if such allegations go to the very root of the agreement to refer to arbitration, or if they relate to matters outside the scope of the submission, the only forum to decide that matter is the Civil Court. In either of these cases S. 19 will *ex necessitate rei* be inapplicable: see 3 Lah 296² at pp. 298, 299, 66 I C 741¹² and A I R 1934 Sind 200.¹³

If on the other hand, misrepresentation, fraud, or coercion is alleged to have been committed in reference to matters which are sought to be proved in proof or disproof of the contentions of the parties relating to a dispute which has been, or can be, validly referred to arbitration in accordance with the original agreement, this will not necessarily be a ground for declining to stay the suit. Unfortunately, in the present case it is not possible to come to a definite decision on this point on the materials on the record. The exact terms of the reference to arbitration made by the defendant to Messrs. Leslie Reed and R. H. Martin on the 8th February cannot be known, as the document containing them has not been produced. Nor can it be determined with any degree of certainty as to whether the defendant's dealings with Hari Saran Chowkra were or were not covered by the agreement, Ex. D.1. None of the parties appears to have been examined in detail as the circumstances in which those transactions were conducted, and it is obviously unsafe to come to a definite finding on mere

inferences drawn from stray questions put to the witnesses in cross-examination.

The decision of the lower Court therefore cannot be sustained on any of the grounds on which it proceeds. It has already been held above that the so-called award of 9th March 1935 is a nullity. It must therefore be ignored. This however does not mean that the defendant's application under S. 19 should be dismissed forthwith. On the other hand, the application having been made before the filing of the written statement or the defendant having taken any other proceedings in the suit, the Court is bound to consider and decide it in accordance with law. In doing so, it must first decide whether all matters raised in the suit had been referred to the arbitrators in accordance with the submission clause in the agreement, Ex. D.1. If it comes to the conclusion that this was so, it would be for the plaintiff to show that sufficient grounds exist for not having the dispute settled by arbitration as agreed to by the parties in the aforesaid clause. If the plaintiff fails to satisfy the Court that any such ground exists, the Court must pass an order staying the suit and having the dispute settled by arbitration. It may be mentioned here that in that event, the proper course would have been to restart the arbitration proceedings from the stage at which they were on 9th February 1935 when the suit was instituted. But it was stated before us by the learned counsel for the respondent that one of the arbitrators appointed on that date is not in India now and therefore it is not possible to continue the proceedings before the same arbitrators. Accordingly, if the Court now decides to stay the suit the parties, shall have to appoint new arbitrators in accordance with the procedure laid down in Cl. 21 of the agreement and obtain a proper award from them. If on the other hand the Court finds that the suit comprises matters which are outside the agreement, the suit, in so far as it relates to those matters, shall proceed.

For the reasons given above, I would accept this petition, set aside the order of the Court below, and remand the case to it for re-hearing and re-decision in accordance with the foregoing remarks. In the circumstances, I would leave the parties to bear their own costs in this Court.

Both counsel have been directed to cause their respective clients to appear

12. Jnanendra Krishna Bose v. Sinclair Murray & Co., A I R 1921 Cal 255=66 I C 741=34 C L J 173.

13. Hormusji and Daruwalla v. District Local Board Karachi, A I R 1934 Sind 200=153 I C 911=28 S L R 223.

before the lower Court on 16th August 1937, when a date for further proceedings in the case will be fixed.

Abdul Rashid, J.—I agree.

V.B.B./R.K.

Case remanded.

A. I. R. 1937 Lahore 859

SKEMP, J.

Sarb Krishan and another —

Official Receivers — Petitioners.

v.

Mt. Fatima — Respondent.

Civil Revn. Petn. No. 627 of 1937, Decided on 13th July 1937, from order of Dist. Judge, Ludhiana, D/. 6-2-1937.

(a) Mahomedan Law — Dower— Deferred dower is payable after death, divorce or after period fixed for its payment.

Deferred dower becomes payable only on the expiration of the period fixed for the same at the time of the marriage or after the dissolution of marriage by death or divorce. [P 860 C 1]

(b) Insolvency — Fraudulent transfer — Transfer in lieu of deferred dower — Application for adjudication within one year of transfer—Transfer held fraudulent and could be set aside.

Where a transfer of property by an indebted husband to his wife in lieu of her deferred dower took place a few days after the demand of debt by the creditors, and within a year the husband applied to be adjudged insolvent, and, in all probability the husband retained a benefit to himself by the transfer :

Held : that the transfer was tainted with fraud, and could be set aside under S. 53, Provincial Insolvency Act : *A I R 1930 Lah 1027* and *A I R 1929 P C 279, Rel. on.* [P 861 C 1]

Achhru Ram — for Petitioners.

D. N. Aggarwal — for Respondent.

Order. — This petition has arisen from proceedings under S. 53, Provincial Insolvency Act. It was lodged and admitted as a second appeal but on objection being taken at the hearing, Mr. Achhru Ram for the petitioner immediately agreed that no second appeal lies and this has been treated as a petition for revision under the Proviso to S. 75, Provincial Insolvency Act. The insolvent is one Ismail who was adjudicated on 21st October 1935 on his own petition dated 3rd June 1935. On 3rd August 1934, he had sold a house by a registered deed to his wife Mt. Fatima for Rs. 1,500, being Rs. 900 dower and Rs. 600 the value of ornaments. On 27th July 1934 he had received a notice from some of his creditors for payment of their debts, the notice having been despatched on 25th July 1934. After Ismail's adjudication,

the Official Receiver made an application under S. 53, Provincial Insolvency Act. There is no doubt that Ismail has been adjudged insolvent on the petition presented within two years of the transfer (the time is less than one year), and the question is whether the transfer was made in favour of Mt. Fatima in good faith and for valuable consideration. Both good faith and consideration are requisite under S. 53, Provincial Insolvency Act. The case of the insolvent and his wife is that Rs. 600 was due to her for her ornaments and Rs. 900 for dower. Ismail married Mt. Fatima in 1902 and a kabainnama was drawn up on that occasion which recites (a) that he had given her ornaments worth Rs. 200 and (b) that dower was fixed at Rs. 900 of which one-third was prompt, the balance deferred. Besides this, certain relatives said that they had given the bride ornaments worth Rs. 400 on the occasion of her marriage. Admittedly in 1930 Ismail sent Rs. 1,000 to one of his creditors and he said that he sold these ornaments for Rs. 600 which went towards this sum. The Insolvency Judge did not believe that Mt. Fatima's relatives gave her ornaments worth Rs. 400 and he did not believe the story of the sale of the ornaments for Rs. 600. As for the dower debt, he said Rs. 300 was prompt, and Rs. 600 deferred, and ordinarily demand for deferred dower is only made after the death of the husband or after divorce. He therefore set aside the transaction on the ground that it was fraudulent except that Mt. Fatima might prove as a creditor her prompt dower.

The learned District Judge accepted the appeal of Mt. Fatima. He held that all the ornaments had been given to Mt. Fatima on the occasion of her marriage and that they were sold for Rs. 600. Following certain rulings he also held that a Mahomedan wife had a right to demand deferred dower at any time. He therefore upheld the transaction in full. Mr. Achhru Ram for the petitioning creditor admitted that the District Judge's finding about the sale of the ornaments for Rs. 600 was a finding of fact and binding, but he argued that Mt. Fatima had no right to demand deferred dower until the death of her husband or her divorce, that the consideration to the extent of the deferred dower was bad and that the transaction was tainted with fraud and must be set aside. Mr. D. N. Aggarwal for the respondent

argued that the District Judge had found that the transaction was bona fide and that this was a finding of fact which could not be impugned in revision. It appears to me that the question of law is involved whether Mt. Fatima could demand her deferred dower before divorce or widowhood. Mulla's Mahomedan Law (10th Edn.), para. 221 states :

The amount of dower is usually split into two parts, one called "prompt" which is payable on demand, and the other called "deferred" which is payable on dissolution of marriage by death or divorce;

and the rule is stated in very similar terms in other works of authority on Mahomedan Law, e. g. Wilson's Anglo-Mahomedan Law (6th Edn.) p. 120, paragraph 46; see also Baillie's Digest of Mahomedan Law, 1875, p. 92 :

It is usual however to divide the dower into two parts, one termed mooujjul or prompt which is immediately exigible; the other moowujjul or deferred, which is not exigible till the dissolution of the marriage. The payment even of the exigible part of the dower is not unfrequently postponed till that event : c. f. idem page 129.

Macnaghten's Precedents of Mahomedan Law (Edn. 2) 1897 does not say when deferred dower is due. Syed Ameer Ali's Edn. 5, Vol. 2, page 442, says :

The portion which is payable immediately is called the mahr-i-muajjal 'prompt' or 'exigible' The other portion is called mahr-i-muwajjal 'deferred dower' which does not become due until the dissolution of the contract. . . . Generally speaking, among the Muslims of India the deferred dower is a penal sum, which is allowed to remain unpaid with the object of compelling the husband to fulfil the terms of the marriage contract in their entirety.

At page 447 the learned author writes :

The prompt portion of the mahr may be realised by the wife at any time before or after consummation; the deferred portion remains unpaid until the dissolution of the contract or such other time as its payment may have been postponed to. There is no rule by which it necessarily follows that postponed or deferred dower becomes realisable only on the death of the husband, or if he happen to divorce the wife, on such divorce. The great difference between prompt and deferred dower is this : the portion of the dower specified in the contract as prompt is payable and realisable at once, and the wife can refuse all conjugal rights on the part of the husband until it is paid. As regards postponed dower, it becomes payable only on the expiration of the period specified. If no period is fixed, it becomes payable on the dissolution of the contract.

Mr. Aggarwal for the respondents relied on the second sentence of this paragraph as authority that a wife can demand deferred dower at any time. Read with its context and especially with the passage at page 442, I do not think it means this,

but only that deferred dower may be realised at any time fixed at the time of the marriage. Mr. Aggarwal also relied on a certain number of judicial authorities most of which come from Allahabad. In 8 All 178¹ where an indebted husband had transferred property to his wife in lieu of dower, it was held there was good consideration even though the dower was deferred; but cases of insolvency were excepted, Straight, J. saying :

A genuine sale made for good and valid consideration to one creditor, even if effected to delay and defeat another, apart of course from cases in which either insolvency or bankruptcy is involved, is not void.

In 43 I C 280,² a case relied on by the District Judge, Stuart, A. J. C. said :

In the Courts below . . . it was agreed that the dower was prompt dower But, whether it was prompt or deferred, a Mahomedan wife can hardly be stated to be guilty of fraud if she asks her husband to pay her dower, even if that dower be deferred. Of course it may be said that ordinarily a Mahomedan wife does not claim her dower during her husband's lifetime, and frequently never claims it at all. But that circumstance is immaterial. A Mahomedan wife has a right to claim dower, and she can enforce that right as she wishes and how she pleases.

These remarks are strong but obiter, the case being one of prompt dower. In A I R 1934 All 441,³ a case of transfer to a wife in lieu of dower by an indebted husband but not under the Insolvency Act, 8 All 178¹ was followed and it was said :

A wife is not entitled as of right to demand the payment of her deferred dower debt and cannot enforce such a claim, but if she does demand it and if the husband thinks fit to pay it or to make a transfer of property in her favour in lieu thereof, he is legally competent to do so and such transfer will be valid.

This however was not under the Insolvency Act and no case was cited in which transfer of property by an insolvent or a man shortly afterwards adjudged insolvent to his wife has been upheld, the consideration being deferred dower. Another test in these cases is: did the debtor retain any advantage for himself : see 7 Rang 624 (P C)⁴ quoted in 12 Lah 194⁵ at pp. 198.

1. Suba Bibi v. Balgobind Das, (1886) 8 All 178 = 1886 A W N 51.

2. Nasimunnissa v. Abdul Kadir, A I R 1918 Oudh 29 = 43 I C 280 = 20 O C 295.

3. Mangat Rai Hira Lal v. Sakina Begam, A I R 1934 All 441 = 149 I C 1211 = 1934 A L J 64.

4. Ma Pwa May v. S. R. M. M. A. Chettyar Firm, A I R 1929 P C 279 = 120 I C 645 = 56 I A 379 = 7 Rang 624 (P C).

5. Madan Gopal v. Lahri Mal Janki Das, A I R 1930 Lah 1027 = 130 I C 62 = 31 P L R 775 = 12 Lah 194.

199. In the Privy Council case, there was moreover no question of bankruptcy. Now, in the present case, while making over the house to his wife there is a strong suspicion that the insolvent retained a benefit for himself. In his evidence indeed he said :

I do not live with my wife since a year. I occasionally visit her. I do not sleep in the house at night.

It is remarkable that a husband so fond of his wife as to pay her deferred dower before it was actually due should never sleep a night in the house. Considering all the circumstances, that the transaction took place a few days after a demand by the creditors, that the husband applied to be adjudged insolvent within a year, that in all probability he retains a great advantage for himself, I am of opinion that the transfer in so far as it was for deferred dower is tainted with fraud. That being so, the whole transaction must be set aside: 12 Lah 194.⁶ I therefore accept this petition and hold that the transaction whereby Ismail transferred his house to Mt. Fatima is void. The costs throughout will be borne by her.

B.D./R.K.

Petition allowed.

A. I. R. 1937 Lahore 861

ADDISON AND DIN MOHAMMAD, JJ.

Chanan Das — Creditor — Petitioner.
v.

Ghulam Mohammad, Debtor and others
— Creditors — Respondents.

Civil Revision Petn. No. 419 of 1936,
Decided on 16th February 1937, from
order of Dist. Judge, Jhang, at Sargodha,
D/. 9th March 1936.

Punjab Relief of Indebtedness Act (7 of 1934), S. 25—Insolvency Court is Civil Court—Insolvency proceedings should be suspended under S. 25 when fact of application by debtor to Board has been brought to its notice.

The mere fact that there is a special Act for insolvency does not mean that the Insolvency Court is not a Civil Court. All that the Insolvency Act does in this respect is to determine the Civil Court which shall hear insolvency petitions. The words 'in respect of any such debt' in S. 25, Punjab Relief of Indebtedness Act, mean in respect of any debt for the settlement of which application has been made to the Board. An insolvency application comes within the meaning of 'other proceeding pending before a Civil Court in respect of any such debt'. Insolvency proceedings should therefore be suspended under S. 25 when the fact of filing of an application to the Board by the debtor has been brought to the notice of the Insolvency Court. [P 861 O 2]

J. L. Kapur — for Petitioner.

Order.—Ghulam Muhammad applied to be adjudicated an insolvent. Subsequently he made an application under S. 9, Punjab Relief of Indebtedness Act to the Board appointed for the area in which he resided or held land to effect a settlement between him and his creditors. This was brought to the notice of the Insolvency Judge before whom the insolvency application of Ghulam Muhammad was pending. Under S. 25, Punjab Relief of Indebtedness Act, the Insolvency Judge suspended the proceedings pending before him. One of the creditors appealed to the District Judge against the order suspending the insolvency proceedings and his appeal was dismissed. The same creditor then applied to this Court on the revision side for an order setting aside the suspension of the proceedings in the Insolvency Court. It is this petition which is before us. The principal contention before us was that an Insolvency Court was not a Civil Court. It is obvious however that it is. Under the Insolvency Act it is the Court of the District Judge which is the primary Insolvency Court, though provision is made for a Subordinate Judge to be made such a Court. The mere fact that there is a special Act for insolvency, does not mean that the Insolvency Court is not a Civil Court. All that the Insolvency Act does in this respect is to determine the Civil Court which shall hear insolvency petitions. S. 25 is as follows:

When an application has been made to a Board under S. 9, no Civil Court shall entertain any new suit or other proceeding brought for the recovery of any debt for the settlement of which application has been made to the Board, and any suit or other proceeding pending before a Civil Court in respect of any such debt shall be suspended until the Board has dismissed the application or an agreement has been made under S. 17.

It is the second part of this section which applies to the case before us. The words "in respect of any such debt" mean in respect of any debt for the settlement of which application has been made to the Board. The insolvency application comes within the meaning of "other proceeding pending before a Civil Court in respect of any such debt". Under S. 25 therefore of the Punjab Relief of Indebtedness Act, the proceedings before the Insolvency Court were properly suspended. For the reasons given, we dismiss the petition. No order as to costs is necessary as the appeal has been heard *ex parte*.

K.B./R.K.

Petition dismissed.

A. I. R. 1937 Lahore 862

COLDSTREAM, J.

Noble Millicans — Defendant —
Appellant.

v.

Mrs. Gladys Millicans — Plaintiff —
Respondent.

First Appeal No. 77 of 1937, Decided on 5th July 1937, from order of Dist. Judge, Delhi, D/- 10th April 1937.

(a) Divorce Act (1869), S. 55—Scope—S. 55 deals with procedure and applies to Court to which appeals lie—Appeal lies from order fixing amount of maintenance.

The language of S. 55, Divorce Act, provides expressly for an appeal from all orders passed by the District Judge. It is one of the sections dealing with 'procedure' and must apply only to the procedure to be followed and the Court to which appeals lie. An appeal lies from an order of the Court fixing amount of maintenance under S. 41. [P 862 C 2]

(b) Divorce Act (1869), Ss. 41 and 43—Scope—High Court will not interfere with order passed by Court about maintenance under S. 41 unless it is passed in disregard of evidence or is unreasonable.

The order passed by the District Judge about maintenance under S. 41, Divorce Act, terminates when a final order is passed under S. 43, and S. 41 gives the Court a very wide discretion to fix such maintenance as it thinks fit. High Court will not therefore ordinarily interfere with an order fixing the amount of maintenance unless it appears to have been passed in disregard of the evidence and is clearly unreasonable. [P 862 C 2]

Bhagwat Dayal — for Appellant.

Mela Ram — for Respondent.

Judgment.—On 27th February 1937, the District Judge of Delhi granted a decree subject to confirmation by this Court dissolving the marriage between Gladys Millicans and Noble Millicans. In his judgment, the District Judge gave the custody of the three children of the parties to the petitioner Mrs. Millicans and in an order passed on 10th April 1937 ordered the respondent to pay her Rs. 120 to maintain them. Mr. Millicans has submitted an appeal against the decision of the District Judge dissolving the marriage as well as the order about the custody of the children and the amount fixed for their maintenance.

On this appeal coming up for hearing, it is objected by Mr. Mela Ram for Mrs. Millicans that no appeal lies either against the decree dissolving the marriage or against the order about the custody of the children and their maintenance. He points out that S. 55, Divorce Act, bars an appeal against the decree dissolving

the marriage. The other orders are merely ad interim orders which will cease to have force when this Court hears the application which has been submitted for the confirmation of the decree. For Mr. Millicans, Mr. Bhagwat Dayal admits that no appeal lies against the decree and states that the only matter which he wishes to agitate is that of the amount fixed by the order of 10th April 1937 as maintenance allowance for the children. He contends that the order regarding maintenance is open to appeal. He does not at this stage attack the order of the Judge giving Mrs. Millicans custody of the children (of which matter, I notice, S. 41 of the Act makes no specific mention). The language of S. 55, Divorce Act, appears to me to provide expressly for an appeal from all orders passed by the District Judge. The words

in the like manner as the decree and order of the Court made in the exercise of its civil jurisdiction are enforced and appealed from under the laws, rules and orders for the time being in force in S. 55, which is one of the sections dealing with "procedure" must, I think, be held to apply only to the procedure to be followed and the Court to which appeals lie. The order passed by the District Judge about maintenance will terminate when a final order is passed under S. 43, and S. 41 gives the Court a very wide discretion to fix such maintenance as it thinks fit. This Court will not therefore ordinarily interfere with an order fixing amount of maintenance unless it appears to have been passed in disregard of the evidence and is clearly unreasonable. Counsel for Mrs. Millicans has not referred me to any evidence justifying the fixing of the amount at Rs. 120 per mensem except the fact that Mr. Millicans' gross salary is Rs. 450 and I can find nothing on the record showing that Mr. Millicans paid Rs. 90 for the two elder children at school, one of the facts relied upon by the District Judge in fixing Rs. 120. Mr. Millicans has stated on oath that after deductions made for his provident fund, income-tax, house rent and insurance and interest on a loan, he gets only Rs. 175 per mensem. With his memorandum of the present appeal he submitted an affidavit detailing the deductions from his salary which amount to Rs. 266.6-0. Assuming that Rs. 20 are on account of interest on a loan which we may ignore, his net income is approximately Rs. 203. His affidavit shows that his wife's statement

that he paid Rs. 90 at one time for the education of two children is untrue—he was paying Rs. 70 and that they can be educated at good schools for Rs. 24 per mensem. No counter-affidavit has been put in; Mrs. Millicans is not dependent on her husband. It is true that any alteration in the amount paid must be small—a matter of Rs. 20 or Rs. 25 per mensem, but after considering the evidence and the peculiar circumstances of this case, I think that Mr. Millicans is entitled to a modification of the order. I accept the appeal and fix the amount to be paid as maintenance at Rs. 95 per mensem.

S.C./R.K.

Appeal allowed.

* A. I. R. 1937 Lahore 863

SKEMP, J.

Firm Ram Sahai-Chuni Lal —

Plaintiff — Appellant.

v.

Moti Ram — Defendant — Respondent.

Second Appeal No. 392 of 1937, Decided on 15th July 1937, from decree of Dist. Judge, Rawalpindi, D/- 12th January 1937.

* Limitation Act (1908) Art. 75—Instalment bond — Default clause enabling suit for entire amount — Instalments defaulted—Suit brought more than three years after default—Claim for interest on entire amount from date of suit — Suit held governed by Art. 75, Lim. Act — Interest being claimed from date of suit, waiver clause in Art. 75 not applicable — Suit brought for entire amount cannot be treated as suit for instalment.

A bond payable by instalments provided that if there was default in three consecutive instalments, the creditor would have the option to sue for the full sum together with interest after deduction of any instalments actually paid. The bond was executed in March 1932. Nothing was paid and the suit was brought in November 1935. It was admitted that seven instalments were barred and the claim for balance of principal plus interest due on the whole sum from the original date of the bond was claimed. It was contended by the debtor that the suit was barred by time being brought beyond the time provided by Art. 75, Lim. Act. On the other side it was contended that the default clause was exclusively for the benefit of the creditor, and that he had waived the benefit of the provision, and as such the suit was within time. It was further contended that the suit should be regarded as a suit for each of the instalments still due at a date within three years from the date of the suit :

Held : that the suit was governed by Art. 75. As the creditor had claimed interest on the entire amount from the date of suit, he could not take advantage of the waiver clause. When there was option either to sue for the whole or to wait

and the creditor exercised the option and the whole amount became due, the question of a right to recover the instalments only did no longer arise and as such the suit was barred by time : *A I R 1933 Lah 849 Dissent.* ; *A I R 1934 All 661 (F B), Foll.* ; *A I R 1937 Lah 1* ; *A I R 1932 Nag 1* ; *A I R 1934 All 1039* and *A I R 1929 Cal 292, Rel. on* ; *A I R 1918 All 55 held virtually overruled by A I R 1934 All 661, (F B).* [P 864 C 1; P 865 C 1]

*Achhru Ram — for Appellant.**D. R. Sawhney — for Respondent.*

Judgment. — This second appeal has arisen from a suit on an instalment bond with a default clause. The bond was for Rs. 1,500 payable by monthly instalments and provided that if the instalments were paid regularly, the obligees would remit Rs. 400. It also provided that if there was default in three consecutive instalments, the obligees would have the option to sue for the full sum of Rs. 1,500 together with interest after deduction of any instalments actually paid. The bond was executed in March 1932. Nothing was paid and the plaintiffs sued in November 1935. The plaintiffs admitted that seven instalments amounting to Rs. 480 were barred and the claim was for Rupees 1,020, balance of principal, plus Rs. 530 interest due on the whole sum from the original date of the bond. The defendant pleaded that the suit was barred by time, as being brought more than three years after default. The trial Judge held that the suit was within time and granted the plaintiffs a decree for Rs. 1,020 but disallowed interest as in his view of the case the plaintiffs could not rely on the default clause. On appeal, the learned District Judge held that the entire suit was barred by time. He accepted the appeal and the plaintiffs have come in second appeal.

I will say at once that I think the learned District Judge was right. Mr. Achhru Ram for the appellants relied on the Privy Council judgment, 7 Luck 442,¹ which deals with a mortgage. Their Lordships held that a clause empowering the mortgagees in case of default to bring the property to sale was inserted 'exclusively for the benefit of the mortgagees' and that the mortgagor had no right to redeem on his own default because the mortgage money did not become due within the meaning of Art. 132, Lim. Act, until both the mortgagor's right to redeem and the

1. *Lasa Din v. Mt. Gulab Kunwar*, A I R 1932 P O 207=138 I C 779=59 I A 376 = 7 Luck 442 (P O).

mortgagee's right to enforce his security had accrued. Mr. Achhru Ram contended that the same principle would apply to a simple money bond, and that the clause enabling the plaintiffs to sue in default was inserted for their exclusive advantage; but as pointed out by Sulaiman C. J. in 57 All 108² at p. 110, the present suit is governed by another Article of the Limitation Act. Their Lordships were dealing with Art. 132. Apparently Art. 75 applies here. Certainly it is Art. 75 or Art. 74. Sulaiman C. J. pointed out that :

The Limitation Act is in a sense a purely arbitrary enactment and that various periods for different suits were a mere matter of choice dependent on public policy.

Article 74, applicable to simple bonds payable by instalments, laid down that time should run from the expiration of the term of payment. Art. 75, applicable to bonds payable by instalments with a default clause, says that time begins to run

when the default is made unless where the payee or obligee waives the benefit of the provision

In the present case waiver was not pleaded or mentioned in the plaint. Mr. Achhru Ram argued that waiver was to be inferred from the circumstances, but the District Judge pointed out that the plaintiffs sued for interest from the date of the bond which was inconsistent with any idea of waiver. I do not think that any waiver can be inferred. It was laid down by a Full Bench of the Chief Court long ago that in similar circumstances forbearance to sue could not be regarded as waiver within the meaning of this Proviso: 183 P R 1883.³ This has been repeatedly followed. I am therefore of opinion that there is no waiver and that time began to run when the default was made, i. e., on 14th June 1932, when the third instalment fell due. The suit is, therefore, well out of time. Mr. Achhru Ram's argument was that the suit should be regarded as a suit for each of the instalments still due at a date within three years before the date of suit, and as for the claim for interest that was, he admitted, a claim which should not be sustained and should be ignored. He referred to various rulings, i. e. A I R 1930

Lah 124⁴ which, however, is distinguishable and I understood was ultimately given up. The bond in that case provided that in case of default being made in the payment of two instalments, the whole amount would become due only if a demand for such amount were made. The intention of the parties was that unless and until the plaintiff made a demand, the whole of the money should not be payable from the defendant to him. This clearly distinguishes the case. He also referred to A I R 1936 Lah 570⁵ which was modified on appeal in A I R 1937 Lah 1.⁶ I must obviously follow the Letters Patent judgment. The bond provided that if the executant did not pay three instalments, the creditor would be entitled to realise the amount of these instalments and interest thereon or to realise the entire balance by means of a suit. The plaintiffs stated that the defendant had not paid any instalments. 27 instalments were barred by limitation. They sued for the balance together with interest. The Bench held that there was no question of waiver :

The bond gave the creditor option to demand payment of three instalments if default was made together with interest thereon from time to time. It also gave the creditor the option to bring a suit for the whole amount due under the bond if the creditor chose to exercise his right to call in the whole amount. . . . It was open to the creditor to sue at any time for all those instalments which had become payable within three years of the institution of the suit.

In my judgment, this case was decided on a special clause which differs materially from the present clause. Mr. Achhru Ram also relied on A I R 1933 Lah 849⁷ which is quite short and relies only on A I R 1930 Lah 124⁴ already cited. With all due respect I think this case—a Single Bench judgment—was erroneously decided. He also relies on 41 All 104⁸ which is also in his favour but which was virtually overruled in 57 All 108² : see p. 121, and was disapproved of by a Full Bench of the Nagpur Judicial Commissioners' Court in A I R 1932 Nag 1⁹. I agree with the

2. Jawahar Lal v. Mathura Prasad, A I R 1934 All 661 = 151 I C 585 = 57 All 108 = 1934 A L J 1035 (F B).

3. Khairuddin v. Atumal, (1883) 188 P R 1883 (F B).

4. Wasu Ram v. Mohammad Bakhsh, A I R 1930 Lah 124 = 121 I C 80 = 31 P L R 904.

5. Godar Shah v. Fazal Ilahi, A I R 1936 Lah 570 = 164 I C 59 = 38 P L R 357.

6. Fazal Ilahi v. Godar Shah, A I R 1937 Lah 1 = 169 I C 929 = 39 P L R 110.

7. Chhajju v. Nanak Bakhsh, A I R 1933 Lah 849 = 149 I C 861.

8. Mohan Lal v. Tika Ram, A I R 1918 All 55 = 47 I C 926 = 41 All 104 = 16 A L J 929.

9. Vishwanath v. Sadashiva, A I R 1932 Nag 1 = 135 I C 414 = 28 N L R 44 (F B).

majority of the Judges in 57 All 108² for the reasons given therein. The learned Chief Justice said :

When there is option either to sue for the whole or to wait and the creditor exercises the option, the whole amount becomes due, and the question of a right to recover the instalments only does no longer arise.

King, J. said at page 144 :

The suggested interpretation of Art. 75 involves the view that although the instalment bond contains a default clause which entitled the creditor to sue for the whole amount as soon as the default was made, nevertheless it is open to the creditor to ignore the default clause and to treat the bond as if it were a simple instalment bond governed by Art. 74. With all due respect I am unable to accept the suggestion, as it seems to me that it conflicts with the provisions of Art. 75.

Again King, J. said at page 142 :

The only option given is to sue for the whole sum either within the stipulated period or after it This practically amounts to no option at all. I think it only amounts to this that the creditor was to be entitled to sue for the whole sum even within the stipulated period as soon as default was made in the payment of two successive monthly instalments.

These passages were quoted in 57 All 561,¹⁰ a Division Bench ruling of the same Court. To the same effect are the Nagpur Full Bench rulings already cited and two Division Bench judgments of the Calcutta High Court, namely, A I R 1926 Cal 789¹¹ and A I R 1929 Cal 292.¹² In my opinion not only was waiver not pleaded but the claim to interest from the date of the bond is inconsistent with any idea of waiver. The suit is governed by Art. 75 and this second appeal must be dismissed with costs.

B.D./R.K.

Appeal dismissed.

10. Sukh Lal v. Bhoora, A I R 1934 All 1039 = 153 I O 205 = 57 All 561 = 1934 A L J 1056.

11. Basanta Kumar Singha v. Nabin Chandra, A I R 1926 Cal 789 = 96 I O 594 = 53 Cal 277.

12. Sarat Lakshmi Dassya v. Narendra Singha, A I R 1929 Cal 292 = 121 I O 565 = 33 O W N 250.

A. I. R. 1937 Lahore 865

COLDSTREAM AND BHIDE, JJ.

Kesar Singh — Plaintiff — Appellant.

v.

Sant Ram and others — Defendants — Respondents.

First Appeal No. 2122 of 1935, Decided on 7th December 1936, from decree of Senior Sub-Judge, Gujranwala, D/- 6th February 1934.

1937 L/109 & 110

(a) Contract Act (1872), S. 25 (3) — Mere implied promise is not sufficient.

A mere implied promise such as is conveyed by an unconditional acknowledgment is not sufficient for the purposes of S. 25 (3) of Contract Act : *Case law referred.* [P 866 C 1]

(b) Stamp Act (1899), Sch. 1, Art. 5 — Suit on basis of bahi account against M — Acknowledgment by M — "Balance from above account at instance of M . . . Rs." — Acknowledgment held not promise to pay nor agreement.

The question whether an acknowledgment is tantamount to a promise to pay and whether it requires to be stamped as an agreement must be decided on the wording of the acknowledgment in question. [P 866 C 2]

Where a person brought a suit for the recovery of certain sum on a basis of bahi account relating to ornaments ordered by M and the wording of the acknowledgment made by M was : "Balance from the above account at the instance of M under date Phagan 21, Sambat 1984 Rs. 6106" :

Held : that the language used in the acknowledgment could not be held to express a promise to pay nor could the acknowledgment be treated as an agreement for purposes of stamp duty : A I R 1935 Lah 567, *Rel. on.* [P 866 C 1, 2]

Shamair Chand, Parkash Chand and Qabul Chand — for Appellant.

J. L. Kapur, Yeshpal Gandhi and Din Dayal Khanna — for Respondents.

Bhide, J. — This is an appeal from a decree of the Senior Subordinate Judge Gujranwala, dismissing the plaintiff's suit for recovery of Rs. 8,000 on the basis of a bahi account relating to gold and silver ornaments ordered by one Mul Raj. The account was of Sambat 1978-79 (=about 1921-22 A. D.), and the plaintiff's suit, instituted on 5th March 1931, was *prima facie* barred by time. He relied, however, on an acknowledgment of the debt by Mul Raj dated Phagan 21, 1984 (=3rd March 1928) to bring his suit within limitation. The learned Senior Subordinate Judge held that the acknowledgment having been made after the expiry of the period of limitation could not serve to extend time under S. 19, Limitation Act. He further held that although an unconditional acknowledgment implies a promise to pay, such an implied promise was not sufficient to fulfil the requirements of S. 25 (3), Contract Act, and could not furnish a fresh cause of action under that section. The suit was accordingly dismissed and the plaintiff has appealed. The sole point argued in appeal was that the learned Senior Subordinate Judge was in error in holding that the acknowledgment relied upon by the plaintiff was not suffi-

cient to bring the case within the purview of S. 25 (3), Contract Act. The wording of the acknowledgment in question is as follows: "Balance from the above account, at the instance of Chaudhri Mal Raj, under date Phagan 21, Sambat 1984, Rs. 6,106-3-6."

In support of his contention that the above entry creates a promise to pay within the meaning of S. 25 (3), Contract Act, the learned counsel for the appellant has relied chiefly on the ruling of their Lordships of the Privy Council reported in 33 Cal 1047¹ in which it was held by their Lordships that an unconditional acknowledgment of a debt imports a promise to pay. That case however dealt with an acknowledgment which was made within limitation and their Lordships had no occasion to consider its effect for the purpose of S. 25 (3), Contract Act, which requires that there should be a promise to pay in writing signed by the debtor when the debt is time-barred. The question of the effect of the above mentioned ruling of their Lordships of the Privy Council with reference to the requirements of S. 25 (3), Contract Act, has been considered by several High Courts in India and so far as I can find, there seems to be practically a consensus of opinion that a mere implied promise such as is conveyed by an unconditional acknowledgment is not sufficient for the purposes of that section: see e. g. 23 All 502,² 30 All 268,³ 52 All 169,⁴ 53 All 963,⁵ 57 All 434,⁶ 57 Cal 394,⁷ 60 Cal 714,⁸ 8 Pat 706,⁹ 12 Lah 239,¹⁰

1. Maniram v. Seth Rup Chand, (1906) 33 Cal 1047=33 I A 165=2 N L R 130=4 C L J 94=10 O W N 874 (P O).
2. Ganga Prasad v. Ram Dayal, (1901) 23 All 502=1901 A W N 150.
3. Govind Das v. Sarju Das, (1909) 30 All 268=1908 A W N 129=5 A L J 274.
4. Govind Singh v. Bijoy Bahadur Singh, A I R 1929 All 980=121 I C 108=52 All 169=1929 A L J 1279.
5. Abdul Rafiq v. Bhajan, A I R 1932 All 199=137 I C 243=53 All 963=1932 A L J 77.
6. Ghulam Murtaza v. Fasih-un-nissa Bibi, A I R 1935 All 129=152 I C 370=57 All 434=1934 A L J 1185.
7. Sasi Kanta Acharjee v. Sonaula Munshi, A I R 1929 Cal 444=121 I C 412=57 Cal 394=33 O W N 965.
8. Satyakel Dutt v. Romesh Chunder Sen, A I R 1933 Cal 658=146 I C 834=60 Cal 714=37 O W N 826.
9. Deoraj Tewari v. Indrasan Tewari, A I R 1929 Pat 258=120 I C 470=8 Pat 706=10 P L T 169.
10. Davinder Singh v. Lachhmi Devi, A I R 1930 Lah 985=129 I C 281=12 Lah 239=32 P L R 976.

A I R 1933 Lah 209¹¹ and A I R 1936 Lah 164.¹¹ The learned counsel for the appellant was not able to cite a single ruling in which it was held that a mere acknowledgment implying a promise to pay is sufficient to satisfy the requirements of S. 25 (3), Contract Act. He referred to A I R 1932 Lah 470,¹³ 16 Lah 258,¹⁴ 132 I C 844¹⁵ and A I R 1931 Lah 631,¹⁶ but none of these rulings is in point. In the first two rulings, the wording of the acknowledgment in question was held to amount to an express and not merely an implied promise to pay. The other two rulings related to the question of stamp duty required for an unconditional acknowledgment which imports a promise to pay. The ruling in A I R 1931 Lah 631¹⁶ has at times been misunderstood, as has been pointed out in the Full Bench ruling reported in A I R 1935 Lah 567.¹⁷ The question whether an acknowledgment is tantamount to a promise to pay and whether it requires to be stamped as an agreement must be decided on the wording of the acknowledgment in question. In the present instance, the wording of the acknowledgment does not go further than an admission by Chaudhuri Mal Raj that the balance due on 21st Phagan 1984 was Rs. 6,106-3-6. I do not think the language used in this acknowledgment can be held to express a promise to pay as was held in A I R 1932 Lah 470¹³ or in 16 Lah 258¹⁴ in view of the wording of the acknowledgments in those cases. In the present instance, it appears that the acknowledgment was treated as an agreement for the purposes of stamp duty and penalty was levied by the Judge who dealt with the case in its initial stage; but in view of the Full Bench ruling A I R 1935 Lah 567,¹⁷ his view appears to me to be erroneous. In any case it cannot affect the decision of

11. Mukhi Lal Chand v. Gul Muhammad, A I R 1933 Lah 209=141 I C 617=34 P L R 430.
12. Baru Mal v. Daulat Ram, A I R 1936 Lah 164=161 I C 703.
13. Firm Kanshi Ram-Banshi Ram v. Arjan Das, A I R 1932 Lah 470=137 I C 840=33 P L R 940.
14. Nihal Ram-Chela Ram v. Radhu Ram-Hukmi Ram, A I R 1934 Lah 835=155 I C 1074=16 Lah 258.
15. Milkhi Ram v. Basant Singh, A I R 1931 Lah 686=132 I C 844.
16. Pahlad v. Shib Lal, A I R 1931 Lah 631=132 I C 881.
17. Nanak Chand v. Fattu, A I R 1935 Lah 567=158 I C 234=17 Lah 1=38 P L R 390 (F B).

the question now before us. I would accordingly dismiss the appeal with costs.

Coldstream, J.—I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 867

JAI LAL, J.

Lala Nand Lal—Petitioner.

v.

Emperor.

Criminal Revn. Petn. No. 1200 of 1937, Decided on 13th September 1937, from order of Senior Sub.Judge, Ambala, D/- 12th August 1937.

(a) Criminal P. C. (1898), S. 476—Court holding thorough inquiry and recording evidence for offence under S. 193, Penal Code — Before directing prosecution Court must find that conviction is practically certain.

In a civil suit an application was made by a party to the Court that a certain witness had made a false statement and that a complaint be made against him under S. 193, Penal Code. The Court held a thorough inquiry and recorded the statements of witnesses. The Court considering that *prima facie* there were grounds for enquiry directed that a complaint be made, although the Court was not sure that the case was good for conviction :

Held : that under the circumstances it was necessary for the Court to find that the conviction of the witness was practically certain before it could direct his prosecution. [P 868 C 2]

(b) Criminal P. C. (1898), S. 476—Every case of perjury need not necessarily result in prosecution—In such cases Court should see that prosecution is undertaken in interests of justice and not to satisfy private grudge of litigant.

Every case of perjury need not necessarily result in the prosecution of the person who is guilty of the offence. The Court has to see whether it is in the interests of justice to direct the prosecution of the person concerned. It is the policy of the law, as appears from the amendment of the relevant sections of the Criminal Procedure Code, whereby such prosecutions have not now been left to private prosecutors but their conduct has been entrusted to the Courts, that in dealing with such matters the Court should see that the prosecution is undertaken in the interests of justice and not to satisfy the private grudge of a litigant.

[P 868 C 2; P 869 C 1]

J. N. Aggarwal and *Lala Sham Lal*—for Petitioner.

Mohammad Monir (Asst. Advocate General)—for the Crown.

Order. — This is a petition for revision made by Nand Lal of Ambala against an order passed under S. 476, Criminal P. C., directing that a complaint under S. 193, Penal Code, be made against him. This

order was made by a Subordinate Judge of Ambala and an appeal preferred by the petitioner to the Senior Subordinate Judge of Ambala was dismissed. Before me this petition is opposed on behalf of the Crown by the learned Assistant Advocate General and by Mr. Tek Chand, advocate, on behalf of one Munna Lal. The connexion of Munna Lal with these proceedings I will state presently. Mr. Tek Chand cited some authorities in support of his contention that this Court should not interfere on revision with the order in question. At one time he contended that this Court had no jurisdiction to entertain such a petition; but subsequently he modified his position by contending that when the two Courts below are agreed in directing the prosecution of a person, this Court should not ordinarily interfere on revision. Ordinarily this Court is reluctant to interfere with orders where the Courts below, after a consideration of the entire material on the record, have come to the conclusion that an offence has been committed, which it is desirable, in the interests of justice, to send for inquiry to a Magistrate.

Now, what are the facts of this case? A suit for about Rs. 800 was instituted by one Amar Nath against Kailash Picture Palace, Ltd. of Ambala. Nand Lal is a previous managing director of the above company, and Munna Lal was at the time of the suit its managing director. It is abundantly clear that the relations between Nand Lal and Munna Lal were not friendly; on the other hand, they were strained. There was a denial of the claim of Amar Nath by the defendant, and Nand Lal was cited as a witness by the plaintiff to prove his signatures on some documents which he relied upon in support of his claim. Nand Lal was examined partly on one day and the case was adjourned for the continuation of his examination to another date. It appears that some body informed him that he would be asked questions about his indebtedness in cross-examination by the defendant company. It also appears that this second date of his examination was 15th January 1937. On that date, he admittedly owed monies to Gobind Ram, the Punjab National Bank, and the Commercial Bank of Ambala. The total indebtedness was somewhere between 20 and 25 thousand rupees to all these creditors. It appears that in order to avoid giving a disparaging answer to the unpleasant question he had, before he

went to Court, recourse to a device. He paid off Gobind Ram in cash and he drew a hundi for Rs. 16,500 on a firm in Rawalpindi and sent the same to the Commercial Bank of Ambala with instructions to discharge his liability to the Punjab National Bank and to the Commercial Bank of Ambala. This hundi was not apparently ultimately accepted by the Commercial Bank because a difference arose as to the commission that was to be paid to the Bank on it. The result was that really there was no actual payment to the Commercial Bank and consequently to the Punjab National Bank also. Whether the dispute about the commission arose before Nand Lal gave his evidence in Court or afterwards is not clear; but it is obvious that neither the Punjab National Bank nor the Commercial Bank of Ambala have actually been paid and the hundi has not been sent either for acceptance or for payment to Rawalpindi.

Now, on 15th January when Nand Lal went into the witness box, a question was asked from him whether he owed any money (a) to Gobind Ram, (b) to the Punjab National Bank and (c) to the Commercial Bank of Ambala; and he gave a negative reply to this question. No other questions were asked on the subject, and the matter was not pursued further. Before the civil suit was decided, an application was made by Munna Lal to the Subordinate Judge alleging that the statement made by Nand Lal about his indebtedness was false, and praying that a complaint be made against him under S. 193, I. P. C. The Subordinate Judge after giving notice to Nand Lal recorded evidence and came to the conclusion that the case should go to a Magistrate for inquiry. He accordingly directed that a complaint be made. Subsequent to the application but before the order directing the filing of a complaint, the suit of Amar Nath against the Kailash Picture Palace, Ltd. was decreed. Nand Lal then appealed to the Senior Subordinate Judge who in one respect differed from the trial Judge. The trial Judge had held that the story about the payment to Gobind Ram was false. The Senior Subordinate Judge did not agree with this conclusion. He held that if that alone had been the subject matter of the order directing the prosecution of Nand Lal, he would have ordered the withdrawal of the complaint. But he held that there was a good case to go to a

Magistrate with regard to the other two items.

Now, the trial Judge has held that the story relating to the drawing of a hundi and delivery thereof to the Commercial Bank of Ambala is a fabrication entirely. The Senior Subordinate Judge does not seem to agree with this conclusion. On the other hand, his view appears to be that though a hundi was given, it was not sent to be cashed to Rawalpindi and the transaction subsequently fell through and therefore Nand Lal had no reason to believe when he gave evidence in Court that he did not owe any money to the two Banks. One significant remark made by the trial Judge is that

the Court has not to see that the case must necessarily lead to conviction. Action can be taken if the Court be of opinion that prosecution will be expedient in the interests of justice and that there are reasonable grounds for conviction.

In other words, the learned Subordinate Judge is not sure that the case is good for conviction but he considers that *prima facie* there are grounds for inquiry. But in this case the Subordinate Judge had held a thorough inquiry and had recorded the statements of witnesses—therefore it was necessary for him to find that the conviction of the petitioner was practically certain before he could direct his prosecution. I have stated above that on the facts the learned Senior Subordinate Judge has not supported the conclusions of the trial Judge. As I have already stated, it was merely a device by Nand Lal to avoid a compromising answer to an unpleasant question, and it is possible that technically he is guilty of perjury, though it is also possible that by adopting the device already mentioned he honestly believed that he could truthfully return an answer to the question by saying that he did not owe anything to the three creditors concerned.

Every case of perjury need not necessarily result in the prosecution of the person who is guilty of the offence. The Court has to see whether it is in the interests of justice to direct the prosecution of the person concerned. In considering this matter I cannot help being influenced by the fact that this application has been made by Munna Lal who is actuated by personal motives in prosecuting the petitioner. This is further indicated by the undue zeal shown in prosecuting the proceedings and presenting the case against the petitioner before me. The petitioner, it appears

from the evidence, is the President of the Municipal Committee of Ambala. It is in evidence that he pays income-tax on an income of Rs. 20,000 a year and also that he owns immovable property worth between 40 and 50 thousand rupees and his stock-in-trade is valued at not less than a lakh. He was giving evidence in Court only as to his signatures on certain documents which he had signed as the managing director of the defendant company. The question of his solvency was not therefore material, and did not affect the result of the suit. Moreover, having regard to the value of the property of the petitioner and his income, his indebtedness to the three creditors did not prove that he was in straitened circumstances. The question was put to him at the instance of Munna Lal with the object of disgracing him and it is not surprising that he adopted a device, may be a reprehensible one, to get round it. It is the policy of the law, as appears from the amendment of the relevant sections of the Criminal Procedure Code, whereby such prosecutions have not now been left to private prosecutors but their conduct has been entrusted to the Courts, that in dealing with such matters the Court should see that the prosecution is undertaken in the interests of justice and not to satisfy the private grudge of a litigant.

Having considered all these matters, I feel doubtful whether the prosecution will have a good chance of success in the Court of a Magistrate. In any case I think that it is not expedient in the interests of justice in this case to direct the prosecution of the petitioner considering the several matters which I have mentioned above. I accordingly accept this petition and setting aside the orders of the Courts below, direct that the complaint, if filed, be withdrawn.

S.C./R.K.

*Petition allowed.***A. I. R. 1937 Lahore 869**

ADDISON AND DIN MUHAMMAD, JJ.

Muhammad Saeed — Defendant — Appellant.

v.

Punjab National Bank, Ltd., Plaintiff and others, Defendants—Respondents.

First Appeal No. 283 of 1936, Decided on 11th January 1937, from preliminary decree of Sub-Judge, First Class, Lahore, D/- 27th February 1933.

Contract Act (1872), Ss. 261 and 264—Equitable mortgage in favour of Bank by firm having father *H* and son *A* as partners—*H* dying leaving *A* and lunatic son *S*—Suit on cash credit account making *A* party in personal capacity as well as representing *H* and *S* as representative of *H* only—Bank having knowledge of *H*'s death more than three years before suit—Subsequent acknowledgment by *A*—Mortgage invalid—*S* held not liable under acknowledgment by *A* under S. 261—Even if S. 264 held applicable, suit was time-barred against *S*.

A firm consisted of *H* and his son *A*. There was an agreement in writing whereby the firm borrowed certain amount from a Bank by deposit of title deeds in 1923. *H* died in 1924 leaving *A* and another lunatic son *S*. *S* was not a partner of the firm. The agreement evidencing the mortgage was not registered. There were acknowledgments made by *A* in January 1926 and in January 1927. The Bank brought a suit in July 1929 on the basis of a cash credit account to recover the amount by sale of the property equitably mortgaged. *A* was made a party in his personal capacity as well as representing his father and *S* as a representative of the deceased father only. The Bank knew of the death of *H* more than three years before the filing of the suit. A preliminary decree was passed on the basis of the mortgage. In an appeal by *S* from such a decree:

Held: that there was no equitable mortgage as the document evidencing the mortgage was not registered and as such was inadmissible in evidence. *A* was not a guardian of his lunatic brother *S* who was not also a partner of the firm. Therefore the acknowledgments made by *A* did not keep alive the debt in respect of *S*. [P 870 C 1, 2]

Held further: that that part of the estate of *H* which came to *S* would not ordinarily be liable in respect of any acknowledgment made by *A* after the death of *H* in the absence of any agreement to that effect under S. 261, Contract Act, and even if S. 264, Contract Act, was held applicable and even if *S* was assumed to be liable for the debt by virtue of the acknowledgment made by *A*, the last acknowledgment that the Bank could rely upon for the suit against *S* was one made in January 1926. This acknowledgment being more than three years before the institution of the suit, the suit against *S* on the cash credit account was barred by time: *A I R 1935 Lah 889, Ref.* [P 871 C 1]

Ghulam Mohy-ud-Din and Abdul Aziz
— for Appellant.

Lala Badri Das and Hargopal —
— for Respondents.

Judgment.—The facts of this case are fully stated in the judgment of this Court, dated 23rd July 1935, in First Civil Appeal No. 926 of 1933¹ and will only be set out briefly in this appeal.

The Punjab National Bank, Ltd., Lahore, sued to recover over Rs. 1,50,000 on the

1. *Mt. Jiwan v. Punjab National Bank, Ltd.* Lahore, Reported in *A I R 1935 Lah 889*—160 I O 897.

basis of a cash credit account, by sale of certain property alleged to have been equitably mortgaged to it by Haji Muhammad and his son Muhammad Amin, who constituted the firm Haji Muhammad-Muhammad Amin. There had been dealings between this firm and the Bank prior to 27th August 1923, on which date an agreement was come to between the Bank and the firm under which the former was to advance Rs. 1,25,000 on the security of the title-deeds belonging to the latter. Haji Muhammad, the father, died on 11th May 1924, and his estate is now represented by his two sons, Muhammad Amin, who was a partner of the firm, defendant 1, and Muhammad Saeed, defendant 2, who was not a partner of the firm and is a lunatic. Defendant 1 was sued in his personal capacity as well as representing his deceased father, while Muhammad Saeed was only sued as a representative of his deceased father. The other defendants are persons to whom certain alienations of property, covered by the title-deeds deposited with the Bank, had been made after the date of the alleged equitable mortgage. Various defences were raised which were repelled by the trial Court and a preliminary decree, on the basis of the alleged mortgage, was passed on 27th February 1933.

Against this preliminary decree two appeals were preferred: one was Civil Appeal No. 1191 of 1933¹ on behalf of some of the subsequent purchasers; it was dismissed as time-barred: the second appeal was No. 926 of 1933 on behalf of certain other purchasers; it was accepted on 23rd July 1935, and it was then held, so far as they were concerned, that the so-called equitable mortgage could not be given effect to for want of registration of the agreement which evidenced the transaction. The present appellant Muhammad Saeed, second son of Haji Muhammad, had applied to institute an appeal against the decision in forma pauperis. His petition was rejected but he was allowed to appeal on payment of full court fees: these have now been paid. There are two appeals by him: one against the preliminary decree and one against the final decree. The first ground of appeal is that there was no equitable mortgage although there was a document evidencing a mortgage which was inadmissible in evidence on account of want of registration. The learned counsel appearing on behalf of the Bank did not dispute

this contention and we uphold it. The reasons for doing so are fully set out in the judgment in Civil Appeal No. 926 of 1933¹ dated 23rd July 1935.

The only other ground of appeal argued was that the personal claim against the appellant Muhammad Saeed was barred by time. In the plaint it was admitted that Haji Muhammad was dead and it was stated that the two sons were his legal representatives. It was sought to bring the suit within time on the ground that Muhammad Amin, the elder son, who was a partner, had admitted the amounts due to the plaintiff Bank by letters, dated 17th January 1924, 20th August 1924, 18th February 1925, 15th July 1925, 20th January 1926, 15th January 1927, 4th August 1927 and 13th March 1928. Certain issues were framed on 27th November 1929, but the appellant did not consider that they covered his case. The acknowledgments relied upon were denied on his behalf and it was pleaded that, even if his brother Muhammad Amin, who had made them, was bound, Muhammad Saeed, the appellant, was not bound by them. Of course, it was also pleaded that there was no mortgage to which effect could be given. A plea was specifically taken that the suit was not within time and issues 5 and 6 in this respect were then framed on 16th December 1929, namely: 5. Was defendant 2 a partner in the firm of Haji Muhammad-Muhammad Amin? 6. If the equitable mortgage is not proved, is the suit within time?

The Judge who tried the case mentioned that it was not the Bank's case that the present appellant was a partner but he held that the present appellant was bound as the elder brother Muhammad Amin must be held to be the guardian of his insane brother, the present appellant, and that for this reason the acknowledgments of the elder brother kept the debt alive with respect to the insane brother as well. It was conceded before us by the learned counsel appearing for the Bank that the judgment could not stand on this ground. Obviously, the elder brother was not the guardian of his insane brother and it has also to be remembered that the insane brother was never a partner of the firm. The suit therefore of the Bank is barred by time as against the appellant unless it can be held that time has been extended by reason of any acknowledgment or

otherwise. Under S. 261, Contract Act, the estate of a partner, who has died, is not, in the absence of an express agreement, liable in respect of any obligation incurred by the firm after his death. According to this section therefore that part of the estate of the deceased Haji Muhammad which came to the appellant would not ordinarily be liable in respect of any acknowledgment made by another partner after his death. It was contended, however, that S. 264, Contract Act, applied. It is to the effect that persons dealing with a firm will not be affected by dissolution of which no public notice has been given unless they themselves had notice of such dissolution. It was contended on behalf of the Bank that no public notice had been proved and that it had not been shown that they knew of the dissolution of the firm.

It was held in A I R 1927 Bom 560² that S. 264 must be construed in such a way as not to apply to cases of dormant partners nor to cases of death. The same Court in A I R 1935 Bom 357³ took the opposite view and held that S. 264 applies even to cases of dissolution of partnership occasioned by death of one of the partners. It is not necessary for us further to consider this question, as there is clear evidence on the record that the Bank knew of the death of Haji Muhammad prior to 29th October 1926, when the elder brother wrote to it, mentioning that he was ready to give a registered deed of mortgage on behalf of himself and his insane younger brother if they would forbear to press for immediate payment. It is clear from this letter that it was then known to the Bank that the father Haji Muhammad was dead and in fact it also appears from a note, dated 17th April 1926, by the Branch Manager on the back of a letter, dated 16th April 1926, written by Muhammad Amin to the Bank, that the Bank knew of this as early as 17th April 1926. This point however need not be stressed as the Bank certainly knew of his death prior to 29th October 1926. Any acknowledgment therefore by Muhammad Amin subsequent to 3rd October 1926, would not keep the debt alive so far as the present appellant is concerned. The

acknowledgment relied upon, prior to 29th October 1926, is dated 20th January 1926. The Bank, therefore, even if we assume that the acknowledgment of 20th January 1926 kept alive the debt with respect to the appellant also, had to sue within three years of this acknowledgment so far as the appellant is concerned. The suit, however, was not instituted till 10th July 1929, but this is more than three years after the acknowledgment of 20th January 1926. The suit therefore on the cash credit account so far as the present appellant is concerned, is clearly barred by time. It might be mentioned here that the elder brother, Muhammad Amin, left the country and did not appeal against the preliminary decree on the basis of the alleged equitable mortgage passed by the trial Court and the present appellant is concerned only with half the property alleged to have been equitably mortgaged minus those portions which had been alienated to other persons.

We accordingly accept the appeal of Muhammad Saeed and set aside the decree of the trial Court with respect to him in toto. This means that half of the property alleged to have been equitably mortgaged, minus those portions thereof which had been subsequently alienated, are released from the preliminary mortgage decree, and it is further held that the appellant Muhammad Saeed is not personally liable as the personal liability against him, as representative of his deceased father, is barred by time. The appellant will bear his own costs throughout except that the plaintiff Bank will pay him the court-fee on this appeal. The appeal against the final decree is also accepted and that decree is set aside so far as the appellant is concerned. There will be no order as to costs with respect to this appeal.

S.C./R.K.

Appeal allowed.

* A. I. R. 1937 Lahore 871

BHIDE, J.

Tara Chand — Plaintiff — Appellant.

v.

Sundar Das and others —

Defendants — Respondents.

Second Appeal No. 93 of 1937, Decided on 15th June 1937, from decree of Dist. Judge, Ferozepore, D/. 17th October 1936.

2. Jwaladutt R. Pillani v. Bansilal Motilal, A I R 1927 Bom 560=104 I O 520=29 Bom L R 1244.

3. Babu v. Dayambal, A I R 1935 Bom 357=158 I O 159=60 Bom 5=37 Bom L R 516.

* Hindu Law — Maintenance — Widow— Widow has no right to sell family property for her maintenance.

The widow of a deceased co-parcener who is only entitled to the right of residence and maintenance in the family property is not entitled to sell the property for her maintenance in case of necessity. [P 872 C 2]

Shamair Chand — for Appellant.

R. L. Anand I — for Respondent 2.

Judgment.—The plaintiff Tara Chand in execution of his decree against Sundar Das, defendant 1, got certain houses and shops attached. Mt. Panna Devi, defendant 2, who is a widow of Kundan Lal, a deceased brother of Sundar Das, filed objections in the executing Court that she was entitled to one half share in the property and that the same should be released. The objection was allowed and thereupon Tara Chand instituted the present suit for a declaration that the above mentioned one half share was liable to be attached and sold in execution of his decree against Sundar Das. The trial Court held that Mt. Panna Devi was only entitled to a right of residence and maintenance in the property and granted a decree declaring the property to be subject to such right. From this decision Mt. Panna Devi appealed to the District Judge who modified the decree to the extent of directing that Mt. Panna Devi would be entitled to sell a part or the whole of the property in dispute if it was necessary for her to do so in order to maintain herself. Tara Chand has preferred a second appeal from this decree.

The learned counsel for the appellant contended that the decree passed by the learned District Judge is contrary to law as Mt. Panna Devi in the exercise of her right of maintenance could only rely upon the income of the property and had no right to sell it. In support of this contention, he relied upon sub-clause (3) of para. 566 of Mulla's Hindu Law. He pointed out that the learned District Judge had not set aside the finding of the trial Court that Sundar Das had succeeded his brother Kundan Lal by survivorship. The learned counsel for the respondent Sundar Das on the other hand relied on the finding of the learned District Judge to the effect that Mt. Panna Devi held 'a life estate' in the property in question. This finding is based on certain mutations by virtue of which land belonging to the husband of Mt. Panna Devi or the land which would have fallen to his share was

mutated in her name. It is however common knowledge that mutations of this kind are very often effected as a matter of routine by the revenue officers. The real question for decision was whether there had been a separation of the joint family and whether Mt. Panna Devi had inherited a life estate owing to her husband's separation from his brother. There is no finding to this effect by the learned District Judge and it appears from the decree passed by him that this was not his conclusion; for if Kundan Lal had separated from Sundar Das and Mt. Panna Devi had held a life estate, the one half share in the property claimed by her could not at all be attached or sold in execution of the decree of Tara Chand and Tara Chand's claim should have been, in that case, dismissed altogether. The learned District Judge however did not dismiss the suit. He only modified the decree of the trial Court by directing that Mt. Panna Devi was entitled to sell the property for her maintenance in case of necessity. This, however, is not permissible according to Hindu law as stated in para. 566 (3) of Mulla's Hindu Law referred to above. To the same effect is the statement of law on the point as given in para. 451 of Mayne's Hindu Law. In the circumstances, it appears to me that the decree passed by the trial Court was correct. I accept the appeal and restore the decree of the trial Court. In view of all the circumstances, I award the plaintiff one half of his costs throughout.

K.B./R.K.

Appeal allowed.

A. I. R. 1937 Lahore 872

SKEMP, J.

Mt. Jio — Defendant — Appellant.

v.

Nabi Bakhsh — Plaintiff—Respondent.

First Appeal No. 190 of 1936, Decided on 13th January 1937, from order of Addl. Dist. Judge, Lahore, D/- 13th May 1936.

Civil P. C. (1908), S. 11, Expl. 4—Suit by *N* against stepmother *J* for declaration that he was exclusive owner of property left by his father *F* on ground that *J* had been divorced by *F*—Suit dismissed—Subsequent suit for declaration that *J* was entitled only to one-fifth share in lieu of maintenance and not to one-half, held barred.

On death of one *F* his land passed to his widow *J* and son *N* in equal shares. *N* brought a suit

against *J* for declaration that he was the exclusive owner of the land on the allegation that *J* had been divorced by *F* many years before his death and had nothing to do with his property. The suit was dismissed on ground that divorce was not proved. *N* brought a subsequent suit against *J* for declaration that *J* was only entitled to one-fifth share in *F*'s land in lieu of maintenance as his widow and not to one-half :

Held: that the ground of action taken by *N* ought to have been made a ground of attack in the previous suit and hence the second suit was barred by S. 11, Expl. 4, Civil P. O.: 20 Cal 79 (P C) and 19 All 517, Ref.; A I R 1927 Nag 322 and A I R 1931 Bom 187, Disting. [P 874 C 2]

Qabul Chand for *Mohammad Monir* —
for Appellant.

A. R. Kapur — for Respondent.

Judgment.—The facts which have led to the present second appeal are not in dispute. The plaintiff, *Nabi Bakhsh*, is the son of *Farid* deceased while the defendant *Mt. Jio* is his stepmother. On the death of *Farid* his land passed by mutation to *Nabi Bakhsh* and *Mt. Jio* in equal shares. The plaintiff instituted a suit against *Mt. Jio* for a declaration that he was the exclusive owner of the land on the allegation that *Mt. Jio* had been divorced by *Farid* many years before his death and had nothing to do with his property. The trial Court held that the divorce was not proved and dismissed the plaintiff's suit; and this decree was upheld on appeal. Now *Nabi Bakhsh* has sued again for a declaration that *Mt. Jio* is only entitled to one-fifth share in *Farid*'s land in lieu of maintenance as his widow and not to one-half. The trial Judge dismissed the suit relying on S. 11 and O. 2, R. 2, Civil P. C. On appeal the learned Additional District Judge took the contrary view and held that the present suit was not barred. He remanded the case to the trial Court for a decision on the merits. Against this decision the present second appeal has been lodged, the sole point being whether the second suit is barred.

After consideration of the learned District Judge's judgment and the authorities cited before me, I am of opinion that it is so barred. The matter is governed by Expl. 4 to S. 11, Civil P. C., which states that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The leading case is 20 Cal 79¹ in the course of

which their Lordships of the Privy Council said:

That it 'might' have been made a ground of attack is clear. That it 'ought' to have been, appears to their Lordships, to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon *Ran Bahadur*, and it appears to their Lordships that the matter 'ought' to have been made a ground of attack in the former suit, and therefore that it should be 'deemed to have been a matter directly and substantially in issue' in the former suit, and is *res judicata*.

This passage or part of it has been quoted in most of the successive rulings. In 19 All 517² the plaintiff sued for possession of a property as owner. He failed and then brought a suit for possession as mortgagee. The learned Judges were of opinion

that the claim in the alternative to hold as mortgagee not merely 'might' but 'ought' to have been added to the prayer in the former suit as a ground of attack on the defendant.

In 25 Bom 189³ the plaintiffs in the first suit claimed land on the ground that they were sole surviving members of a joint family. The suit was dismissed. They were deprived of possession and then brought a suit for recovery of the same land alleging a title by heirship as distinct from survivorship. The leading judgment was written by Sir Lawrence Jenkins, who after referring to 20 Cal 79¹ said that:

The test therefore proposed whereby to determine whether it 'ought' to have been matter of attack is this: are the matters so dissimilar that their union might lead to confusion? To my mind there is in this case but one answer to that question: that absolutely no confusion would have arisen had the plaintiff in the former suit pleaded in the alternative the title he now sets up.

It is clear that if *Nabi Bakhsh* had included in his first suit a claim in the alternative that even if the divorce of *Mt. Jio* was not proved, she was not entitled to so much as half the land for maintenance, there would have been no confusion whatever. The issues and the evidence on this point would have been entirely separate. This really governs the case. The learned District Judge and the respondent relied on A I R 1927 Nag 322⁴

2. *Imam Khan v. Ayub Khan*, (1897) 19 All 517 = 1897 A W N 143.

3. *Guddappa v. Pirkappa*, (1901) 25 Bom 189 = 2 Bom L R 872.

4. *Gangaprasad v. Kodulal*, A I R 1927 Nag 322 = 103 I O 888.

1. *Kameswar Pershad v. Rajkumari Rattan Koer*, (1893) 20 Cal 79 = 19 I A 234 = 6 Sar 241 (PC).

and A I R 1931 Bom 187.⁶ The Nagpur ruling only consists of a few sentences and does not state the facts. It merely enunciates the rule that a person is not bound to sue on an alternative cause of action and failure to do so in the former suit does not bar a subsequent suit. In the Bombay ruling, the plaintiffs sued to recover possession of the whole of the property on the ground that she had purchased it in 1907, that she was the exclusive owner of the property and that her sister, the defendant, had no interest therein. The defence was that the mother was the owner of the property, that the mother and the defendant had purchased another plot which was exchanged for the land in suit, that the exchange was effected by the defendant herself and that the plaintiff had no share therein. The trial Judge held that the plaintiff's purchase was not proved, but granted her possession of half the share on the ground that the property belonged to the mother. That decision was reversed in appeal on the ground that the plaintiff failed on the case set out in the plaint, and could not set up any other claim which was inconsistent with it. The second suit was brought by the plaintiff on the ground that the mother was the owner of the property, that the plaintiff and the defendant were her heirs, that they had exchanged the land for the plaintiff land and therefore the plaintiff was entitled to recover half the share in the plaintiff land. The Bench held that the second suit was not barred. Parker, J. said:

Where the introduction of a ground of attack in the previous suit would have been incongruous to the subject matter of the previous suit, it could not be said that the matter ought to have been set up as a ground of attack in the previous suit.

Baker, J. said that the two alternative cases would have been mutually destructive and the evidence in support of them contradictory. I think this case may be distinguished on the facts from the present one because, as already remarked, the two issues whether Mt. Jio had been divorced and, if not divorced, what share of the land she is entitled to for maintenance are entirely distinct and separate issues. The plaintiff's learned counsel also referred to 41 I A 142,⁶ a ruling not on S. 11 but on S. 34, Ceylon Civil P. C., which is in

the same terms as O. 2, R. 2, Civil P. C. It was there held that where plaintiffs had owing to a technicality failed in a suit on promissory notes, they might base their claim on the original cause of action on which the pro-notes were based. Their Lordships said "So long as the notes were outstanding, there was no right of action otherwise than upon the notes". It was therefore impossible in their Lordships' opinion to hold that the claim for the amount due was the same cause of action as the claim upon the notes and ought to have included in the prior action. In my judgment the ground of action now taken by the plaintiff ought to have been made a ground of attack in the previous suit and the present suit is barred. I accept the appeal, set aside the order of remand passed by the learned Additional District Judge and restore the order of the trial Judge dismissing the suit. The plaintiff is to bear the defendant's costs throughout.

D.S./R.K.

Appeal accepted.

A. I. R. 1937 Lahore 874

TEK CHAND, J.

Chaman Lal — Decree-holder —

Appellant.

v.

Ali Muhammad — Judgment-debtor —
Respondent.

Second Appeal No. 1320 of 1936, Decided on 8th February 1937, against order of Dist. Judge, Shahpur at Sargodha, D/- 22nd May 1936.

Civil P. C. (1908), O. 34, Rr. 4 and 5—Final decree may be passed by consent of parties without preliminary decree — When such decree is not appealed against, executing Court cannot question its validity.

In a mortgage suit a 'final' decree may be passed by a Court by consent of parties without a preliminary decree being formally passed as required by O. 34, R. 4, Civil P. C. In such a case final decree may be passed straight off either authorizing the sale of the property forthwith or deferring the sale for a specified time during which the judgment-debtor undertakes to pay the amount. If the judgment-debtor fails to pay the amount within the stipulated period, the decree-holder is entitled to execute the final decree. When the decree is not appealed against, the executing Court cannot question its validity even if any irregularity in procedure had been committed in passing it: *Case law referred.*

[P 875 C 2]

Rattan Lal Chawla — for Appellant.*Allah Din* — for Respondent.

5. *Ningaya Bharmanna v. M. Gurappa*, A I R 1931 Bom 187=130 I O 605=30 Bom L R 204.

6. *Saminathan Chetti v. Palaniappa Chetti*, (1914) 41 I A 142=26 I O 228 (P O).

Judgment.— On 5th August 1932, Chaman Lal brought a suit against Ali Muhammad for recovery of Rs. 259, being the amount of principal and interest due on foot of a mortgage of a house effected by Ali Muhammad in his favour on 10th August 1926. The mortgagor, Ali Muhammad, appeared before the Court on 5th October 1932 and admitted the claim and by consent a final decree was passed for the sum claimed with interest recoverable from the mortgaged house, if the decretal amount was not paid within six months from that date. In terms of this compromise, the Court passed a decree described as 'decree qatai' (final) for Rs. 259 and costs in favour of the plaintiff against the defendant recoverable from the mortgaged house if the amount due was not paid on or before 5th April 1933. In May 1935, the decree-holder took out execution of the decree by sale of the house. A notice under O. 21, R. 66 was issued to the judgment-debtor, who objected that the decree, as passed on October 1932, was not executable, as no final decree in terms of R. 5 of O. 34 had been passed. The executing Court dismissed the application in a brief order holding that it was not maintainable.

The judgment-debtor appealed to the District Judge who held that in the printed form of the decree-sheet the word 'preliminary' had been struck off and the word 'final' written instead, but the fact that only one decree was drawn up in this case suggested that it should be regarded as a preliminary decree. He accordingly held that the decree was not executable. On this finding he accepted the appeal, set aside the order of the executing Court, leaving it to the decree-holder to move the Court, which had passed the decree, to grant a proper final decree on which he might take out execution. The decree-holder has come in second appeal and it has been contended on his behalf that in view of the compromise arrived at between the parties on 5th October 1932, it was not necessary for the Court to pass a preliminary decree in terms of R. 4 of O. 34 and subsequently to pass a final decree as laid down in R. 5. He urges that the decree passed in this case was a consent decree and it was clearly intended that in default of the judgment-debtor paying the amount fixed within six months the decree-holder could proceed straight off to bring the property to sale and

realise the amount due thereon. He further contended that the executing Court could not go behind the decree which was passed by a Court with jurisdiction and, therefore, the order of the District Judge is wrong.

After hearing both counsel, and examining the record, I have no doubt that the contentions of the appellant are well founded and this appeal must succeed. It is settled law that on a mortgage suit a final decree may be passed by a Court by consent of parties, without a preliminary decree being formally passed as required by R. 4: *see* A I R 1926 Cal 1179;¹ 50 Cal 650;² 2 Pat 538;³ 6 Pat 388⁴ at p. 394 and 49 All 297.⁵ In such a case a final decree may be passed straight off either authorizing the sale of the property forthwith or deferring the sale for a specified time during which the judgment-debtor undertakes to pay the amount. This is what was done in this case and as the judgment-debtor failed to pay the amount within the stipulated period of six months, the decree-holder was entitled to execute the final decree. Further the decree was not appealed against and even if any irregularity in procedure had been committed in passing it, the executing Court could not question its validity. I accept the appeal, set aside the order of the learned District Judge and restore that of the executing Court, dated 9th December 1935. The appellant will get his costs from the respondent in all Courts.

S.C./R.K.

Appeal allowed.

1. Abdul Halim Abdul Hussain v. Hemendra Kumar Ray, A I R 1926 Cal 1179=96 I C 686.
2. Hemendra Lal Singh Deo v. Fakir Chandra Datta, A I R 1923 Cal 626=74 I C 929=50 Cal 650=27 C W N 621.
3. Ishan Chandra Kundu v. Nilratan Adhikari, A I R 1923 Pat 375=72 I C 1049=2 Pat 538=4 P L T 311.
4. Ganganand Singh v. Rameshwar Singh, A I R 1927 Pat 271=102 I C 449=6 Pat 388=8 P L T 730.
5. Askari Hasan v. Jahangiri Mal, A I R 1927 All 167=100 I C 59=49 All 297=25 A L J 107 (F B).

* A. I. R. 1937 Lahore 876

DALIP SINGH AND SKEMP, JJ.

Merchants Mohini Flour Mills Co., Ltd. — Petitioner.

v.

Commissioner of Income-tax — Respondent.

Civil Misc. No. 231 of 1937, Decided on 13th July 1937, in the matter of 1935-36 assessment against the Merchants Mohini Flour Mills Co., Ltd., Sargodha.

(a) *Income-tax — Limitation — Application under S. 66, Income-tax Act—Commissioner cannot extend time — S. 5, Limitation Act, is not applicable.*

The Commissioner of Income-tax has no power to extend limitation in reference to an application under S. 66, Income-tax Act. S. 30 (2) of the Act does confer powers on the Assistant Commissioner to admit an appeal after the expiration of the usual period if he is satisfied that the appellant had sufficient cause, i. e., for such appeals there is a provision analogous to that of S. 5, Lim. Act; but there is no such provision for applications to the Commissioner. S. 5, Lim. Act, is also not applicable for extension of time in Income-tax: *A I R 1927 Mad 545, Rel. on.*

[P 876 C 2]

* (b) *Income-tax — Court-fee — Assistant Commissioner is Revenue Court — Application for certified copy must be stamped.*

Assistant Commissioner of Income-tax is a Revenue Court for purposes of the Court-fees Act. The application for certified copy of Assistant Commissioner's order therefore requires a stamp under Art. 1 (a), Sch. 2 of Court-fees Act, Punjab: *36 Mad 72; 44 P R 1905 (Cr)* and *A I R 1914 Bom 138, Rel. on.*

[P 878 C 1]

Kirpa Ram Bajaj — for Petitioner.

J. N. Aggarwal — for Respondent.

Skemp, J. — This is a petition under S. 66 (3.A), Income-tax Act, made in consequence of a refusal by the Commissioner of Income-tax to make a reference to the High Court under S. 66 (2). The Commissioner rejected the application to him (a) as barred by time and (b) on the merits. A preliminary objection that the present petition was barred by time was withdrawn and I will proceed to consider whether the Commissioner was right in holding that the application to him was barred by time. His reasoning was that the appellate order of the Assistant Commissioner of Income-tax was communicated to the assessee on 12th August 1936, and the application made to the Commissioner on 19th October. The assessee had applied for a copy of the Assistant Commissioner's order by unstamped letter on 12th August, received on the 13th. The Income-tax Officer replied on the 19th,

delivered on the 22nd, pointing out that court-fee stamp was necessary. An application duly stamped with a two annas stamp was made on 24th August and the copy delivered on the 27th. The period of limitation for an application under S. 66 (2) is 60 days which expired on 10th August so that the application was late by nine days, only four days being allowable.

The learned counsel for the assessee explained that the certified copy of the Assistant Commissioner's order which was sent to him by his client was marked, date of application 13th August 1936. Relying on this as correct, he thought he had from the 13th to 27th August to deduct as the period requisite for taking a copy and thus the application was within time. He further stated that the Commissioner had disposed of the application without calling on him personally. Under the law as it stands, the Commissioner of Income-tax has no power to extend limitation in reference to an application under S. 66. S. 30 (2) of the Act does confer powers on the Assistant Commissioner to admit an appeal after the expiration of usual period if he is satisfied that the appellant had sufficient cause, i. e. for such appeals there is a provision analogous to that of S. 5, Lim. Act; but there is no such provision for applications to the Commissioner. This has already been held by a Full Bench of the Madras High Court in *50 Mad 335*.¹ The learned Sir Coutts-Trotter, C. J. said:

The third question is whether there was any power to extend the period in this case or whether the Commissioner had no discretion in the matter. The answer is that the Statute fixes a time and it would be an obviously undesirable burden on the Income-tax Commissioner to put upon him the consideration of questions as to whether he should exercise discretion in the direction of leniency in one case and not in another. The Statute is express and there is no provision in it for any official or even for the Court to extend the time.

I do not myself understand why a discretion should be denied to the Commissioner which is granted to the Assistant Commissioner, but there it is. Nor does S. 5, Lim. Act, apply. It applies to any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force.

1. *Commissioner of Income-tax, Madras v. Ganga Raju, A I R 1927 Mad 545=100 I C 291=50 Mad 335=52 M L J 273 (F B).*

Therefore, *prima facie*, the Income-tax Commissioner was right in holding the application to be time-barred though the petitioner's counsel was misled by the date of application given by the Income-tax Department on the certified copy. It was then argued that the application for a copy did not require to be stamped and thus the application was within time. Stamp duty of two annas on the application purports to be levied under Art. 1 (a) of Sch. 2, Court-fees Act, as amended for the Punjab. This applies in terms to an application

presented to any Civil, Criminal or Revenue Court or to any Board or Executive Officer for the purpose of obtaining a copy or translation of any judgment, decree or order passed by such Court, Board or Officer.

The question is whether the Assistant Commissioner of Income-tax is a Revenue Court or an Executive Officer. Obviously he does not fall within the other part of the definition. In 11 Pat 40²—a reference under the Income-tax Act—where the facts are very similar, the Patna High Court held that an application had to be stamped and that an unstamped application was an invalid application. The learned Chief Justice said :

The most material words of the paragraph are the words "judgments, decrees or order passed by such Court, Board or Officer" and they are intended to cover every case of every kind in which a judgment, decree or order has been passed by any Court, Board or Officer capable of passing such judgment, decree or order and having regard to what I think is the proper meaning of the words, it certainly covers an application to an Assistant Commissioner of Income-tax who has power to make the order and a copy of whose order is necessary for the purpose of preferring an appeal to the Commissioner under the Income-tax Act.

With due respect to the learned Chief Justice, I would look at the matter in a rather different way and say that the question is whether the Assistant Commissioner is a Revenue Court or an Executive Officer. It has twice been held that a Collector or a Collector of Income-tax was a Revenue Court under the Income-tax Act of 1886 and once that he was a Court. In 44 P R 1905 Cr,³ Sir William Clark said :

The Collector in hearing the objection was acting under Ch. 4, Income-tax Act 2 of 1886; the objection was required to be verified in the manner required by law for the verification of

plaints [S. 25 (1)]. The Collector had power to compel witnesses to give evidence (S. 28) and the proceedings are to be deemed to be judicial proceedings within the meaning of Ss. 193 and 228, I. P. O.

The present Act, the Income-tax Act of 1922, by S. 30 (3) requires verification in a prescribed manner and S. 37 confers on officers the same powers as are vested in a Court under the Code of Civil Procedure, 1908, for enforcing the attendance of witnesses, examining them on oath, compelling the production of documents and issuing commissions for the examination of witnesses. This ruling therefore appears to cover the point. The reasoning in 38 Bom 642⁴ is similar: see Heaton, J.'s judgment (p. 645). The learned Chief Justice in his judgment (p. 651) considered the question of "Revenue Courts" as set-up under the Punjab Tenancy Act and other provincial enactments and held that an Income-tax Collector was a Revenue Court although it is quite obvious and must have been present to the minds of the Judges who decided 44 P R 1905 Cr³ that a Collector is not the same as a Revenue Court under the Punjab Tenancy Act. The Bombay ruling dissented from an earlier ruling of the same Court, 8 Bom L R 477,⁵ which however gave no reasons. In 36 Mad 72⁶ at pages 84-86 it was held that a Divisional Officer under the Income-tax Act was a Court. Sundara Ayyar, J. held that the test for deciding whether the Income tax Officer was a Court or not was whether he was a tribunal empowered to deal with a particular matter and authorized to receive evidence bearing on that matter in order to enable him to arrive at a determination. He proceeded :

In my opinion there was a lis in this case. It is not necessary that there should be two parties arrayed as opponents in the matter to be decided by the officer. The petitioner had a right that he should not be made to pay a heavier tax than was properly assessable on his income. The officer had to decide as between the petitioner and Government what the petitioner's income was.

I think the reasoning of these last three rulings is convincing. It is true that they all dealt with applications for criminal prosecution, but it is hard to say that a particular officer is a Revenue Court for

4. *In re Punam Chand Manek Lal*, A I R 1914 Bom 138=25 I O 333=38 Bom 642=15 Cr L J 581=16 Bom L R 446 (F B).

5. *In re Kalidas Rewadas*, (1906) 8 Bom L R 477=4 Cr L J 34.

6. *In re Nataraja Aiyar*, (1913) 36 Mad 72=16 I O 755=13 Cr L J 723=23 M L J 393.

2. *Basant Lal Ramjidas v. Commissioner of Income-tax B. & O.* A I R 1932 Pat 103=136 I O 302=11 Pat 40=13 P L T 437.

3. *Emperor v. Rup Singh*, (1905) 44 P R 1905 Cr =3 Cr L J 128=187 P L R 1905.

purposes of S. 476, Criminal P. C., and yet not a Revenue Court for purposes of the Court-fees Act. I would therefore hold that the Assistant Commissioner of Income-tax is a Revenue Court for purposes of the Court-fees Act. The application therefore required a stamp and the petition to the Commissioner is rightly held by him to be barred by time. We have no power to extend time and therefore the present petition must be dismissed. But as the petitioner who has paid Rs. 100 to the Department has not even had a hearing on this application and as the Department is partly to blame for the application being put in late, I would direct that the parties bear their own costs of this application.

Dalip Singh, J.—I agree.

B.D./R.K. *Petition dismissed.*

* A. I. R. 1937 Lahore 878

COLDSTREAM AND DIN MOHAMMAD, JJ.

Banke Behari Lal — Petitioner.

v.

Commr. of Income-tax Punjab, North West Frontier and Delhi Provinces — Respondent.

Civil Ref. No. 7 of 1937, Decided on 28th April 1937, made by Commissioner of Income-tax, Punjab, North West Frontier and Delhi Provinces, D/- 11th February 1937.

* Income-tax — Assessee, a Government servant, requesting head of his office to pay his February salary in April—Head of office drawing salary in March but paying it to assessee in April—Salary drawn by head of office in March held could not be regarded to have been held in trust or bailment for assessee—February salary received by assessee in April held could not be included in year's assessment.

Upon a true construction of S. 7 (1) read with Ss. 18 (2) and 60 (2), Income-tax Act, salary is not assessable to income-tax until it has been paid to and received by the employee, the scheme of the Act being to levy income-tax not upon potential but actual profits. [P 879 C 1, 2]

An assessee, a Government servant, requested the head of his office to pay him his February salary on 1st April instead of on 1st March. The head of the office drew the salary in March and paid it to the assessee on 1st April as requested. The income tax officer included the salary for February in the year's assessment on the ground that as it was drawn in March it must be regarded as having been paid in that month, because it was held by head of the office in trust or bailment for the assessee until it was actually paid to the latter:

Held: that the head of the office in the circumstances of the case could not be regarded as a

bailee or trustee. The obligation to pay a certain sum of money to the assessee could not make him a bailee, for bailment could be of specific property only. He was clearly not acting as the assessee's agent in drawing the salary for February, for he had not been authorized by the assessee either to draw the February salary in March or to keep it on the assessee's behalf. According to R. 70, Civil Account Code, the assessee's February salary did not belong to him in March. In these circumstances the February salary received by the assessee in April could not be included in year's assessment: *A I R 1933 Rang 46 (F B), Rel. on.* [P 879 C 1, 2]

Bhagwat Dayal — for Petitioner.

S. M. Sikri for *J. N. Aggarwal* — for Respondent.

Coldstream, J.—This is a reference made to this Court by the Commissioner of Income-tax Punjab, North West Frontier and Delhi Provinces under S. 66 (2), Income-tax Act of 1922, arising out of the assessment to income-tax of a Government servant. The circumstances stated by the Commissioner are as follows: The assessee is an Assistant Superintendent in the office of the Auditor General. His monthly pay during 1934-35 (assessable for 1935-36 assessment) was Rs. 427.8.0. His pay for the 12 months would accordingly amount to Rs. 5,130 chargeable at nine pies per rupee plus 25 per cent. If however his February pay, normally payable in March, were deferred to 1935-36, his salary in 1934-35 would be taxable at the rate of six pies plus 25 per cent. and the remaining Rs. 428 would be taxable at whatever rate was found appropriate to the 1936-37 assessment which in ordinary expectation would be nine pies plus one-sixth. In May 1935 the assessee made a return including his salary for March 1934 (paid normally in April) to January 1935 accompanied by a letter submitted through the head of his office who noted on it that pay for February 1935 was 'disbursed to him' on 1st April 1935. Assessment was made originally on the basis of that return. Meanwhile the Income-tax Officer, under instructions from the Commissioner, served notice on the assessee for inclusion of the salary for February. In his reply the assessee stated that in a letter dated 5th February he had asked the head of the office to pay him his February salary on 1st April instead of on 1st March 1935 and that the head of his office had complied with his request. The letter of 5th February ran:

I beg to request that my pay for the month of February 1935 may kindly be paid to me on 1st

April 1935 instead of on 1st March 1935. By doing so my total income for the financial year ending on 31st March 1935 will be less than Rs. 5,000 and I will be assessed to income-tax at the rate of six pies per rupee instead of nine pies per rupee.

The assessee's salary was drawn by the head of his office either on 21st or 27th March. The Income-tax Officer included the salary for February in the year's assessment on the ground that as it was drawn in March it must be regarded as having been paid in that month, because it was held by the head of the office in trust for the assessee until it was actually received by the latter. The assessee appealed pointing out that under Art. 70, Civil Account Code the head of the office is responsible to Government for pay drawn by him until he has paid it to the person entitled to receive it and obtained his receipt, that in exactly similar circumstances salary for 11 months only had been assessed in previous years and the action of the Income-tax Officer had overruled the decision of his predecessors. The Assistant Commissioner rejected the appeal and the assessee asked for a reference to this Court. The question referred by the Commissioner is:

Was it impossible as an issue of law for the Assistant Commissioner to find that the assessee's salary for February 1935 was paid by or on behalf of Government before the end of March 1935?

The Commissioner's opinion is that as S. 7, Income-tax Act, does not require salary which is taxable to be received by the assessee but paid by the employer within the period concerned, and, as it was the duty of the head of the office to disburse the salary with reasonable promptitude and return it to the Treasury if he could not disburse it, and as it was at the assessee's request that he retained it longer than was necessary, the head of the office can have retained it only as a bailee or agent for the assessee. In his opinion therefore payment was made when the money was drawn from the Treasury and the head of the office began to hold it as the assessee's agent.

I am unable to see why the head of the office in the circumstances of this case must be regarded as a bailee or trustee. The obligation to pay a certain sum of money to the assessee could not make him a bailee, for bailment can be of specific property only. He was clearly not acting as the assessee's agent in drawing the salary for February, for he had not been

authorized by the assessee either to draw the February salary in March or to keep it on the assessee's behalf, and if the view taken by the Income-tax Authorities that the salary was in law paid when it was drawn be correct, he was acting in a manner prejudicial to the assessee. That income-tax is to be assessed upon salary with reference to the time at which it is actually received by the employee seems clear from the provisions of S. 18 (2) and S. 60 (2) of the Act. S. 18 (2) lays down that income-tax is to be deducted at the time of payment and as no deduction was made in March, in this case it follows that the February salary was paid not in March but in April. S. 60 (2) clearly indicates that the assessment is to be on the amount actually received during the period for which the tax is assessed.

Rule 70, Civil Account Code makes it clear that the assessee's February salary did not under the rules belong to him in March, for, had the head of the office lost it, the responsibility would have been his, no receipt for it having been given by the assessee. Here I may say that we have not been referred to any law or rule making it obligatory for an employee to demand payment of his salary in the month following that for which it is payable or forbidding him to ask for its payment to be postponed. In support of the Commissioner's view, counsel for the Crown has cited 7 I T C 184,¹ but that judgment does not deal with the taxation of salaries for which S. 7 of the Act specially provides.

The Full Bench judgment of the Rangoon High Court in 11 Rang 172² on which reliance is placed by counsel for the assessee dealt with a case relating not to the assessment of salaries but to the assessment of contributions by the employer to his employee's provident fund, but much of what is said in that judgment goes to support the present assessee. The opinion was there expressed that upon a true construction of S. 7 (1) read with S. 18 (2), salary is not assessable to income-tax until it has been paid to and received by the employee, the scheme of the Act being to levy income-tax not upon potential but actual profits.

1. Bhikam Chand Laxmi Chand v. Commr. of Income-tax, C. P. and U. P., (1934) 7 I T C 184.

2. Commr. of Income-tax, Burma v. Bombay Burma Trading Corporation Ltd., A I R 1933 Rang 45=143 I C 532=11 Rang 172 (F B).

Lastly it is to be noticed that the prescribed form for the return of income-tax on salaries includes not the months of the income-tax year for which salary is payable but the months March to February in which the salary is paid. For the reasons I have indicated, I would answer the question referred in the affirmative. The assessee will have his costs and his deposit will be returned to him.

Din Mohammad, J.—I agree.

P.R./D.S. *Answered in affirmative.*

*** A. I. R. 1937 Lahore 880**

TEK CHAND AND ABDUL RASHID, JJ.

Messrs. Anant Ram-Khem Chand —
Assessee—Petitioner.
v.

Commissioner of Income-tax, Lahore —
Respondent.

Civil Ref. No. 11 of 1937, Decided on 15th June 1937, made by Commissioner of Income-tax, Punjab, North West Frontier and Delhi Provinces, D/- 10th February 1937.

* (a) Income-tax Act (1922), S. 4—'Income' and 'capital receipt' — Sale of patent by patentee for fixed price — Price payable not in lump sum but in instalments—Even in such case instalment received during accounting year is not taxable 'income', but 'capital receipt'—If transaction is merely 'working license' granted for annual payment, it is taxable 'income'.

If a transaction is an out and out sale of the patent by the patentee for a definite fixed price, even though it is not payable in lump sum but in instalments, there can be no doubt that any such instalment received during the accounting period cannot be treated as taxable 'income', but is a 'capital receipt' and as such exempt from assessment. If, on the other hand, it is merely a 'working license' granted for an annual payment, it is clearly 'income' and as such is taxable : *Scoble v. Secretary of State, (1903) 1 K B 494, Ref.* [P 882 C 1]

(b) Income-tax Act (1922), S. 4—Taxable income—If assessee is carrying on business of acquiring and selling of patents as regular trade, price received by him by sale of any particular patent would be taxable income.

If the assessee has been carrying on the business of acquiring and selling of patents as a regular trade, the price received by him by the sale of any particular patent would be income within the meaning of the Income-tax Act and assessable as such. In that event, the case would be similar to that of a speculator in immoveable properties, who purchases and sells such properties as a regular trade. The profit made by him in any transaction would clearly be his taxable income. But this would not be so if a person who had inherited immoveable property or had acquired it

as an investment, subsequently sold it at a profit: *Case law referred.* [P 882 C 1]

(c) Income-tax Act (1922), S. 4—Patentee granting working license for number of years in consideration of royalty on percentage basis on net profits—Royalty is taxable.

If a transaction is a working license for a number of years in which no fixed sum is to be paid to patentee but he is to receive a royalty on a percentage basis on the net profits made by the grantee, the amount of the royalty so received would clearly be assessable in the hands of the grantors : 7 *Tax Cas 310, Ref.* [P 882 C 2]

* (d) Income-tax Act (1922), S. 4 (3) (vii) — Patentee assigning patent rights to another for indefinite period without losing corpus of patent in consideration of annual payment—Annual receipts so received are income, profits or gains and are not exempted from taxation under S. 4 (3) (vii).

An assessee who owned patent rights which were originally used in his business conveyed the working rights under license to another person against payment of profit shares. He subsequently cancelled this agreement and converted his rights under that conveyance into license under an agreement against an annual payment during subsistence of agreement. Thus what was transferred by the assessee was not the corpus but the usufruct of the patent for an uncertain period in consideration of amount which had not been definitely known :

Held : that the annual receipts under the agreement were income, profits or gains and were not exempted by S. 4 (3) (vii), Income-tax Act. [P 883 C 2; P 884 C 1]

Kirpa Ram Bajaj—for Petitioner.

J. N. Aggarwal and S. M. Sikri —
for Respondent.

Tek Chand, J. — This is a reference by the Income-tax Commissioner, Punjab and North West Frontier Province, under S. 66 (2), Income-tax Act, referring to this Court a question of law arising from the petitioner's appeal against the assessment for 1935-36, made on his income for the "accounting period" 1934-35. The assessee is an undivided Hindu family, known as Anant Ram-Khem Chand, which for brevity's sake will be described hereinafter as "Khem Chand". The facts, as disclosed in the "stated case" and its annexures, or admitted by both counsel before us, are that Khem Chand was the patentee of a tube-well boring strainer, known as the "Khem Patent". The Letters Patent relating to this strainer were granted to Khem Chand by the Governor-General on 20th November 1929, but were to have effect from 10th August 1927 for a period of 16 years, i. e., till 9th August 1943. Khem Chand manufactured strainers of this patent, and used and sold them till 20th April 1933, when he conveyed the

patent rights to one Pandit Diwan Chand of Lahore for the remaining term of the patent, in consideration of Diwan Chand agreeing to pay to him 10 per cent. of the net price realized on the actual sales. This arrangement continued till 5th March 1934, when it was cancelled by mutual consent. On that date, a tripartite agreement was entered into between the original patentee (Khem Chand), the first transferee (Diwan Chand), and a private limited company known as Reliable Water Supply Service of India, Limited, Lahore (which for brevity's sake will be called hereinafter "the Company"). This Company had itself taken out a patent for another tube-well boring strainer, known as the "Tej Patent" for a period of 16 years, commencing 12th May 1925, and had been manufacturing and selling these strainers on a large scale. In order to avoid competition by the strainers of the "Khem Patent", the Company came to an arrangement with Khem Chand and his transferee Diwan Chand; and all three executed the agreement above referred to on 5th March 1935, which is printed verbatim at pages 6 to 12 of the paper-book. By this agreement, the earlier agreement between Khem Chand and Diwan Chand, dated 20th April 1933, was cancelled, and Khem Chand granted unto the Company full license and authority to make, manufacture or cause to be manufactured, use, exercise and vend strainers for tube-wells under and according to the specification of the Khem Patent during the term now unexpired of the Tej Patent and any prolonged or extended period thereof.

In consideration of Diwan Chand cancelling his agreement, the Company agreed to pay to him (Diwan Chand) Rs. 4,000 a year; and in consideration of the conveyance of the patent by Khem Chand to the Company it agreed to pay him Rs. 4,500 per annum "on the conditions and covenants and for the term set forth in the document". Such of these conditions as are material for the disposal of this case will be mentioned later. In accordance with the terms of this agreement, the Company paid the first instalment of Rs. 4,500 to Khem Chand during the "accounting period", 1934-35. In the course of the assessment for the year 1935-36, which was to be made on his income for 1934-35, Khem Chand claimed before the Income-tax Officer that this sum was exempt from assessment. He contended that it was not "income" within the meaning of S. 4 (3), Income-tax Act, but that it was a "capital

receipt", being a part of the sale-price of the patent, which instead of having been paid in one lump sum, had been made payable in annual instalments of Rs. 4,500 till the expiry of the patent. The Income-tax Officer overruled this contention, and included this item in the assessable income of Khem Chand. It appears from his order that he treated the transaction between Khem Chand and the Company as one of sale of his patent rights, but he held that as these rights had not been sold "for a lump sum consideration", but "on the other hand the assessee is to get it (payment) regularly every year" for a number of years, it was "in the nature of a fixed royalty" and therefore liable to assessment. On appeal the Assistant Commissioner held that the payment being in the form of money received for the use of a capital asset, as for instance rent realized for the use of house property, and these receipts being of recurring nature, paid every year for benefit derived from the patent, it was taxable profits. He accordingly dismissed the appeal. The assessee applied to the Commissioner under S. 66 (2) for making a reference to this Court to decide the question of law involved, and contended that the Income-tax Officer and the Assistant Commissioner had misunderstood the real nature of the transaction which was one of "sale of a capital asset, and the annual receipts were instalments of the sale-price". The Commissioner has made this reference, but has expressed his opinion against the assessee's contention. He has observed that on a proper reading of the conveyance, the transaction was not one of "sale", but was rightly described as a "license", on which royalty is payable annually to the assessee. He has also expressed the opinion that even if the conveyance be not regarded as a continuing license but an outright transfer of rights once and for all, still, the receipts lay properly in revenue account, being profits and gains therefrom which arose in the course of the assessee's business.

With this expression of opinion, the learned Commissioner has formulated the following question of law for determination by this Court:

The assessee having owned patent rights which were originally used in his business: having conveyed the working rights under license against payment of profit-shares, and having converted his rights under that conveyance into license under the annexed agreement against an annual payment; (query) are the annual receipts under the said agreement such that in principle and law it was impossible for the Assistant Commissioner to find that they were 'Income, Profits or Gains;

and were not established to be exempted by S. 4 (3) (vii) of the Act?

The answer to this question depends on the determination of the nature of the transaction as disclosed in the agreement of 5th March 1934. If the transaction was an out and out sale of the patent by Khem Chand to the Company for a definite fixed price, even though it was not payable in lump sum but in instalments, there can be no doubt that any such instalment received during the accounting period cannot be treated as taxable "income", but is a "capital receipt" and as such exempt from assessment. If on the other hand it was merely a "working license" granted for an annual payment, it is clearly "income" and as such is taxable. I may remark here that the Income-tax Officer was clearly in error in his law, when he, while treating the transaction as one of sale, considered that the amount received would be exempt only if the patent rights had been sold "for a lump sum consideration". This matter was decided long ago in the celebrated case in (1903) 1 K B 494,¹ which is regarded as the leading authority on the subject and has since been followed in numerous cases in England as well as in India. Similarly I think the learned Commissioner was not right in laying too much emphasis on the circumstance that the assessee had originally used the patent rights in question in his own business of manufacture and sale of the strainer, or that in 1933 he had conveyed the working rights under the license to Diwan Chand against payment of a share in the profits. It is not alleged that the assessee has been carrying on the business of acquiring and selling of patents as a regular trade. If that were so, there can be no doubt that the price received by him by the sale of any particular patent would be income within the meaning of the Act and assessable as such. In that event, the case would be similar to that of a speculator in immoveable properties, who purchases and sells such properties as a regular trade. The profit made by him in any transaction would clearly be his taxable income. But this would not be so if a person who had inherited immoveable property or had acquired it as an investment, subsequently sold it at a profit: see 5 Tax Cas 159,² 5 Tax Cas 424³

and 5 Tax Cas 658.⁴ The fact therefore that Khem Chand himself had manufactured and sold strainers of this patent from 1927 to 1933 is immaterial for the decision of the point before us. Similarly, the terms of his transaction with Diwan Chand can have no bearing on it. That transaction was, as pointed out by the learned Commissioner himself, a working license for a number of years in which no fixed sum was to be paid to Khem Chand, but he was to receive a royalty on a percentage basis on the net profits made by the grantee. The amount of the royalty so received would clearly be assessable in the hands of the grantors: (1919) 7 Tax Cas 310.⁵

For ascertaining the real nature of the transaction between Khem Chand and the Company, we must look to the agreement of 5th March 1934. In this document, the transaction is described as a "license" and the amount payable annually by the Company to the grantor is stated to be "royalty". But, as rightly pointed out by the learned Commissioner himself, too much stress cannot be laid on the use of these words. We must look to the substance of the transaction as is disclosed in the agreement read as a whole. If we find, as is contended by the assessee's learned counsel, that it was an out and out sale for an ascertained sum, the payment of which was spread over a number of years, we must hold that by this transaction his capital asset was transmuted from the form of a patent to a sum of money payable in fixed instalments. If however we come to the conclusion that it was nothing more than the grant of a working license for a number of years on certain conditions, the property in the patent not being transferred absolutely to the grantee but still remaining in the grantor, the verdict must be against him.

Now a perusal of paras. 3, 4, 6, 7, 9 and 16 of the agreement clearly shows that the assessee, Khem Chand, had not transferred completely the ownership of the patent to the Company, nor can it be said that the price payable was a fixed, definite amount, payment of which had been spread over a number of years. Para. 3 provides that the sum of Rs. 4,500 was payable annually by the grantee to the

1. *Scoble v. Secy. of State*, (1903) 1 K B 494.

2. *Californian Copper Syndicate v. Harris*, (1911) 5 Tax Cas 159=6 F 894.

3. *The Hudson's Bay Co., Ltd. v. Stevens*, (1911) 5 Tax Cas 424.

4. *Teberau (Johore) Rubber Syndicate, Ltd. v. Farmer*, (1910) 8 O 906=5 Tax Cas 658.

5. *William John Jones v. Commr. of Inland Revenue*, (1919) 7 Tax Cas 310.

grantor during the subsistence of the agreement. In para. 6 it is stated that:

The date of expiry of the agreement shall be the date on which either of the two patents (Tej Patent and Khem Patent) first expires, otherwise than for non-payment of renewal fees. Extension granted to either or both shall be considered as keeping alive the patent or patents so extended.

As already stated, the Tej Patent was taken out on 12th May 1925, and the Khem Patent on 10th August 1927. Under S. 14, Patents and Designs Act, 2 of 1911, therefore, they are to expire on 11th May 1941 and 9th August 1943 respectively. Consequently, under part 1 of para. 6, the agreement between Khem Chand and the Company would expire in May 1941; but part 2 keeps it alive for such further period for which an extension might be granted to either or both of the parties. Under S. 15 of the Act, the term of 16 years may be extended by the Governor-General or the High Court, to a period not exceeding five years, which in exceptional cases might be enlarged to 10 years. It is thus clear that the agreement would not necessarily determine in 1941; it might be kept alive for a further unknown period which may expire at any time between 1942 to 1953, during which time the Company would be liable to pay to the assessee Rs. 4,500 per annum. Obviously, it cannot be said that the transfer was for an ascertained, fixed and definite sum. Further, in para. 16 of the agreement it is provided that:

Notwithstanding that the license hereby granted ceases on the expiry of the Tej Patent, the Company shall nevertheless by giving three months' previous notice in writing to Khem Chand have the option to continue the manufacture, vend and use of the strainer as heretofore on payment of the royalty and of the sum at the rates hereinbefore mentioned.

Again, para. 7 lays down that if at any time during the currency of the agreement, the Company goes into liquidation, the licence shall stand determined and on such determination Khem Chand shall have the right to sue and vend the strainers of this patent. All these conditions make both the duration of the 'license', and the total amount payable still more uncertain. Nor can it be said that the grantor had parted with the corpus of the patent. The property in it still remains in him, and in para. 9 it is provided that if any improvements are made in respect of these strainers during the currency of the agreement, such improvements shall belong to Khem Chand, who alone will have the exclusive right of

having them patented, though, of course, the Company will have the right to use and vend the improved strainer during the subsistence of the license without payment of any additional royalty. For the assessee it was urged that these and other similar provisions were merely entered for the protection of the rights of an unpaid vendor. But after consideration I do not think that this is so. It seems that what was transferred to the Company was not the corpus but the usufruct of the patent for an uncertain period in consideration of an amount, which had not been, nor could be, definitely known. The learned counsel for the assessee laid much stress on para. 15 of the agreement, which is to the effect that the Company shall "be entitled to assign, grant license, sell, dispose of or in any manner deal with the rights hereby assigned to it".

This however is not conclusive of the matter. It merely gives the Company the right to grant a sub-license of the working rights in the patent during the subsistence of the license, and provides that the sub-license shall be subject to the same conditions and limitations under which the license had been granted to the Company. Nor can he derive any support from paras. 12 and 14, according to which the Company was to pay all renewal fees and cost of extension applications, and was empowered to bring suits against third parties for any infringement or threatened infringement of the patent.

Both counsel cited a number of rulings before us, but I do not think it necessary to discuss them in detail, as the governing principles are well settled and the decision in each case turned on its own peculiar facts. For the assessee, reliance was placed principally upon 9 Tax Cas 520.⁶ In that case certain patents were assigned for a capital sum of £25,000 payable in ten equal instalments and in addition, a royalty was payable "so long as the patent may survive, be it 16 years or be it a longer period". It was held that the annual instalments of £2,500, in which the capital sum was to be paid, were not taxable, but that the royalty of £1,000 payable during the subsistence of the patent was liable to assessment. This decision, in my opinion, is clearly against the contention of the assessee in this case. Here, as already

6. *Collins v. Frith-Brearley Stainless Steel Syndicate, Ltd.*, (1925) 9 Tax Cas 520=133 L T 616.

stated, the assignment was not for a capital sum, but was for Rs. 4,500 payable annually so long as the Khem or the Tej Patent may survive. It is therefore clearly like the royalty payable in the case cited and is assessable. In this connexion, reference may also be made to the decision of the House of Lords in 11 Tax Cas 730⁷ at p. 746 where it was held that if what was assigned was merely the use of the invention for a period of time, and the corpus of the patent was not taken away from the grantor but still remained his property, it was 'income' and as such assessable.

In this view of the case, no question of exemption under S. 4 (3) (vii) arises, as the receipt cannot possibly be said to be 'casual' or 'non-recurring'. For the foregoing reasons, I would answer the question referred to us against the assessee, holding that the annual receipt of Rs. 4,500 under the agreement is "income, profits and gains", and that it is not exempt from assessment under S. 4 (3) (vii). I think however that this is a fit case in which the parties should be left to bear their own costs in this Court.

Abdul Rashid, J.—I agree.

D.S./R.K. *Answer accordingly.*

7. Constantinesco v. Rex, (1927) 11 Tax Cas 730 = 43 T L R 727.

A. I. R. 1937 Lahore 884

COLDSTREAM AND DIN MOHAMMAD, JJ.

Spedding Dinga Singh & Co. —
Assessee — Petitioner.
v.

Commissioner of Income-tax —
Respondent.

Civil Ref. No. 2 of 1937, Decided on 18th May 1937, from Commissioner of Income-tax, Punjab, North West Frontier and Delhi Provinces, D/- 15th December 1936.

Income-tax Act (1922), S. 4— Foreign business — Remittance of money to British India from assessee's business in foreign country— Presumption is that such remittance is of profits—No such presumption arises in case of imported stock in trade.

Where money or something equivalent to money, that is something which can forthwith be used as an ascertained sum of money, is remitted to British India from a foreign country where a firm does business and profits are available in that country, the onus lies upon the person denying that the remittance is of profits to prove his case, but no such presumption arises that stock in

trade brought into India by a firm whose normal business is investing in a commodity, importing it and selling it, is profit : *Case law referred.*
[P 886 C 2 ; P 887 C 1]

J. G. Sethi and M. L. Sethi —

for Petitioner.

J. N. Aggarwal and S. M. Sikri —

for Respondent.

Coldstream, J.—This is a reference by the Commissioner of Income-tax, Punjab, Delhi and North West Frontier Provinces, under S. 66 (2), Income-tax Act, 1922. The circumstances leading to the reference are as follows : The assessee is a firm registered in Lahore as Spedding Dinga Singh and Company. The firm takes leases of forests in Kashmir and elsewhere, fells trees marked for it by the forest authorities and sells the timber. We are concerned at present with the assessment of profits arising out of two leases in Kashmir, one of the Lolab forests and the other of the Kamraj forest. Some of the timber is sold in Kashmir, part of the profits being utilized locally for further extraction expenses, but the greater part is floated down the Jhelum river and sold at the firm's depot at Jhelum in the Punjab. The working expenses are remitted from British India, the firm's headquarters being at Lahore during the winter when very little work is done in Kashmir. The Jhelum depot is financed from Lahore also. Accounts are kept in Lahore in the winter but the books are taken to Srinagar in Kashmir in the summer, where some or all of the partners spend the hot weather. During the accounting period with which we are now concerned, July 1931 to June 1932, the firm made a profit of more than three lakhs in British India and Rupees 67,095 in Kashmir. There is no dispute about the assessment of the profits in British India. The contest is about the Kashmir profits, which the Commissioner of Income-tax has taxed holding on the reasoning made clear below that the whole of these profits were received in India.

The amount assessed to tax by the Income-tax Officer in the first instance included a sum of Rs. 20,102 in addition to the ascertained profits of the firm arising in British India. The Income-tax Officer calculated this sum as follows : He found that Rs. 11,17,765 had been remitted to Kashmir to cover working expenses including royalty payable to the Kashmir State, and that the timber imported had been sold at Jhelum for Rs. 11,00,867. At a

time when there was money in excess in Kashmir a sum of Rs. 37,000 had been sent from there to British India (Lahore) to clear or help to clear a bank overdraft. Adding this sum to the sale price of the timber, he found that there had been remittances to British India to the value of Rs. 11,37,867. This amount exceeded the amount remitted to Kashmir for working expenses by Rs. 20,102, and assuming that the difference, which he called "inwards excess," represented profits brought into British India, he added the sum to the profits admittedly made in British India and liable to be taxed.

The assessee appealed. The contentions urged were that the cash remittance of Rs. 37,000 was not a remittance of profits, the money having been sent to India to repay capital borrowed and that in computing the difference between the "outward" and "inward" remittances regard should be had to the cost price of the wood sold and not its sale price. The Assistant Commissioner issued notice to the assessee to show cause why the whole of the Kashmir profits should not be assessed to tax. After considering the assessee's arguments, his conclusion was that the whole of Rs. 37,000 was profits brought into British India, because (1) the purpose for which the sum of Rs. 67,000 was brought into India and used was not a test of its being or not being profits, (2) because the timber brought into India represented a remittance of profits equal to the amount for which it was actually sold and (3) because all the profits of the business, including the Kashmir profits, had been brought into the accounts kept in Lahore where control of the whole business was centralized and had been allocated to the partners as their profits.

On a further appeal to the Commissioner, it was again argued for the assessee that the remittance of Rs. 37,000 was not a remittance of profits, that the distribution of the profits of the business in accounts kept in Lahore did not prove the receipt of the comprised profits at the place of account, that there was no "excess inwards" because regard should have been had to the cost price and not to the sale price of the timber brought into British India, which cost price was shown by the accepted accounts to have been less than the cost price calculated by the Income-tax Officer, that in any case the

timber imported was not profits imported but capital, and that the Kashmir profits were not ascertained when the timber was brought into British India.

During the hearing of the appeal the Commissioner asked the assessee to furnish further figures. From his appellate order, it appears that what he asked for were figures showing the remittances sent to Kashmir for working expenses as distinct from the money sent to the forest managers from the Kashmir office. The figures were sent to the Commissioner by the assessee's auditor who, in a covering letter dated 14th May 1936, a portion of which is quoted in the Commissioner's order of reference (appendix para. 7), noticed that the figures showed an apparent inward excess of about a lakh in the difference between outward remittances from British India and the cost price of the timber brought into British India, which was taken to be Rs. 8,34,000. From the figures supplied, the Commissioner concluded and (this is common ground) that the remittances from British India to Kashmir amounted to Rs. 7,37,488. On these figures the excess inwards was *prima facie* Rupees 96,512.

Here I may mention that the figure Rs. 8,34,000 was calculated by deducting Rs. 2,66,000 (approximately, the exact figure being Rs. 2,66,587) which was the admitted amount of the profits made by the sale of Kashmir timber in British India, from the sale price of the timber Rs. 11,00,000 (exactly Rs. 11,00,867). There is no dispute, I may add, about the figures, although as will be made clear hereafter, the assessee's case is that Rs. 8,34,000 included working expenses incurred in British India which ought to have been deducted in order to arrive at a correct estimate of the cost price of the timber when it came into British India. The Commissioner dismissed the appeal. His order is not throughout easy to follow. It seems however that he accepted the assessee's contentions that the distribution of profits in the head office accounts did not by itself imply a receipt of those profits in British India and that in calculating excess inwards or outwards it was the cost price of the timber and not its sale price that should be considered. It also appears that he did not accept either the Income-tax Officer's assessment or the assessment by the Assistant Commissioner

as having been made on a proper basis. His conclusion he expressed as follows :

Receipts in British India were in excess of the available profits, Rs. 67,095. The assessee has failed to establish that what was received did not include these profits, therefore it must be held to include them and they are assessable.

At the same time in view of "the nature of the enhancement practically as a new basis intact," he expressed his willingness to refer the case under S. 66, Income-tax Act, not only in respect of the enhancement but so as to cover the whole amount. The assessee petitioned the Commissioner asking for a reference under S. 66 (2) formulating two questions : (1) Whether as a matter of law it was impossible to find that the assessee's evidence had not disproved the presumption that the cash and moneys worth which he received in British India from Kashmir comprised the available Kashmir profits amounting to the agreed figure assessed ? (2) Whether in the circumstances of the case any presumption arises that any profits were received in British India ?

The Commissioner drafted a statement accordingly reversing the order of the questions proposed. To this statement the petitioner's counsel took objections in a letter addressed to the Commissioner. The Commissioner, after hearing Mr. Sethi, refused to entertain the objections but added to his statement an appendix incorporating this letter and giving his reasons for rejecting the objections. Counsel's submissions were that the figures on which the Commissioner had relied in estimating the cost price of the timber for the purpose of deciding whether there had been an 'excess inwards' were incomplete. It was explained that included in the cost price of the timber at the date of its sale was a sum of Rs. 1,22,000 which had been spent in British India on working expenses at the Jhelum depot, that the cost price of the timber when it entered British India was therefore not Rs. 8,34,000 but Rs. 8,34,000 minus Rs. 1,22,000 or Rupees 7,12,000, that is to say considerably less than the remittances from British India to Kashmir which remittances according to the auditor's figures, accepted by the Commissioner, amounted to Rs. 7,37,488. The letter also asked that the facts and figures given by the auditor in his letter of 14th May might be printed. This request the Commissioner has refused.

Before us, assessee's counsel, while conceding that there is good authority for the proposition that where money, or something equivalent to money, that is to say something which can forthwith be used as an ascertained sum of money, is remitted to British India from a foreign country where a firm does business and profits are available in that country, the onus lies upon the person denying that the remittance is of profits to prove his case, contends in the first place that no presumption arises that stock in trade brought into India by a firm whose normal business is investing in a commodity, importing it and selling it, is profit, and in the second, that the evidence finally accepted by the Commissioner proves positively that no part of the Rs. 67,000 profit in Kashmir was received in British India, the timber received being merely stock in trade the profit made by selling which has been taxed in India.

Before proceeding further, it is necessary to notice the following facts. The assessment in this case is based on the assessee's accounts which have been accepted as "duly and properly maintained", and not one based on an estimate of profits made under the provisions of S. 13, Income-tax Act, nor one made to the best of the Income-tax Officer's judgment under S. 23 (4). Parties are agreed that the figures adopted by the Commissioner may be assumed to be correct and nothing turns upon their accuracy so far as we are concerned. Again, it is not suggested that any part of the Kashmir profits has been brought into India by any of the partners. The partners put in an affidavit to this effect and the truth of it has not been questioned by the Commissioner. It is true that the Commissioner in his order under S. 32 (see para. 8) appears to have rejected the assessee's argument that the remittance of Rs. 37,000 could not be a remittance of profits because it was used or mostly used to pay off a bank overdraft, but he has not taxed that remittance; what he has taxed is not this sum or any other particular item of the accounts but a sum which in his view was represented by or comprised in the timber imported for sale—and he has done so only, so I understand, because he believed it probable that the value of that timber exceeded the remittances outwards by more than the available (although at that time unascertained) profits in Kashmir. That this is

so is obvious from his statement of the case where he remarks that he attaches no particular significance to this 'back remittance'. See also para. 2 at p. 2 and para. 10 of his printed order under S. 32. It is admitted by counsel for the Income-tax Commissioner that it is to the remittance of Rs. 37,000 that the words 'back remittance' refer. Much more than this sum I may note was subsequently remitted to Kashmir for working expenses, and we may take it that so far as this sum is concerned, the assessee ultimately discharged to the satisfaction of the Commissioner the onus of proving that it was not a profit received in British India.

Having cleared the ground with these observations, I return to the Commissioner's statement and the objections pressed on behalf of the assessee. That the Commissioner was entitled in the absence of any proof to the contrary to presume that the remittance of Rs. 37,000 was a remittance of profits is, as I have already indicated, not disputed; but as the Commissioner has made it clear that he does not now base his assessment on such a presumption, the question whether the presumption arose in respect of this remittance becomes immaterial. In view of the final acceptance of the assessee's case (and I think that the language of the statement justifies the assumption that he has accepted it), that the remittance was merely a temporary transfer of capital, the answer to the first question, so far as it relates to the Rs. 37,000, should be 'no'.

For the proposition that there is a legal presumption in the circumstances of this case that the timber imported comprised all available profits in Lahore, I know of no judicial authority. That the timber was stock in trade seems to be admitted by the Commissioner (para. 10 and para. 18 at p. 10), and how such a presumption can attach to what is admittedly stock in trade by the sale of which profit has not been but is hoped to be made, I find difficult to comprehend. The rulings cited by counsel for the Income-tax Commissioner in support of the Commissioner's proposition that until it is shown that stock in kind imported is not profit, it must be presumed to be profit even if there is no evidence that it is profit, do not appear to me to have any bearing on the point, dealing as they do with cases in which what is brought in is either money or

securities or something which can take the place of money. No doubt, profits can be received in forms other than money; they can be in the shape of goods, but the rulings cited nowhere lay down that imported stock in trade is to be taxed as profits unless it is proved that it is not profits. We are dealing here, it is to be remembered, with undisputed facts and figures, not with a case where facts have been concealed or accounts found unsatisfactory. I would accordingly answer the first question so far as it relates to the timber also in the negative.

This brings us to the second question referred to us. Whether in this case profits were imported is no doubt a question of fact, but our judgment is asked upon it, and I have no doubt that we are at liberty to examine whether there was any evidence before the Commissioner to support his conclusion that the cash and money's worth received by the assessee in British India comprised the available Kashmir profits amounting to Rs. 67,095 and whether this conclusion could be based on any legal presumption drawn from the admitted or proved facts: *see 4 Tax Cas 591*.¹ In view of the Commissioner's finding as to the remittance of Rs. 37,000, it is unnecessary to consider the question so far as it concerns that remittance, for as I have made clear, that sum has not been taxed as profits received. What has been taxed is an unascertained portion of the value of the imported timber, it having been presumed that the timber represented at least Rs. 67,000 of profits made in Kashmir. The Commissioner's decision in his order under S. 32 that the timber imported comprised the Kashmir profits was based partly on the evidence of the accounts showing that the cost value of the timber when it came to British India exceeded the amount of the remittances to Kashmir and showing that the Kashmir profits were distributed among the partners in the account books in British India, partly on the contents of the auditor's letter of 14th May 1936, and partly on a purely theoretical presumption that because the timber was worth more than the Kashmir profits Rs. 67,000 and the assessee had failed to establish that its value did not include those profits—those profits are assessable as received in British India.

1. *Scottish Provident Institution v. Allan*, (1903) A C 129=72 L J P C 70=88 L T 478=67 J P 341=4 Tax Cas 591=19 T L R 432.

In his statement of the case which is before us of which the appendix must, I think, be regarded as an integral part, the Commissioner first seeks to justify his order under S. 32 on the ground that the full facts were not before him when he passed the order, while there was, on the other hand, an admission by the Auditor that there was an inward excess of nearly a lakh of rupees. Then, in his appendix, having acknowledged that the auditor's admission was erroneous, he refuses to reconsider the case because the assessee's petition asking for a reference to be made to this Court did not set forth the specific contentions in which he has in the end apparently found some force. We are not sitting as a superior Court dealing with an appeal against the order under S. 32 and we have to give our decision on the merits of the case now laid before us in the statement of the case including the appendix.

It is argued by counsel for the Income-tax Commissioner that the Commissioner's decision as to there having been an 'excess inwards' is one of fact which cannot be questioned here. This is correct so far as the order under S. 32 is concerned. When the case came before the Commissioner on appeal, no attempt it seems was made to bring it to his notice that a sum of Rupees 1,22,000 which was included in the 'cost price' (Rs. 8,34,000) of the timber at the time of its sale in Jhelum had been supplied to the Jhelum depot from Lahore, and that the real 'cost price' of the timber when it was brought into British India was therefore not Rs. 8,34,000 but Rupees 7,12,000 a sum less than the amount accepted by the Commissioner as representing the remittances outwards. Moreover, the Commissioner had before him the auditor's letter which admitted that on the assumptions that Rs. 7,37,488 had gone out, and that timber to the cost value of Rs. 8,34,000 had come in, there was *prima facie* an inward excess of approximately Rs. 96,500. We have it from the Commissioner's statement of the case (paragraph 7 of the appendix and see also paragraph 26 (2) of the order under S. 32) that while he was aware that some expenditure had been incurred at headquarters and at the Jhelum depot, no reference had been made to this depot in any part of the complete audited accounts. It is clear, therefore, that when he dealt with the case under S. 32, he had material for his conclusion in the auditor's letters and the

accounts before him. But he has now conceded that the Auditor's admission was erroneous, and accepted as true the firm's figures showing that Rs. 1,22,000 were spent on the timber in British India and that therefore there was not an 'excess inwards' of Rs. 96,000 (para. 7 of the appendix). In his statement he goes on, however, to remark:

This does not enable me to say that there was not an excess inwards or to say what the excess really was.

But if the admission in the auditor's letter be excluded, what evidence is there that there was an excess? I can find none and neither can counsel for the Income-tax Commissioner. It is remarkable that even in his order under S. 32 the Commissioner himself, somewhat inconsistently, discounts the importance of the question whether there was or was not any excess (para. 23):

Thus, I look on the 'excess' detail as only one of the various considerations in evidence in support of the assessee's attempt to show that what came in did not comprise profits, and that in the beginning of his order he makes it quite clear that the conclusion as to what the excess was is not based on any evidence other than the auditor's admission (para. 2 at p. 2). He did not "find it necessary to come to any finding of what the respective outward and inward totals were". It seems obvious then that if the assessee's figures are correct (the Commissioner has accepted them and their genuineness is not disputed before us) and the admission by the auditor is found erroneous, there is no material left for the conclusion that there was an excess inwards. The question of the value, as evidence, of the material in the shape of the admission (before the admission was discovered to be erroneous) is not, I think, open to us for consideration, but I am constrained to observe that it is difficult to see why the auditor's remark should in any way estop the assessee, as the Commissioner appears to hold that it does, from implementing his statement with further true details. It was known, when the auditor wrote his letter, on what "new basis intact" the Commissioner was about to assess the tax. As a matter of fact the auditor's 'admission' (he was not examined about this) was simply that between the totals of the outward remittances (Rs. 7,37,488) and the cost price of the timber at the date of sale (Rs. 8,34,000), there was an apparent

inward excess of more than Rs. 96,000 and this fact could never be denied. It follows that as the case submitted stands, there is no evidence proving that there was an inward excess. The fact that the Kashmir profits were distributed among the partners in the firm's account books in British India is not by itself proof that profits were received in British India. For this proposition there is ample authority and as I have already noticed the Commissioner himself does not dispute it.

The only other 'material' relied on by the Commissioner for his decision that this imported timber comprised the Rupees 67,000 Kashmir profits is the fact that the assessee failed to show that it did not do so. This brings us back to the question whether there was a legal presumption against the assessee. My view is that there was none. On the other hand, the evidence establishes the assessee's case that what was received in the shape of timber was capital. The Commissioner has admitted that it was stock in trade. None of the rulings, to which our attention has been drawn by counsel for the Income-tax Commissioner, dealt with a case on all fours with the present case. That on which reliance has been mainly placed is the *New Mexico case*, 2 Tax Cas 165.² But I find no feature in common between that case and the present one, in which there has been no conversion of money received in one country as capital into an equivalent for interest on investments in another. The profits stayed in Kashmir. No use was made of them in British India and the Rs. 67,000 was not made a debit entry in the Lahore books. 4 Tax Cas 446,³ the next case cited, appears to me to go against the Commissioner. No doubt it was remarked in his judgment by Lord Traynor (p. 457) that it is not necessary that what is brought in must be *in forma specifica* before it can be treated as profit for purposes of income-tax and these words are authority for the proposition that profits may be received in other forms than in cash. But the question still remains whether this profit of Rs. 67,000 was brought into India in the shape of timber. Nor can I see how the judgment in 5 Tax Cas 159,⁴ referred to by counsel for the

Income-tax Commissioner, helps him. That merely decided that where there is a company whose business is the organizing and selling of mining property and a sale of such property is made at a profit, the price being received in shares, the difference in the exchange is assessable to income-tax. A I R 1936 Mad 776⁵ has also been cited, but that case is not to the point here, the question there having been simply whether money in the shape of house sites was received in a particular year.

Pressed to its logical conclusion, the Commissioner's decision would appear to justify the assessment to tax of a sum equal to the value of all the timber imported. He has not however assessed the tax on this basis and he has deliberately declined to estimate what proportion of the value of the timber represented profits. Once it was found that the timber was capital, and that the account did not prove an inward excess, the onus lay on the department to satisfy itself as to what amount, if any, of the timber represented profits. But having no evidence to go upon, the department could not do this. The Legislature makes taxable only gains, profits and income, and nothing else (see 19 Tax Cas 33⁶) and what we have to decide in this case is simply whether the timber or its market value was as a fact profits. Can it be said on the evidence that the timber in this case was the produce of carrying on the assessee's business, and not merely an element in the process of production? I think not. The case might have been different if, as soon as it came into British India the timber had been allotted forthwith to the partners of a syndicate whose object had been, say simply the purchase of timber at a cheap rate, but the business of the assessee is not the acquisition of timber but the sale of it and the profits of the business accrue and are ascertained not by the bringing of the timber into British India but by the selling of it. The profits thus made by the assessee have been duly taxed. I may add that there is no evidence, nor is it the case put forward for the Income-tax Commissioner, that any

2. Scottish Mortgage Co. of New Mexico v. Mr. Kelvie, (1884) 2 Tax Cas 165.

3. Standard Life Assurance Co. v. Allen, (1904) 4 Tax Cas 446=3 F 805.

4. Californian Copper Syndicate v. Harris, (1905) 5 Tax Cas 159=6 F 894.

5. Chidambaram Chettiar v. Commissioner of Income-tax, Madras, A I R 1936 Mad 776=164 I C 1022=59 Mad 263=71 M L J 35 (S B).

6. Kneen v. Martin, (1935) 1 K B 499=19 Tax Cas 33=152 L T 337=79 S J 31=104 L J K B 361.

part of the Rs. 67,000 profits was invested in this or any other timber imported into British India. My conclusion is that the second question should be answered in the affirmative. The Income-tax Commissioner will pay costs of this reference.

Din Mohammad, J.—In my view the questions propounded by the Commissioner are not happily worded. As these questions stand, they appear to me to be inter-dependent. If, for instance, the answer to question 1 be in the negative, question 2 does not arise. Question 2 presupposes that there is in existence as a matter of law a presumption that the cash and money's worth, which the assessee received in British India from Kashmir, comprised the available Kashmir profits and that that presumption was indisputable and undisputed. This however is not the case. The assessee in suggesting question 1 joined issue with the Commissioner on the existence of this presumption and in my view therefore the principal point for determination is whether in the circumstances of the case before us it is possible to raise a legal presumption against the assessee that what he received in British India in the shape of saleable timber was as a whole or in part profits, gains or income liable to be assessed to income-tax. This is what question 1 seeks to decide. Whatever is laid down in other decided cases, and howsoever permissible the presumption may be in different circumstances, I am definitely of opinion that on the facts of the present case it is not possible to hold that such a presumption arises. The Commissioner himself has stated unequivocally that he attaches no importance to the cash remittance of Rs. 37,000. In sub-para. 1 of para. 10 of his appellate order, he says :

As below, I do not think the cash really comes into any separate consideration. If it stood alone in the middle of a year with general cash consignment outwards, nobody would imagine that it represented a drawal of profits.

In sub-para. 2 of the same paragraph he even admits that :

If what is sent can be specifically identified as a discrete slab of original capital, then even though profits were there and could have been taken it, cannot be found that the remittance was of profits.

In the face of these statements, it cannot be said that the legal presumption envisaged in the first question could arise in this case. As I take the facts of the case to be, the presumption is just the other way. The second question therefore

does not arise, but, if it arose for the sake of argument, I am at one with my learned brother Coldstream, J. that it should be answered in the affirmative.

K.B./R.K. *Answer in affirmative.*

A. I. R. 1937 Lahore 890

BHIDE, J.

Sardar Amar Singh — Plaintiff

— Appellant.

v.

Sardarni Shiv Datt Kaur and others—
Defendants — Respondents.

Second Appeal No. 931 of 1936, Decided on 3rd May 1937, from decree of Addl. Dist. Judge, Lahore, D/- 11th May 1936.

(a) Co-sharer — Adverse possession — Removal of absentee co-sharer's name from revenue records at instance of other co-sharers in possession amounts to ouster and commences adverse possession of co-sharers in possession even if no notice of removal is sent to absentee co-sharer.

The removal of the name of the absentee co-sharer from the revenue records at the instance of other co-sharers in possession of the land is an overt act amounting to ouster and commences adverse possession of co-sharers in possession even if no notice of removal is sent to the absentee co-sharer whose name has been removed. The reason is that the removal of name is done openly and if the absentee co-sharer takes any interest at all in the land he cannot fail to have notice of it in the ordinary course and hence his knowledge of the adverse claim by other co-sharers may be reasonably presumed : 46 P R 1875, Ref. [P 892 C 1]

(b) Co-sharer — Adverse possession—Non-participation in rents and profits by co-sharer for long time is evidence of his ouster and abandonment.

The non-participation in rents and profits by a co-sharer for a very long time may justify an inference of ouster. The fact is also an evidence of 'abandonment', i. e. an intentional quitting of possession by a proprietor coupled with an intention not to resume it: *Culley v. Deo d Taylerson*, 52 R R 566 and 29 Bom 300, Rel. on ; 29 P R 1910, Ref. [P 892 C 1, 2]

Tirath Ram and J. N. Talwar —
for Appellant.

Ghulam Mohy-ud-din —
for Respondents.

Judgment.—Sardar Amar Singh, plaintiff in this case sued for possession of 11/72nd share in 7228 kanals of land situated in the village Thea Khurerian-wala in the Lahore District. The suit was decreed by the trial Court but dismissed on appeal by the Additional District Judge. Plaintiff has preferred a second appeal. The material facts are that plain-

tiff's father Sardar Narain Singh was a co-sharer in this land but he had migrated to the United Provinces and he was shown as an absentee in Revenue Records from the time of the earliest settlement. The entry continued up to 1907, when on a report made by the Patwari, notices were issued and the name of Sardar Narain Singh was struck off as it was found that the other co-sharers denied his title and were holding the land in their own right. Sardar Narain Singh died in 1906. The plaintiff was a minor at the time. His estate was under the administration of the Court of Wards till 1912. In 1930 plaintiff made an attempt to get his name entered in the revenue records as a co-sharer of the land in dispute, but his application was rejected. Thereupon he instituted the present suit.

The fact that plaintiff's father was entered in the revenue records as a co-sharer of the land in dispute, and that his name was struck off in 1907 have been proved beyond any doubt. Plaintiff's contention was that the possession of one co-sharer cannot be adverse unless there is some act amounting to an 'ouster' on his part and this is brought to the knowledge of the co-sharer ousted. Reliance was placed on 64 P R 1918¹ in support of this contention and it prevailed in the trial Court. The learned Additional District Judge was however of opinion that as the plaintiff's father's name was struck off in 1907, and plaintiff was not shown in the revenue records as a co-sharer, his status was not that of a co-sharer and the principle laid down in the above ruling does not apply to the case. The learned Judge further held that the 'erasure' of the name of the plaintiff's father from the revenue records was an 'overt act' on the part of the other co-sharers and that as the plaintiff did not claim the land within 12 years of this act, his suit was time-barred. He also relied on para. 242 of Rattigan's Digest of Customary Law, in which it is stated that the immediate heir of an absentee co-sharer must sue within 12 years of the death of the absentee co-sharer or within three years after attaining majority if he was a minor at the time of the death of the absentee co-sharer.

The learned counsel for the plaintiff-appellant has contended that the above

findings of the learned Additional District Judge are unsound. As regards the status of the plaintiff, it is pointed out that plaintiff's father was admittedly a co-sharer, and it was urged that the mere removal of his name from the revenue records without notice to the plaintiff's father or plaintiff himself cannot affect his rights as a co-sharer. It was also urged that the removal of plaintiff's father's name cannot amount to an 'overt act,' commencing 'adverse possession' of the other co-sharers, as the act was never brought to the knowledge of the plaintiff or his father. In support of this contention the learned counsel strongly relied on A I R 1934 Lah 456,² the facts of which were similar. In that case the name of the absentee owner had been removed at the instance of the co-sharers in possession, but it was found that no notice had been proved to have been given either to the absentee co-sharer or his descendants, and therefore it was held that the possession of the co-sharers was not adverse. In the present case also, there is no evidence of any notice as regards the removal of the name being sent to Narain Singh or the plaintiff.

The crucial point which seems to me to require decision in the case is whether the removal of plaintiff's name from the revenue records can or cannot be considered to be an "overt act" on the part of the other co-sharers amounting to "ouster". It was urged on behalf of the appellant that the revenue authorities removed the name of Narain Singh of their own accord. But this is not correct. In the first place, the plaintiff himself alleged in the plaint that it was the defendants who had got his name removed. Secondly, although the initial report was made by the village Patwari, it appears from the record that notices were sent to the co-sharers in possession and they denied the title of Narain Singh and claimed that they were holding the land as their own property. Notice was at first ordered to be issued to Narain Singh as well; but his address was apparently not known and there is nothing on the record to show that any notices were issued. The learned Additional District Judge has relied upon 46 P R 1875³ in support of his view that the removal of the name of Narain Singh

1. Hardit Singh v. Gurmukh Singh, A I R 1918 P C 1=47 I O 626=64 P R 1918 (P C).

2. Beli Ram v. Munshi, A I R 1934 Lah 456=154 I O 983=15 Lah 907=37 P L R 195.

3. Hait Ram v. Chaitan, (1875) 46 P R 1875.

at the instance of the defendants was itself an "overt act" by which they asserted their adverse possession and amounted to "ouster". This aspect of the question is not discussed in A I R 1934 Lah 456.² I do not see why the removal of the name of Narain Singh should not be considered to be an overt act amounting to "ouster". It was done openly, and if the plaintiff had taken any interest at all in the land, he could not have failed to learn about it. For, the records of right are attested every four years and there was also a settlement of the Lahore District about the year 1912-13.

The Privy Council authority on which the learned counsel for the appellant has chiefly relied, viz. 64 P R 1918,¹ only lays down that uninterrupted sole possession of property by a joint owner without more must be referred to his lawful title. But in the present instance there was besides an overt act on the part of the co-sharers in possession by which they claimed adverse title in 1907. It is true that no notice is proved to have been given to the plaintiff or his father; but for reasons given above, it seems to me that the removal of the plaintiff's name from a public record was bound to come to plaintiff's notice in the ordinary course, if he took any interest in the land, and hence his knowledge of the adverse claim set up by the defendants may be reasonably presumed. It may be noted in this connection that although plaintiff was a minor in 1907, he appears to have become a major in 1912, when his property was released from the Court of Wards. Plaintiff however took no action to assert his claim till 1930. The defendant's title therefore became perfected by adverse possession for over 12 years in the meantime.

It was held in 52 R R 566⁴ and 29 Bom 300⁵ that even non-participation in rents and profits for a very long time may justify an inference of ouster. In the present instance, plaintiff and his father have been out of possession for over 80 years and it is not disputed that they took no interest in the land during this period and did not receive any share of its rents and profits. These facts I think would in the circumstances of the case justify an

inference of ouster. They are also good evidence of "abandonment", i.e. an intentional quitting of possession by a proprietor coupled with an intention not to resume it: cf. 29 P R 1910.⁶ This evidence as to abandonment is further strengthened by the fact that plaintiff has been taking interest in other property in the Punjab, viz. in the village Attari, some 30 miles from the village where the land in dispute is situated. There is evidence on the record to show that plaintiff and his father have been looking after the land in Attari through a mukhtar, that the land was leased and that plaintiff has been visiting Attari from time to time. I see no reason to disbelieve this evidence. No explanation whatever is forthcoming why the plaintiff or his father should not have similarly taken steps to assert their rights in or claim a share of the rents and profits of the land in dispute for about 80 years if there was no "abandonment" in the sense explained above. The learned Additional District Judge has given no finding on the question of "abandonment," but after considering the evidence on the record, I am of opinion that it must be held that the land had been abandoned even before 1907, and consequently the possession of the other co-sharers was adverse since then. In view of all the facts discussed above, I do not see sufficient grounds for interfering with the decision of the learned Additional District Judge and therefore dismiss this appeal. But in view of all the circumstances, I leave the parties to bear their costs.

T.M./D.S.

Appeal dismissed.

6. Shahzada Suraya Jah v. Azim, (1910) 29 P R 1910=5 I O 888=61 P L R 1910=17 P W R 1910.

* A. I. R. 1937 Lahore 892

ABDUL RASHID AND TEK CHAND, JJ.

Mohd. Hayat Khan and others —
Plaintiffs — Appellants.
v.

Khair Din — Defendant — Respondent.
Second Appeal No. 141 of 1937, Decided on 28th June 1937, from decree of Dist. Judge, Sialkot, D/-11th November 1936.

(a) Negotiable Instruments Act (1881), S. 76 (d) — Word "drawer" in S. 76 (d) does not include "maker" of pre-note: 37 P L R 31=A I R 1935 Lah 153 = 152 I O 1006, Overruled.

4. Culley v. Deo d Taylerson, (1840) 11 A & E 1008=3 P & D 539=9 L J Q B 288=52 R R 566.

5. Gangadhar v. Parasharam, (1905) 29 Bom 300 = 7 Bom L R 252.

The word "drawer" as used in Cl. (d) of S. 76, Negotiable Instruments Act, does not include the "maker" of a pro-note : 37 P L R 31 = AIR 1935 Lah 153 = 152 I C 1006, Overruled ; A I R 1937 Lah 259, *Foll.* [P 893 C 2]

* (b) Negotiable Instruments Act (1881), S. 69 - Pro-note payable at S—Maker of pro-note residing at K having no place of business at S — Promisee resident all along of S — Possession of pro-note by promisee at S is sufficient compliance with provisions of S. 69—Presentment of pro-note to maker at S is not necessary.

A pro-note was payable at S. The maker of the pro-note was a resident of K. The promisee was all along a resident of S and in possession of the pro-note. The maker had no place of business at S. On the suit by the promisee for recovery of the amount of the pro-note, it was contended by the maker that the suit was liable to be dismissed as the pro-note was not duly presented to him :

Held : that the provisions of S. 69, Negotiable Instruments Act, were sufficiently complied with as the promisee had the pro-note in his possession at S from its execution to the date of suit and was in a position to present it to the maker if he visited that place. Presentment of the pro-note to the maker was not necessary and the suit was proper : A I R 1937 Lah 259, *Rel. on.*

[P 893 C 2 ; P 894 C 1]

Shamair Chand — for Appellants.

Dr. Shuja-ud-Din — for Respondent.

Abdul Rashid, J.—On 5th January 1933 Khair Din, resident of Mauza Koreki in the Daska Tahsil of the Sialkot district, executed a pronote for Rs. 600 in favour of Mohd. Hayat Khan, Pathan of Sialkot City. The pronote was payable at Sialkot with interest at the rate of 12 per cent. per annum. On 6th January 1936, Mohammad Hayat Khan instituted the suit, which has given rise to the present appeal, for recovery of Rs. 816.9.6 on the basis of the pro-note. Khair Din, defendant, denied having executed any pro-note in favour of the plaintiff. He further pleaded that no consideration had passed and that in any case the suit of the plaintiff was liable to dismissal as the pro-note had not been duly presented to him. The trial Court held that it had been established that the pro-note had been executed by the defendant for consideration. It further held that the pro-note had not been presented to the defendant by the plaintiff. The trial Court relied on A I R 1935 Lah 153¹ in holding that the presentment of the pro-note to the defendant was not necessary in the present case. On these findings, the

plaintiff's suit was decreed. The defendant preferred an appeal in the Court of the learned District Judge. The learned District Judge affirmed the findings of the trial Court so far as the questions of the execution of the pro-note and consideration therefor were concerned. The learned District Judge, however, held that as the pro-note had not been presented to the defendant, the plaintiff was not entitled to a decree. Accordingly the appeal was accepted and plaintiff's suit was dismissed. Against this decision, the plaintiff has preferred a second appeal to this Court.

The case relied upon by the trial Court was decided by me sitting in Single Bench. In that case I held that the definition of "drawer" in S. 7, Negotiable Instruments Act was not exhaustive and the "maker" of the pro-note could also be called a "drawer" and that consequently no presentment was necessary in view of the provisions of S. 76 (d), Negotiable Instruments Act, in a case where the maker of the pro-note was the defendant. This question was considered by a Division Bench of this Court in A I R 1937 Lah 259.² After going through the judgment of the Division Bench, and on a fuller consideration of the question, I have altered my opinion and agree that the word "drawer" as used in Cl. (d) of S. 76, Negotiable Instruments Act, does not include the "maker" of a pro-note. In the present case, the plaintiff lives in Sialkot City. The pro-note being payable at Sialkot City could only be presented to the defendant at that place. The defendant is a resident of mauza Koreki which is situated at a distance of about 15 miles from Sialkot. The defendant has no place of business in Sialkot. It was therefore impossible for the plaintiff to present the pro-note to the defendant at Sialkot City. In these circumstances I agree respectfully with the observations made in the Division Bench ruling referred to above, A I R 1937 Lah 259,² to the effect that the provisions of S. 69, Negotiable Instruments Act, are sufficiently complied with, if the plaintiff had the pro-note in his possession at Sialkot and was in a position to present it to the defendant if he visited that place. It is clear in the present case that from the time of the execution of the pro-note up to the time of the institution

1. Shiv Nath v. Bishambar Das, A I R 1935 Lah 153 = 1935 Cr O 239 = 152 I C 1006 = 36 Cr L J 217 = 37 P L R 31.

2. Sheikh Mohammad Ismail Maula Bakhsh v. Abdul Majid Khan, A I R 1937 Lah 259.

of the suit the pro-note was throughout in the possession of the plaintiff who lives at Sialkot. His possession of the pro-note at Sialkot from the time of its execution up to the time of the institution of the suit is sufficient compliance with the law. For the reasons given above, I would accept the appeal, set aside the judgment and decree of the learned District Judge and restore that of the trial Court with costs throughout.

Tek Chand, J.—I agree.

A.L./R.K. *Appeal allowed.*

A. I. R. 1937 Lahore 894

COLDSTREAM, J.

Mt. Santi — Decree-holder—Petitioner.
v.

Mulkh Raj — Judgment-debtor —
Respondent.

Civil Revn. No. 309 of 1937, Decided on 14th July 1937, from order of Senior Sub-Judge, Amritsar, D/- 12th February 1937.

(a) Civil P. C. (1908), S. 115 — Revision lies from order rejecting application to amend decree under Ss. 151 and 152.

Revision lies from an order of the Court rejecting an application to amend the decree under Ss. 151 and 152. The question of limitation does not arise in such applications, for an amendment under S. 152 can be made at any time: *A I R 1929 Lah 400, Foll.; 37 P L R 623, Ref.*

[P 894 C 2; P 895 C 1]

(b) Civil P. C. (1908), S. 152 — No right to party to have mistake corrected—Discretion is with Court (*Obiter*).

Obiter.—A party has no right under the Civil Procedure Code to have a mistake corrected whatever the circumstances may be; the matter is left to the discretion of the Court, and this discretion has to be exercised in view of the particular facts of each case: *A I R 1933 Oudh 529, Rel. on.*

[P 895 C 1]

(c) Civil P. C. (1908), O. 34, R. 11 (b)—Rate of interest after date fixed for payment by preliminary decree is matter for discretion of Court — No mention of future interest in decree — Court must be assumed to have allowed no interest—Successor of Judge passing decree cannot exercise discretion vested in Court by O. 34, R. 11 (b).

The rate of interest after the date fixed for the payment of the amount due by the preliminary mortgage decree is a matter for the discretion of the Court under O. 34, R. 11 (b), Civil P. C., and where the space where in ordinary course the rate of future interest until realization is mentioned is left blank, it cannot be said that the Court intended to allow such interest but accidentally forgot to do so. Even though there is mention of such interest in latter part of the decree, it must be assumed that the Court did not allow any future interest. The successor of the Judge who passed the decree cannot exercise the discre-

tion vested in the Court by O. 34, R. 11 (b) as one does not know what rate the Judge who gave the decree might have thought suitable. [P 895 C 1, 2]

N. C. Pandit — for Petitioner.

Shamair Chand — for Respondent.

Order.—The present petitioner *Mt. Santi* brought a suit in the Court of the Senior Subordinate Judge, Amritsar, against the respondent *Mulkh Raj* to recover a debt of Rs. 3,740 on the basis of a mortgage deed. The suit was contested but before its decision counsel for *Mulkh Raj* made a statement that "the claim is admitted. A decree may be passed in favour of the plaintiff but six months' time may be allowed". The trial Court on 7th April 1934 therefore passed an order as follows:

I accordingly grant in favour of the plaintiff against the defendant a preliminary decree for Rs. 3,740-7-0 and costs, and direct that if he (defendant) pays into Court this sum together with interest up to date at the agreed rate on or before 8th October 1934, the plaintiff shall deliver up the documents relating to the mortgaged property. In default all the consequences contemplated by O. 34, R. 4, Civil P. C., shall follow.

A preliminary decree in the usual form was drawn up. It left blank the place where in ordinary course the rate of future interest until realization would have been mentioned. But it stated that the proceeds of the property if put to sale would be applied in payment of the debt found due together with subsequent interest. This preliminary decree was made final on 8th December 1934. *Mt. Santi* proceeded to execute the decree on 9th January 1935. In her application subsequent interest was claimed at six per cent. Fifteen months later on 14th April 1936, *Mt. Santi* submitted an application asking the Senior Subordinate Judge to amend the decree in exercise of his powers under Ss. 151 and 152, Civil P. C. so as to have inserted in the place left blank the rate of interest stipulated in the mortgage deed which was 14 annas per mensem per cent. This application was rejected by the Senior Subordinate Judge and *Mt. Santi* has petitioned this Court for revision.

I have heard learned counsel's arguments on the point whether a revision is competent in the circumstances. As I am about to dismiss the petition on the merits, there is no need to discuss this question at length. Suffice it to say that in *A I R 1929 Lah 400*¹ it has been held by this Court (*Addison, J.*) that a revision lies in

1. *Ganesh Das v. Kaki Bai, A I R 1929 Lah 400.*

such a case and that the judgment in 9 Lah 308,² which lays down that an erroneous decision of law or fact by a Court having jurisdiction is not open to revision under S. 115, Civil P. C., does not appear to me to have any application to a case like the present one. It is also correct to say that the question of limitation does not arise in such applications, for an amendment under S. 152 can be made at any time. On the other hand, I have no doubt that, as held in A I R 1933 Oudh 529,³ a party has no right under the Civil P. C. to have a mistake corrected, whatever the circumstances may be, that the matter is left to the discretion of the Court, and this discretion has to be exercised in view of the particular facts of each case: see for example 37 P L R 623.⁴

In this case the respondent admitted the debt for which the petitioner sued him. It is unfortunate that nothing was said by his counsel regarding the form of the decree, but it must be assumed that he accepted the decision of the Court that the decree was to be in the form prescribed for a mortgage decree. Certainly there was no mention of future interest after the lapse of the six months grace which the judgment-debtor asked for and the plaintiff granted. It is true that the mortgage contract expressly provided for interest up to date of realization, but the rate of interest after the fixed date is a matter for the discretion of the Court (O. 34, R. 11 (b)), and it cannot be said that the Court intended to allow such interest but accidentally forgot to do so. Here I may note that the decree does not say that the interest after the fixed date is nil as the learned Senior Subordinate Judge's order seems to imply, but as made clear above, the place for the rate of interest was left blank. Now this decree was accepted by the plaintiff petitioner at the time. She had ample time to ask for amendment when she applied for the decree to be made final. It is clear that she understood all along that the compromise on which the decree was passed did not stipulate for interest at the rate stated in the mortgage deed, for in applying for

execution, she asked for interest at six per cent. I cannot see how the successor of the Judge who passed the decree can exercise the discretion vested in the Court by R. 11 (b) of O. 34. We do not know what rate the Judge who gave the decree might have thought suitable and it must be assumed that he allowed no further interest in spite of the mention of it in the latter part of the decree. Having regard to the conduct of the plaintiff in allowing the decree to become final without asking for its amendment, and only asked for it when the property was about to be sold (and no doubt she realized that the proceeds would not cover the debt), I see no sufficient reason for interfering in revision with the lower Court's order and dismiss this petition with costs.

S.O./R.K.

Petition dismissed.

A. I. R. 1937 Lahore 895

TEK CHAND, J.

Sodhi Lal Singh — Appellant.

v.

Firm Lala Bihari Lal-Lakshari Mal and another — Respondents.

First Appeal No. 282 of 1936, Decided on 4th March 1937, from order of Addl. Dist. Judge, Ferozepore, D/- 1st October 1936.

(a) Provincial Insolvency Act (1920), S. 75 (3).—All orders passed by District Court except those specified in Sch. 1 are appealable—Prayer for leave made in memorandum of appeal—No order granting leave made but appeal admitted—Leave must be taken to be granted.

Sub-s. (3) of S. 75, Provincial Insolvency Act, is very wide in its terms, and makes appealable to the High Court (with the leave of the District Court or High Court) orders passed by the District Court, other than those specified in Sch. 1.

[P 896 C 2]

Where in an appeal to the High Court, prayer for leave to appeal is made in the memorandum but no express order granting such leave is made and appeal is admitted, the leave must be taken to have been granted by the order admitting the appeal.

[P 896 C 2]

(b) Civil P. C. (1908), O. 6, R. 17—Application for adjudication in time—Amendment to correct misdescription of property allowed beyond time—Amendment takes effect nunc pro tunc.

Where an original application for adjudication is made in time but the Court allows the amendment to correct the misdescription of the property after expiry of limitation, such amendment neither alters the character of the claim nor introduces a new cause of action, and in such cases the amend-

2. Sant Singh v. Mubarak Singh, A I R 1928 Lah 140=106 I C 901=9 Lah 308=29 P L R 42.

3. Ala Bakhsh Khuda Bakhsh v. Durga Bakhsh Singh, A I R 1933 Oudh 529=147 I C 961=9 Luck 162=10 O W N 1087.

4. Mahomed Mahmud Khan v. Munshi Ram, (1935) 37 P L R 623.

ment takes effect *nunc pro tunc*: A I R 1914 Lah 263 and A I R 1922 All 81, Rel. on.

[P 896 C 2]

(c) Civil P. C. (1908), O. 6, R. 17—Party accepting costs subject to which amendment was allowed—He cannot challenge order in appeal.

Where an amendment is allowed by the Court subject to the payment of adjournment costs, the party accepting such costs and thus adopting the order cannot challenge it by way of appeal: A I R 1928 Lah 813 and A I R 1934 Lah 974, Rel. on.

[P 896 C 2; P 897 C 1]

Vishnu Datta — for Appellant.

Fakir Chand Mittal —

for Respondents.

Judgment.—On 17th March 1936, the respondents, who are some of the creditors of the appellant, applied for his adjudication as insolvent. In the application it was stated that the debt due by the appellant to the respondents amounted to more than Rs. 500 and that within three months of the making of the application, immovable property of the appellant had been sold in execution of money decrees passed against him by Civil Courts. In para. 3 of the application, the property sold was described as follows:

1. Agricultural land situate in Mouza Manawan, sold on 17th December 1935, in execution of a decree obtained by Mt. Pritam Kaur against the appellant.

2. A haveli situate at Ferozepore, sold on 11th January 1936, in execution of a decree obtained by the Punjab National Bank.

On 27th August 1936, the petitioning creditors applied for amendment of the original application for insolvency, stating that there was a misdescription of the land sold in execution of Pritam Kaur's decree, inasmuch as the land sold was situate in Mauza Sukh Chain but had been wrongly stated to be in Mauza Manawan. The learned Additional District Judge issued notice to the appellant, and after hearing him granted the application on 1st October 1936, allowing the amendment on payment of Rs. 15 as costs. This order was duly complied with. The petitioning creditors paid Rs. 15 to the appellant's pleader on 28th October 1936, and the necessary correction was made in the original application. About a month after receiving the amount of costs, the appellant filed an appeal in this Court on 30th November 1936, contending that the amendment should not have been allowed in the circumstances of the case.

Counsel for the respondents raises a preliminary objection that the order of amendment passed by the lower Court is

interlocutory and is not appealable. In my opinion, this objection is without force. Sub-s. (3) of S. 75, Provincial Insolvency Act, is very wide in its terms, and makes appealable to the High Court (with the leave of the District Court or High Court) orders passed by the District Court, other than those specified in Sch. 1. In this case, a prayer for such leave was made in the memorandum of appeal, and though no express order granting leave to appeal was passed, the Motion Bench must be taken to have done so by the order admitting the appeal. I overrule the objection.

On the merits, however, I am of opinion that the appeal has no force. The amendment allowed by the lower Court did not introduce a new cause of action or alter the character of the claim. All that was done was to correct a misdescription of the immovable property, which had been sold in execution of a money decree against the appellant. It is admitted that the name of the decree-holder (Mt. Pritam Kaur), the name of the Court which had passed the decree (Senior Subordinate Judge, Ferozepore), the date on which the decree was passed (17th December 1935), were all correctly given in the original application. The only mistake was in the name of the village where the land sold was situate. It was wrongly shown as Manawan instead of Sukh Chain. It is argued that the amendment was made more than three months after the alleged act of insolvency, that the application for adjudication must be taken to have been instituted when the amendment was made and therefore it was barred by time. But the original application had been presented within three months, and in such cases the amendment takes effect *nunc pro tunc*: see 62 P R 1914¹ and 66 I O 208,² where similar amendments correcting misdescription of property were allowed to be made even on appeal, long after the period of limitation for instituting the suit had passed. I see no force in the contention.

Moreover, in this case the appellant had accepted Rs. 15 which had been allowed by the lower Court as costs of adjournment necessitated by the amendment. He having thus adopted the order and enjoyed the benefit under it, cannot be allowed now to challenge it by way of appeal: A I R 1928

1. Jalal Din v. Qaim Din, A I R 1914 Lah 263=25 I O 439=62 P R 1914=255 P L R 1914.

2. Bhagirathi Shukul v. Chandra Harihar Patak, A I R 1922 All 81=66 I O 208=20 A L J 159.

Lah 813³ and A I R 1934 Lah 974.⁴ The appeal fails and is dismissed with costs.

S.C./R K.

Appeal dismissed.

3. Sohan Lal v. Dbari Mal-Ishar Das, A I R 1928 Lah 813=109 I C 819.

4. Gbulam Qadir v. Fateh Bano, A I R 1934 Lah 974=156 I C 342=36 P L R 264.

A. I. R. 1937 Lahore 897

DALIP SINGH AND SKEMP, JJ.

Sardar Kirpal Singh and others —
Assessee—Petitioners.
v.

Commissioner of Income-tax —
Respondent.

Civil Ref. No. 14 of 1936, Decided on 4th May 1937, made by Commissioner of Income-tax, Punjab, North West Frontier and Delhi Provinces, D/- 24th March 1936.

(a) Income-tax Act (1922), S. 25-A — Hindu joint family constituting itself into company with specific shares to members including mother—Supposition is that joint family has disrupted — Members of such company owning foreign businesses and having personal khata — Loan to company standing in name of mother — Equalization of credit amounts in personal khata, accumulation of interest by mother and remittance of cash and goods by foreign businesses to company and vice versa held not sufficient material to hold that joint Hindu family still existed.

When a Hindu joint family constitutes itself into a company with specific shares belonging to the individual members of the undivided joint Hindu family, the normal supposition would be that the transaction showed that the Hindu joint family had disrupted. This normal supposition could be rebutted by evidence showing that the whole of this transaction was a mere camouflage. But in case where income-tax authorities have themselves adopted the supposition as being genuine for some years there must be strong evidence to show that the transaction was really not bona fide. [P 899 C 1]

A joint Hindu family constituted itself into a limited company with specific shares belonging to the sons, their wives and the mother. The sons had their personal khata. A portion of cash assets stood in the name of the mother as a loan to the company. There were also two foreign firms belonging to the members. For six years the members were assessed separately, but subsequently they were assessed as a joint Hindu family on the following grounds : (1) That in some year there was equalization of the credit amounts in the personal khata of the sons ; (2) that the interest on loan by mother was not drawn but allowed to be accumulated, and (3) the cash and goods were remitted by the foreign businesses to the company and vice versa. The Income-tax Officer held on this material that the company was a mere camouflage ; The sons were not called upon to explain their accounts in the light of hypothesis that they were separate :

Held : that there was no sufficient material to show conclusively that the joint Hindu family still existed in the disguised form. [P 899 C 2]

(b) Income-tax Act (1922), S. 22 — Notices to individual members — Whether income of individual member can be charged as income of joint family without fresh notice (*Quaere.*)

Quaere. — Whether, where notices have been issued to the individual members of the family as such, it is open to the Income-tax Officer without issuing a new notice to the Hindu joint family through its manager or any adult member of the family to charge the income received by the individuals as income of the joint Hindu family ? [P 900 C 1]

(c) Income-tax Act (1922), Ss. 22 and 63 (2) — Notice — Individual served with notice found to be member of Hindu joint family — Fresh notice may be issued to joint family as provided by S. 63 (2).

If the Income-tax Officer comes to the conclusion that the separate individual to whom he had issued notice was really a member of a Hindu joint family, a fresh notice may be issued to Hindu joint family through the person whom he considers to be its manager or through any other adult member of the family as provided in S. 63 (2), Income-tax Act. [P 900 C 2]

M. C. Mahajan — for Petitioners.

J. N. Aggarwal — for Respondent.

Dalip Singh, J. — The facts of this reference are stated at length in the order of reference of the learned Commissioner and need only be briefly recapitulated here. It appears that one Jawanda Mal was carrying on a business. He was presumably a member of a joint Hindu family along with his sons. In March 1927 or thereabouts, Jawanda Mal formed the intention of giving all the cash assets of the business to a limited liability company of which, it is stated, he himself and three of his sons originally were to be the main share-holders. A portion of the cash assets left over was to stand in the name of the wife of Jawanda Mal as a loan to the company and she was given a share in the company and the remaining three persons necessary to constitute a company consisted of the wives of the three sons. Subsequently, when the company came to be registered, it is again alleged, though it is not conceded on the part of the Income-tax authorities, that one son Balwant Singh, who had been absent in England, was also given a share. Jawanda Mal divested himself of a considerable portion of his share in this fashion in favour of his four sons, a small amount being retained by himself in his own name. The four sons had equal shares practically except that one Balwant Singh had 495 shares, to the other sons 496. The wives had

only one nominal share each. Shortly after this Jawanda Mal died and the shares standing in his name continued to stand as before. The sons or some of them who acted as directors drew salaries and one minor son, it appears, did not draw any salary. In the books of the company, each son had a personal khata in which credits and debits were entered to his personal account. It would appear from the above statement that seemingly, at any rate, the Hindu joint family had disrupted and had been replaced, so far as the cash assets of the business were concerned, by a limited liability company consisting of eight members.

It is alleged now on behalf of the Income-tax authorities that this was mere camouflage and that really the Hindu joint family did not disrupt and the nominal shares assigned to the mother and the wives of the three sons were all benami to camouflage the continued existence of the undivided Hindu joint family. However, from 1927 on to 1933, that is for six years, the sons of Jawanda Mal were assessed on the basis of a disruption of the joint Hindu family as separate individuals. In 1934-35 assessment, the Income-tax Officer however appears to have for the first time suspected that the Hindu joint family still subsisted. It is unnecessary to enter at any great length into the reasons given by the Income-tax Officer for this conclusion. They have been upheld in the main by the Assistant Commissioner on appeal and by the learned Commissioner in the order of reference. The main point, however, that emerges from the arguments addressed to us appears to be that in 1933 in spite of the fact that the personal khatas of the sons contained varying amounts standing to their credit due to the fact that they had drawn different amounts for their personal expenditure, if any, the credit amounts were yet by some means equalized in the books of the company so that the same sum was shown as standing as a credit balance in favour of the three sons. It is, therefore, contended on behalf of the income-tax authorities that there was some material for the Income-tax Officer to come to the conclusion that the four sons of Jawanda Mal still formed a joint Hindu family. On the other hand, on behalf of the assessee it is contended that when the question arises whether a Hindu family has disrupted or not and when the point at issue

is whether those individual members of that joint Hindu family have continued as a partnership, that is to say a tenancy in common instead of the previous joint tenancy, then the mere fact that some evidence exists to show a tenancy in common is not sufficient to prove that a joint tenancy still exists.

The question that really arises for decision may be put in the form of an illustration. If it is alleged by any person that he was once a member of a joint Hindu family but has since separated and has no connexion with the other members of that joint Hindu family normally, and it is proved that as a matter of fact he still resides in the same house with them and has a secret partnership with them in all their seemingly separate businesses, this would be good material for holding that the Hindu family which was alleged to have disrupted has not really disrupted at all. The question, however, is obviously quite different when the individual who alleges a separation asserts that he has separated from a joint Hindu family but has continued as a partner along with the other members or some of the members of that joint Hindu family. Evidence which in the first case might very well be held to be good material for holding that the alleged disruption was false, would not be good enough evidence in the second case for showing that the alleged disruption was similarly false. In this particular case, the mere fact that the credit amounts in the personal khatas were equalized does not, in my opinion, show conclusively that the Hindu joint family still existed in a disguised form. After all, when a Hindu joint family or the members thereof constitute themselves into a company with the assets of the joint Hindu family, they do create a situation in which, ordinarily speaking, the rights and liabilities of the members inter se have altered considerably. For instance, in the case of a father, the sons who own a share in the company can alienate that share without reference to the father thus practically securing a partition which, according to the law in this province, they could not do if they constituted a joint Hindu family during the lifetime of the father without his consent. Secondly, the karta of the family would be liable to account to the members of the company for all expenditure and income received by the company, whereas, if the Hindu joint family existed,

the karta would not be so liable to account under normal conditions. Therefore, when a Hindu joint family constitutes itself into a company with specific shares belonging to the individual members, and further introduces into the company persons who are not members of the undivided joint Hindu family, the normal supposition would be that the transaction showed that the Hindu joint family had disrupted. It is of course true that this normal supposition could be rebutted by evidence showing that the whole of this transaction was a mere camouflage. But in the present case, when for six years the income-tax authorities had themselves adopted the supposition as being genuine, there must be strong evidence to show that the transaction was really not bona fide. As stated above, all that could be relied on by the income-tax authorities in this case was the equalization of the credit amounts in the personal khatahs.

The learned counsel for the assessee has explained that what happened in this case was that one of the minor sons who had been away in England from 1929 returned in 1933, and raised some disputes as to the expenditure and income of the company by which his brothers or one of his brothers, according to him, profited at his expense and that to avoid a family dispute and the laborious task of going into the accounts for over six or more years, the brothers decided to settle the matter by equalizing all the credit amounts in the personal khatahs so as to give a fresh start to all the individual members of the family. Here again, normally speaking, the equalization of four accounts would naturally show that four accounts really existed and therefore the first supposition would be that these four accounts really existed as four separate accounts. If this were so, then of course the Hindu joint family could not be said to exist. Now it cannot be said that four accounts did not really exist merely because the credit amounts of all the four accounts had, by some process of agreement between the parties, been equalized. The matter is at least capable of other explanations, and I must add that in the circumstances of this case if the Income-tax Officer had reason to believe that this was a suspicious circumstance, it was only fair to call upon the assessee to explain, if possible, the suspicious circumstance arising in the mind of the Income-tax Officer

and then to either accept or reject his explanation. All that appears to have been done was that the Income-tax Officer wrote a letter demanding proof of disruption to which the four brothers replied with duplicate letters stating the facts about the company and about the joint partnership in two foreign concerns. It does not appear that they were ever called upon to explain their accounts in the light of the hypothesis that they were separate and not joint. This being so, I am of opinion that in the circumstances of this case there was no sufficient material for the Income-tax Officer to come to the conclusion that the Hindu joint family had not been disrupted. This finding really disposes of the whole case, but for completeness it is desirable, in my opinion, to give findings on the other points raised also.

The next question is whether interest on loan is really a benami transaction, the asset really not belonging to the mother as shown in the books but belonging to the undivided joint Hindu family. There is no material at all upon this point to which our attention has been drawn except that it is stated that the fact that there is an accumulation of interest on the account standing in the name of the mother shows that the mother has never drawn upon the interest accruing to her from the alleged loan and that therefore this proves that the asset really belonged not to the mother but to the four sons. I am again unable to hold that this conclusively proves or even points to the conclusion reached. A Hindu widow on good terms with her sons would normally have no occasion to draw any money. There is nothing to show that the mother is living separate from her sons and an orthodox widow might well have no dealings with money at all and would allow the interest on her shares to accumulate not because it does not belong to her but because she had no need to draw on it and the sentiments of the people would be against her personally handling money in the state of widowhood. Moreover, it is not proved that she has never drawn any portion of the so-called interest on her loan. It is only an assumption that because there is an accumulation of interest in her name, therefore she has never drawn any portion of it at all. Under these circumstances, I am unable to hold that the loan which was given by the mother to the company was

really not a bona fide transaction, and, as a matter of fact, she held no money at all and that there is no loan item by her to the company and that the item really belongs to the undivided Hindu joint family.

The next point raised is the question of remittances from two foreign firms, one in London and one in Colombo, to the company. It is contended that the books of the company show that cash and goods were remitted both by the company to these foreign businesses and cash and goods were remitted by the foreign businesses to the company and from this it is contended it was open to the Income-tax Officer to draw the inference that some of these remittances were really disguised profits. Now, no doubt, it might be open to the Income-tax Officer to draw the inference that the remittances to the company contained disguised profits, but it would not follow from that that these remittances were really to the members of the undivided joint Hindu family unless it was further held that the company itself was nothing more than a camouflage for the undisturbed Hindu joint family. The matter therefore comes back to the first question upon which it has already been held that there is no sufficient material to show that the Hindu joint family was not disrupted and that the company was nothing more or less than a camouflage for it. The answer therefore to this question must also be that there was no material to justify the Income-tax Officer in holding that an item of Rs. 10,000 charged as an asset of the Hindu joint family as disguised profits by way of remittances really existed.

The last question raised in the order of reference is the question of the notice to the firm. It was urged originally, when the case first came before the High Court, that the notices having been issued to the individual members of the family as such, it was not open to the Income-tax Officer without issuing a new notice to the Hindu joint family through its manager or any adult member of the family to charge the income received by the individuals as income of the joint Hindu family. I do not consider that it is necessary to decide this point at all. It is true that the High Court issued a mandamus to the Commissioner to refer this question of notice also. The learned Commissioner has given reasons for holding that the notice, as originally issued, contained a heading "family" as

well as a notice to the individuals. A notice has actually been produced before us and it does not appear to contain any address "family" in it at all. It is impossible for us to decide on the material before us whether this is the notice that was served on the individual members or not. I should however like to point out that the second argument of the learned Commissioner, namely that it would be impossible to work the Act if a notice issued to an individual as such could not form the basis of an assessment of the same individual along with others as members of a joint Hindu family, does not appear to be correct. It would be perfectly easy for the Income-tax Officer, if he came to the conclusion that the separate individual to whom he had issued notice really was a member of a joint Hindu family, to issue a fresh notice to the joint Hindu family, through the person whom he considered to be its manager or through any other adult member of the family as provided in S. 63 (2). This would, normally speaking, take place long before the year allowed under S. 34 had elapsed, and the learned counsel for the income-tax authorities was not able to show us how the Act would become unworkable if this simple procedure of issuing a fresh notice were followed ordinarily. I would therefore answer the questions as follows: Question No. (1) in the affirmative; question No. (2) also in the affirmative; question No. (3) in its changed form is left undecided; question No. (4) is answered in the affirmative; and question No. (5) is answered in the negative. The assessee shall have the costs of this reference.

Skemp, J.—I agree.

S.O./R.K.

Reference answered.

* A. I. R. 1937 Lahore 900

JAI LAL, J.

Piara Ram — Objector — Appellant.

v.

Amir Chand and others, Auction-purchasers and others, Creditors and another, Debtor — Respondents.

Misc. First Appeal No. 155 of 1936, Decided on 21st October 1936, from order of Dist. Judge, Mianwali, D/- 10th June 1936.

* Minor — Insolvency — Insolvency of coparcenary firm having one member minor—

Effect of—Debts incurred for family business—Entire family property vests in receiver and is saleable.

A minor who cannot be adjudged insolvent, can be deemed to be insolvent, when he is a member of a co-parcenary firm which is adjudged insolvent. The property of the firm, i. e. of its partners vests in the receiver, excepting in the case of a minor member, such property as has been acquired by him otherwise than as a member of the firm. [P 901 C 2; P 902 C 2]

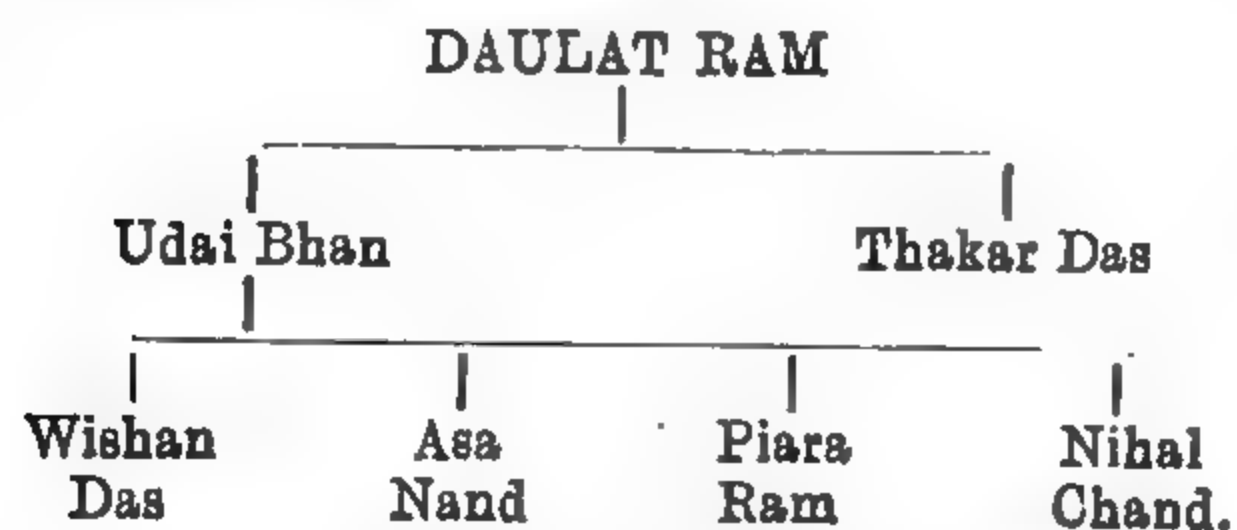
A manager of a firm consisting of two co-parceners, one of whom was a minor, incurred some debts for family business. The firm was adjudged insolvent, and the receiver sold the property belonging to the firm. The minor applied to cancel the sale of his share in the property :

Held : that the entire family property, including the share of a minor, vested in the receiver and was saleable by him : *A I R 1933 Lah 901, Rel. on ; Case law referred.* [P 903 C 1]

Mehr Chand Mahajan—for Appellant.

Lala Badri Das — for Respondents (Auction-purchasers).

Judgment.—In 1927 or 1928 there was a firm called Daulat Ram-Udai Bhan in a village in the Mianwali District. When this firm was started is a question that will have to be decided in this appeal. This firm was adjudicated insolvent by an order made by the District Judge of Mianwali on 25th April 1928. It is to be noted that the application was to adjudicate the firm and not the individual partners thereof, and the order of the District Judge also is to the same effect, though in one place it is stated that the insolvent firm is Daulat Ram-Udai Bhan through certain persons. These persons are Wishan Das and Piara Ram. The pedigree-table of the parties is as follows :



Daulat Ram died on 4th June 1907. Udai Bhan died on 13th November 1914. Asa Nand and Nihal Chand also are dead. Piara Ram was born according to one account in 1914, according to the other in 1915. There can be no doubt therefore, that even if he was born in the life-time of Udai Bhan he was an infant. At the same time, there is no dispute that Piara Ram is a son of Udai Bhan. Piara Ram was a minor when the order of adjudica-

tion was made. Subsequently, the receiver in whom the estate of the insolvent firm vested sold certain properties which according to him belonged to the insolvent firm. In order to attack the action of the receiver, the first step that Piara Ram took was to apply that his adjudication be annulled because being a minor he could not be adjudicated an insolvent. This contention was accepted by the District Judge but it is a question whether he actually annulled the adjudication of Piara Ram. Under the circumstances and in view of the fact that it was the firm which had been adjudicated insolvent, no question of annulment of adjudication of Piara Ram could arise. Probably therefore, realizing this difficulty, the learned District Judge passed the order in the following form :

In the order of adjudication it is stated that Wishan Das major and Piara Ram minor were the proprietors of the firm. An adjudication of the firm means adjudication of its partners. This is well settled law. The law is clear that a minor could not be declared an insolvent. As a matter of fact the order of adjudication does not make it clear that the minor as such was adjudged insolvent. Only the firm of Udai Bhan-Daulat Ram was adjudicated and it was merely mentioned that Piara Ram minor was one of the partners. In order however to set the matter at rest I now make it clear that if the inference is to be derived that Piara Ram was also declared insolvent, this would be wrong. I therefore declare that the order of adjudication in so far as it might by implication be said to declare Piara Ram minor as such, insolvent, was illegal and if that was the meaning of the order then I have no hesitation in declaring the adjudication of Piara Ram minor as such annulled. This I hope clarifies the position.

It would be observed from the above that the learned District Judge emphasized the fact that the firm had been adjudicated insolvent and that there was no order of adjudication against Piara Ram minor "as such". In these proceedings therefore I must proceed on the assumption that the firm Udai Bhan-Daulat Ram is the insolvent firm and the assets of that firm are being dealt with by the receiver. It has been held that the two partners of the insolvent firm are Wishan Das and his minor brother Piara Ram. The effect of the insolvency proceedings therefore is that the property of the insolvent firm, which means the property of its partners, as such vests in the receiver, but the property of the minor Piara Ram does not vest in him, that is to say, the property which has come to him otherwise than as a member of the insolvent firm. After

this order of the so-called annulment was passed by the District Judge, Piara Ram applied that sale of his share in the property sold by the receiver should be cancelled and the same returned to him. The learned District Judge declined to proceed with the case and directed Piara Ram to seek his remedy by suit if he was so advised. From this order an appeal was preferred to this Court and I remanded the case to the District Judge, holding that he should decide the question whether the receiver was legally competent to sell the property claimed by the minor and, if he was not, to restore the same to him in so far as such restoration could be effected. The District Judge has now held an enquiry in the presence of the parties and is of opinion that the receiver was competent to sell the entire property in dispute. He has held that the firm Udai Bhan-Daulat Ram was started by Udai Bhan and that after Udai Bhan's death it descended as a joint family business to his sons and thus became ancestral family business in the hands of the sons. He doubts whether the firm was started by Daulat Ram. The learned District Judge therefore has held that as the debts were due from the firm and it was to pay off those debts that the property has been sold by the receiver, Piara Ram is not legally competent to object to the sale. Piara Ram has again come up to this Court in appeal.

In my opinion this appeal must fail. It is first contended by the learned counsel for the appellant that the view of the learned District Judge that the firm was started by Udai Bhan was erroneous, it being alleged that the firm was started by Wishan Das. In my opinion there is ample evidence in support of the conclusion of the learned District Judge that the firm was started by Udai Bhan. It is not necessary to discuss this evidence as I agree with the reasons given by the Court below. In the witness box Piara Ram has admitted that he is a member of a joint Hindu family with Wishan Das. In my opinion under the circumstances this firm must be deemed to be a coparcenary firm of Wishan Das and Piara Ram. Wishan Das was the managing member of the firm and the family after the death of Udai Bhan and if it be established that the debts were incurred for the family business, then the entire family property, including the shares of Wishan Das and Piara Ram, if it is legally

possible to say that these two brothers have any shares in the property, vests in the receiver and is saleable by him. It is however contended by Mr. Mehr Chand Mahajan, counsel for the appellant, that there is no proof that the debts were taken for the family business. In connexion with this contention it must be remembered that the proceedings in this case have arisen out of an adjudication order. The insolvent is the firm Udai Bhan Daulat Ram. The creditors of that firm had to prove their debts in order to have the same entered in the schedule of the liabilities of the firm and the persons who claimed to be the creditors of the firm filed affidavits in support of their claims which were admitted by the receiver and entered in the schedule. It must therefore be assumed for the purpose of these proceedings that the debts entered in the schedule are the debts of the firm and were incurred on behalf of the firm by the manager. In my opinion, under the circumstances, Piara Ram is not entitled to claim that there should be an independent enquiry by the Court in his presence in which the creditors should be called upon to prove the existence of their debts and the fact that the debts were taken for the family business or were applied to it. The only plea that appears to me to be legally open to Piara Ram in these proceedings is that he is not liable or rather his property is not liable to satisfy the debts of the firm, but I have already held he is liable for the payment of the debts of the firm to the extent of his share in the joint family property.

But another contention which is very strenuously urged before me is that even if Piara Ram is a partner in the coparcenary firm and his share in the joint property is liable to satisfy its debts, in the insolvency proceedings the receiver is not entitled to sell his share because he is not the insolvent. As I have already stated, for that limited purpose he must be deemed to be an insolvent as the firm of which he is a member has been adjudicated as insolvent. Authorities have been cited at the Bar in which it has been held that when a father who owns coparcenary property jointly with his son has been adjudicated insolvent, the son's share in the property does not vest in the receiver but the right of the father to sell the share of the son to discharge his debts vests in the receiver. Reference

was made to 7 Lah 376,¹ A I R 1927 Lah 152,² A I R 1930 Lah 645³ and 13 Lah 464.⁴ It has also been held that a receiver is entitled to sell a minor brother's share to pay the debts due from a firm in which the minor brother was a partner. This was held in 15 Lah 9⁵ and incidentally in 53 All 868⁶ at p. 885. A contrary view appears to have been expressed in 15 Pat 363.⁷ But this view appears to be opposed to the consensus of opinion which prevails in other Courts as for instance in 53 All 239,⁸ 53 All 868,⁶ 49 Mad 849,⁹ 9 Luck 304¹⁰ and 55 Bom 110.¹¹ It is not however necessary to consider this point, because in my opinion in the circumstances of the present case it does not arise. It is not that Wishan Das alone has been adjudicated an insolvent. The firm has been adjudicated insolvent and the firm being a co-parcenary firm, the minor's interest in the family property is saleable by the receiver. I hold therefore that the view of the learned District Judge is substantially correct and I dismiss this appeal with costs.

S.C./A.L.

Appeal dismissed.

1. Sat Narain v. Sri Kishan Das, A I R 1926 Lah 264 = 93 I C 612 = 7 Lah 376 = 28 P L R 245,
2. Munshi Ram v. Bhagwan Das, A I R 1927 Lah 152 = 92 I C 595 = 27 P L R 32.
3. Official Receiver, Lahore v. Chimanlal, A I R 1930 Lah 645 = 123 I C 286 = 31 P L R 245.
4. Gori Shankar v. Bashesar Nath, A I R 1932 Lah 151 = 135 I C 217 = 13 Lah 464 = 33 P L R 314.
5. Champa v. Official Receiver, Karachi, A I R 1933 Lah 901 = 149 I C 693 = 15 Lah 9 = 36 P L R 450.
6. Bankey Lal v. Durga Prasad, A I R 1931 All 512 = 135 I C 139 = 53 All 868 = 1931 A L J 917 (F B).
7. Nilkantha Narayan v. Debendra Nath, A I R 1936 Pat 115 = 161 I C 167 = 15 Pat 363 = 17 P L T 39.
8. Anand Prakash v. Narain Das, A I R 1931 All 162 = 135 I C 119 = 53 All 239 = 1931 A L J 122 (F B).
9. Balavenkataseetharama Chettiar v. Official Receiver, Tanjore, A I R 1926 Mad 994 = 97 I C 825 = 49 Mad 849 = 51 M L J 269 (F B).
10. Siddheshwar Nath v. Deokali Din, A I R 1934 Oudh 1 = 147 I C 642 = 9 Luck 304 = 10 O W N 1233 (F B).
11. Haridas Himatlal v. Lallubhai Mulchand, A I R 1931 Bom 50 = 129 I C 153 = 55 Bom 110 = 32 Bom L R 1362.

A. I. R. 1937 Lahore 903

TEK CHAND, J.

Kundan Lal — Plaintiff — Appellant.
v.

Har Parshad and another —

Defendants — Respondents.

Second Appeal No. 232 of 1936, Decided on 14th December 1936, from decree of Dist. Judge, Hissar, D/. 29th November 1935.

Practice — Remand — Suit to set aside ex parte decree on ground of fraud — Plaintiff alleging that he was minor and was not represented in former suit — No issue framed and tried by Court on point of minority — Remand held necessary.

In a suit to set aside an ex parte decree on the ground of fraud, the plaintiff averred that the plaintiff was minor on the date of the former suit, that he was wrongly described as major and that no guardian ad litem had been appointed. The trial Court did not frame an issue as to the minority of the plaintiff at the date of the former suit, even though it was denied by the defendant. The trial Court held that the plaintiff had failed to prove his minority :

Held : that as the Court had failed to frame an issue on an important matter which would have entitled the plaintiff to have the decree set aside as null and void irrespective of any fraud on the part of the then plaintiff, there was no proper trial of the case and a remand was necessary.

[P 905 C 2]

D. N. Aggarwal and Faqir Chand Mital — for Appellant.

Vishnu Datta for Nawal Kishore and R. L. Anand I — for Respondents.

Judgment. — This second appeal arises out of a suit instituted by Kundan Lal appellant against Harparshad and Maha Deo defendants for a declaration that the ex parte decree obtained by Harparshad against the plaintiff-appellant in Civil Suit No. 227 of 1931 from the Court of Khan Abdus Samad Khan, Subordinate Judge, Fourth Class, Hissar, had been obtained by fraud and was not binding on him. The suit was dismissed by the Subordinate Judge and the appeal has also been dismissed by the learned District Judge. The relevant facts are that Maha Deo, defendant 1, and his nephew Kundan Lal, plaintiff, are residents of Sirsa and were joint owners of a house situate at Sirsa. On 28th March 1919, Maha Deo for himself and as guardian of Kundan Lal, who was a minor at the time, mortgaged the house without possession to Harparshad for Rs. 500. In the mortgage deed it was stated that the amount raised on the mortgage was required for the marriage

of Teku, son of Maha Deo. It is common ground between the parties that at the time of the mortgage Kundan Lal was a minor.

On 30th March 1931, Harparshad brought a suit for possession of the house as mortgagee against Maha Deo and Kundan Lal. In the plaint both the defendants were described as majors, residing at Fazilka. Notices were issued to both of them at Fazilka but were returned unserved with the report that they had gone to Bahawalnagar in the Bahawalpur State. The then plaintiff Harparshad was given dasti summons apparently at his request for service on the defendant but service was not effected. He was then ordered to give the correct particulars of the address of the defendants in Bahawalnagar and also to deposit fresh process fee for service in the ordinary way as well as by registered post. He neither deposited the process fee nor filed the stamped envelopes for service by post. The Court then ordered that substituted service be effected by inserting an advertisement in a Lahore newspaper called Talim. The advertisement however actually appeared in the newspaper Inqilab. When the case came up for hearing before the Subordinate Judge, neither defendant appeared, and an ex parte decree was passed against both on 6th February 1932. On 3rd March 1933, Maha Deo applied to have the ex parte decree set aside. This application was eventually dismissed on appeal by the Senior Subordinate Judge on 31st March 1934 on the ground that the applicant had not proved that he had knowledge of the decree within 30 days of the application. The learned Judge however held that due service had not been effected on him. On 22nd February 1934, Kundan Lal brought the present suit for having the ex parte decree set aside alleging that it had been obtained by fraud. It was averred in the plaint that the plaintiff was in fact a minor on the date of the former suit, that he was wrongly described as a major, and that no guardian ad litem had been appointed. It was also stated that Harparshad had deliberately supplied a wrong address and that all this was done in order to obtain a decree behind his back, as on the merits Kundan Lal had a very good defence to the suit, his uncle, Maha Deo, having no authority to mortgage the plaintiff's share in the joint house in order to raise money for the marriage of his own son.

The suit was resisted by Harparshad who denied that the decree had been obtained by fraud. He also denied that the plaintiff was a minor at the institution of the previous suit. The learned Subordinate Judge framed the following issues :

- (1) Whether the decree was obtained by fraud ?
- (2) Whether the plaintiff can object to the legality of the mortgage and its consideration ; if so, is the mortgage deed invalid and without consideration ?
- (3) Relief and against whom ?

It is noteworthy that one of the principal allegations in the plaint was that the plaintiff was a minor at the time of the previous suit and had been wrongly described as a major. This allegation was denied by the defendant ; but unfortunately no clear issue was struck on the point. On the issues framed, the Subordinate Judge found that the plaintiff had failed to prove that he was a minor at the time of the institution of the previous suit or the passing of the decree therein. He also found that the mere fact that the plaintiff had given a wrong address of the defendant was by itself not sufficient to prove fraud, unless it was shown that the plaintiff in that suit had taken part in serving the summons on the defendant. On issue 2 the Subordinate Judge found that the question of the validity of the mortgage could not be gone into in this suit. On these findings he dismissed the suit.

On appeal the learned District Judge appears to have entirely misapprehended the facts of the case and misunderstood the judgment of the trial Court. He has held "that the plaintiff's suit was barred because it was brought three years after the attainment of majority;" and has observed that this "finding is fully justified on the evidence on the record" Now, as has been shown already, the Subordinate Judge had not decided that the suit was barred by time. Indeed, no plea of bar by limitation had been raised by the defendant, nor any issue framed on the point. The ex parte decree which was alleged by the plaintiffs to have been obtained by fraud by Harparshad defendant had been passed by Mr. Abdus Samad Khan, Subordinate Judge on 6th January 1932. The present suit had been brought on 22nd February 1934, a considerable time before the expiry of three years from the passing of the ex parte decree. The suit was therefore well within time, and it is not clear as to what the learned District Judge meant by hold-

ing that the suit was time-barred. He appears to have misunderstood the significance of the finding of the trial Judge that the plaintiff was over 21 years old at the time of the institution of the previous suit and that his allegation that he was a minor at that time was incorrect. This finding however had nothing to do with the present suit being within or beyond time. Under Art. 95, Lim. Act, the period prescribed for a suit to have a decree set aside on the ground that it had been obtained by fraud is three years from the date when the fraud became known to the plaintiff. If the learned Judge had merely looked at the date on which the former decision was passed and the date on which the present suit was instituted and referred to the relevant provision of the Limitation Act, he would not have made the double mistake of dismissing the appeal on a point which did not arise in the case and had not been raised in the plaint or mentioned by the trial Judge, and on which his own decision is manifestly erroneous. I am constrained to hold that the learned Judge does not appear to have applied his mind to the case. On this ground alone his judgment is liable to be set aside.

On the second point decided against the plaintiff, both the Courts below appear to have mechanically applied the head-note in A I R 1933 Cal 274¹, a Single Bench decision of the Calcutta High Court, without appreciating the particular facts in reference to which the observations cited were made. The facts here are entirely different and no attempt whatever appears to have been made to ascertain or discuss them. In order to decide whether Harparshad, the plaintiff in the former suit, was or was not guilty of fraud in suppressing the summons, it was necessary for the Courts to refer to the proceedings in the previous suit, some of which I have summarized in the earlier part of the judgment and if they had done so, it is obvious that they would not have dismissed the suit on the authority of a ruling which had no bearing on the case before them. Again, it is clear from the allegations in the plaint that apart from the question of fraud in this case, it was of the utmost importance to determine the exact age of the plaintiff on the date of the institution

of the previous suit. He was admittedly a minor at the time of the execution of the mortgage in 1919. If he was still a minor on 31st March 1931, as alleged by him, and was wrongly described as a major, and no guardian ad litem had been appointed, the decree obtained against him would be a nullity, irrespective of any fraud on the part of the then plaintiff and that a fresh suit lies to have the decree set aside and declared ineffectual. No issue however was framed on the point. No doubt some witnesses vaguely referred to the age of the plaintiff and this evidence is not of a very satisfactory character, but having regard to the importance of the matter, it was necessary to put the matter in issue. There has been no proper trial of this part of the case. A remand to the lower Court is therefore necessary.

I accept the appeal, set aside the judgment and decree of the learned District Judge and send it back to him for disposal in accordance with law. He will frame a clear issue on the question of minority and under O. 41, R. 25, Civil P. C., remit it to the Court of first instance for recording such evidence bearing thereon as the parties may wish to produce. On receipt of the remand report, the learned Judge will give his own decision on all the points involved in the case. Court-fee on this appeal will be refunded; other costs will be costs in the cause. Both counsel have been directed to cause their respective clients to appear before the District Judge, Ferozepore, on 25th January 1937.

K.B./R.K.

Case remanded.

* A. I. R. 1937 Lahore 905

COLDSTREAM AND DIN MOHAMMAD, JJ.

Kanwar Kartar Singh — Assessee —
Petitioner.

v.

*Commissioner of Income-tax, Punjab,
North West Frontier and Delhi Pro-
vinces, Lahore* — Respondent.

Civil Ref. No. 9 of 1937, Decided on 4th June 1937, made by Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, D/- 3rd February 1937.

* (a) Income-tax Act (1922), S. 4 (3) (viii)—
Agricultural income—Maintenance allowance
granted to younger brother under S. 8-A (b),
Punjab Laws Act — Allowance is part of
assignment which is agricultural income and
exempt as such.

1. Tarunanganath Banerji v. Premnarayanlal,
A I R 1933 Cal 274=143 I C 710=60 Cal 98.

Where the assessee receives certain sum every year under S. 8-A(b), Punjab Laws Act, under the order of the Governor-in-Council from his elder brother on whom the impartible estate devolves under S. 8, Punjab Laws Act, as maintenance out of the assignment, which is agricultural income and exempt as such, the allowance is a part of the assignment and cannot be taxed : *Case law discussed.* [P 908 C 1; P 909 C 1]

(b) Income-tax Act (1922), S. 14 (1) — Impartible estate granted by Crown subject to law of primogeniture—No blending is possible—Unfailing test for applicability of S. 14(1) is whether allowance would cease if assessee failed to be member of Hindu undivided family—Assessee granted by his elder brother annual maintenance allowance under S. 8-A, Punjab Laws Act Both brothers receiving separate incomes separately assessed—No joint family income assessed as such—Assessee held not receiving allowance as member of Hindu undivided family.

There is a distinction between a customary impartible estate and an estate granted by the Crown subject to descent by primogeniture. While blending may be possible in the former, it is not so in the case of the latter. [P 910 C 1, 2]

What S. 14 (1), Income-tax Act, contemplates is that the receipt should be from the joint income of the family and not otherwise. The unfailing test for the applicability of S. 14 (1), Income-tax Act, is to determine whether the allowance would cease if the assessee ceased to be a member of the undivided family, if any. [P 910 C 2]

The assessee was granted by his elder brother, succeeding to the impartible estate under the law of primogeniture, certain annual allowance out of the assignment under S. 8-A, Punjab Laws Act. The assessee claimed that this income was received by him as member of the Hindu undivided family and as such exempt under S. 14 (1), Income-tax Act. Both brothers were in receipt of separate incomes on which they were separately assessed. There was no joint family income which was assessed as such :

Held : that the allowance was the gift of the Government and not the gift of the holder of the assignment, or in other words, the karta of the family, and this being so the assessee was not receiving the income as a member of a Hindu undivided family : *Case law referred.* [P 910 C 2]

Mehr Chand Mahajan and Kirpa Ram Bajaj — for Petitioner.

S. M. Sikri for *J. N. Aggarwal* — for Respondent.

Din Mohammad, J.—This order will dispose of Civil Miscellaneous No. 530 of 1936 which is an application under S. 66 (3), Income-tax Act, for the issue of a mandamus to the Commissioner, Income-tax, as well as Civil Reference No. 9 of 1937, which is a statement of the case drawn up by the Commissioner under S. 66 (2) in relation to the same assessment. The assessee, Kanwar Kartar Singh, is the younger of the two sons of Sardar Bahadur Sardar Jiwan Singh of Shahzadpur, the

elder being Colonel Ram Singh. Sardar Bahadur Sardar Jiwan Singh was a Jagirdar, the descent of whose Jagir was regulated by the Descent of Jagirs Act, 1900 (since incorporated in the Punjab Laws Act, 1872). His estate was impartible. Under the provisions of the above mentioned Act, on the death of Sardar Bahadur Sardar Jiwan Singh in 1927, the Jagir devolved on the elder son to the exclusion of the younger son, but the condition imposed under the Act on this devolution was that the holder of the Jagir should pay Rupees 6,000 per annum out of the Jagir to his younger brother for maintenance. In the assessment for 1934-35, the Income-tax Officer, presumably for the first time since 1927, included this sum in the total assessable income of the assessee. To this the assessee demurred on two grounds : (1) that as the allowance was made out of the assignment it was exempt from tax under S. 4 (3) (viii), Income-tax Act, in the same manner as the original assignment was exempt and (2) that he receives this allowance as a member of a Hindu undivided family, and such receipts were exempt under S. 14 (1) of the Act.

The Income-tax Officer overruled both these contentions. On the first point, he held that as the assessee received the allowance from his brother and not direct from the revenue authorities, and as the 'proximate relation' and not the 'ultimate source' was the determining factor in such matters, the allowance lost its original character in the hands of the assessee and was consequently not exempt from taxation. On the second point he observed that the term 'Hindu undivided family', as used in the Act, carried a restricted meaning and as the assessee was not a co-parcener in the impartible estate, the allowance that he received for his maintenance was not covered by S. 14 (1). The assessee appealed to the Assistant Commissioner against the order of the Income-tax Officer, but that officer too upheld the order. The assessee then applied to the Commissioner under S. 66 (2), but the Commissioner refused to make a reference to this Court. Thereupon, the assessee presented an application to this Court under S. 66 (3) and asked for the issue of a mandamus to the Commissioner on the following question :

Whether the maintenance allowance of Rupees 6000 which the assessee receives out of the Jagir income from his brother, Colonel Ram Singh,

who, according to law and custom of primogeniture, has inherited the impartible estate of the family, is not exempt under Ss. 2 (1) and 14 (1), Income-tax Act.

This application was laid before a Division Bench of this Court for preliminary hearing on 16th October 1936, and the Bench admitted it and issued a notice to the Commissioner. On receipt of this notice, the Commissioner intimated to this Court by a letter dated the 12th November that the matter might be adjourned as he was making a reference under S. 66 (2). The hearing of the application under S. 66 (3) was accordingly adjourned and on 26th January 1937 the Commissioner drew up a statement of the case, propounding the following two questions for our decision :

(1) Has the assessee established that the sum of Rs. 6,000 paid to him under agreement of 12th May 1927 by his elder brother was received by him as a member of the Hindu undivided family constituted of him and that brother (with their descendants) and therefore exempt under section 14 (1) ?

(2) If not, has the assessee established (by evidence such that in law the contrary could not be found) that the sum of Rs. 6,000 paid to him under agreement of 12th May 1927 by his brother was an assignment to him of Land Revenues, by and in privity with Government, and not a fixed sum of maintenance allowance by and under the said agreement and, therefore, exempt under S. 4 (3) (viii) ?

Before I proceed further, it will be necessary to settle what question really arises in the case and in what form, especially as the assessee takes exception to the form of the questions propounded by the Commissioner and invites a decision first on his own application under S. 66 (3). It would appear from the questions reproduced above that the Commissioner has founded both the questions propounded by him on an agreement said to have been executed on 12th May 1927. This was really an application made to the Deputy Commissioner by Sardar Ram Singh asking him to fix the allowance of his younger brother at Rs. 6,000 which the latter had agreed to receive in lieu of his relinquishing all claim to the moveable and immovable property, etc., left by his deceased father. Sardar Kartar Singh also expressed his consent to this arrangement. Ultimately, the allowance was fixed at that figure, although the usual practice was to fix it at 10 per cent. as indicated in the application alluded to above. In spite of this, however, I am disposed to think that it is wrong to assume that the allowance paid to the assessee was based

on any agreement arrived at between the two brothers.

At pp. 13-15 of the statement of the case, all the relevant sections of the Descent of Jagirs Act and the Government Notifications have been set out and their perusal would show that not only the allowing of the maintenance depended on the will of the Government but even the sum was to be fixed by it. The rule of descent declared under the Act to prevail in this family 'involved the devolution of the assignment of land revenue' to a single person only as impartible property and the Government was empowered under the Act further to declare that that devolution shall be subject to the condition that the successor to the assignment shall be approved and accepted as such by the Government and that the successor so approved and accepted shall, if so required by the Government, make such provision out of the assignment as the Government may consider suitable for the maintenance of the widow or widows or other members of the family of the last or any previous holder of the assignment. In the exercise of this power, the Punjab Government in 1904 issued two Notifications Nos. 98 and 99 (printed at p. 15) and declared that the rule of descent shall be primogeniture and that it shall be subject to both the conditions mentioned above. On the death of Sardar Jiwan Singh, Colonel Ram Singh was approved as his successor under the first condition and he was further required to pay Rs. 6000 under the second condition. The sum no doubt had been fixed by consent of the parties but the final word lay with the Government. It was open to the Government not to have fixed the maintenance at that figure—it could even leave the younger son quite unprovided for by making no such requirement as is contemplated in S. 8-A (b). It is misleading therefore to say that the assessee was paid the sum in question under that agreement.

The question propounded by the assessee also errs in this respect that it seeks to place the onus on the Department to prove that the allowance is liable to tax. To me however the true legal position appears to be this: the assessee receives Rs. 6000 per annum and normally this income would be assessable. If the assessee claims exemption, he must establish under what provision of the Income-tax Act it is so exempt.

In view of what has been stated above, I consider that the real question arising in this case is whether the sum of Rs. 6,000 received by the assessee every year under the order of the Governor-in-Council from his elder brother by way of maintenance out of the assignment is exempt under S. 4 (3) (viii) or S. 14 (1), Income-tax Act. Had the Commissioner not drawn up the statement of the case suo motu after having refused to do it at once, it would have been necessary for us to issue a mandamus to the Commissioner on this question, but now that the Commissioner has submitted a full statement of the case, it would be useless to call upon the Commissioner to observe that formality once more. As has been held in several cases, it is open to this Court to determine the real question at issue and to answer it. Reference in this connexion may be made to 6 I T C 178¹ in which this course was approved. I would accordingly proceed to decide the case on the lines indicated above.

There are two matters that deserve consideration: (1) Whether this sum of Rs. 6,000 is agricultural income, and (2) whether this sum is being received by the assessee as a member of a Hindu undivided family. If either of these questions is replied in favour of the assessee, this assessment cannot stand.

I first take up the question whether the allowance is agricultural income. The assessee contends that as he receives the allowance under the order of the Governor-in-Council out of the assignment, it is agricultural income and thus exempt from tax. It is common ground that the assignment as such is exempt, and the only question that falls to be determined therefore is whether the allowance retains its original character in the hands of the assessee or loses it in transmission. No direct authority on this point having been cited to us, I am compelled to formulate my own conclusion from the facts proved in the case. After considering all the circumstances of the case, I am inclined to hold that the allowance is a part of the assignment and as such cannot be taxed. As explained above, the provision of this maintenance allowance is to be made out of the assignment and the present holder

of the assignment is bound under the orders of the Government to pay to the assessee 'out of the assignment'. It is as if the holder is under the terms of his own grant required to cut off this slice and pass it on to the assessee. The assignment being impartible, cannot be divided among the various claimants. The rule of descent being primogeniture, the entire block must go to the first-born. But the Act achieves the object of apportioning a part of the assignment to the other members of the last or any previous holder of the assignment by imposing a condition on the present holder to make provision 'out of the assignment' for other members of the family. The insertion of the words 'out of the assignment' leaves no doubt in my mind that what is intended by the Government is that the assignment as such should pass to the other members, so that if default is made by the holder, arrangement could be made to divert it to the claimants at the very source.

The Commissioner has referred to certain decided cases in support of his action, but in my view none of them is relevant. In 7 I T C 111² the assessee who was a widow of a taluqdar had in a compromise effected in the course of a litigation given up all her claims to the estate and accepted in lieu thereof a sum of Rs. 4,000 per mensem as a maintenance allowance. She claimed exemption for this allowance on the ground that it came out of the agricultural income. It was held, and rightly so, that it was not agricultural income in her hands. In 52 Mad 827³ a life-estate was given to a widow who was directed to give Rs. 600 per mensem to the daughter of the last male-holder. The learned Judges who decided the case remarked that the mere fact that a certain pecuniary legacy bequeathed by a zamindar had to be paid by his executor out of agricultural income did not make the legacy itself "agricultural income" within S. 2 (1). In 5 I T C 493⁴ it was observed that a monthly maintenance allowance under a decree of Court not specifying whether the allowance was payable out of the corpus or the income of

1. Commr. of Income-tax, Bengal v. Shaw Wallace & Co., A I R 1932 P O 138=136 I C 742=59 I A 206=59 Cal 1343=6 I T C 178 (P O).

2. Saltanat Begam v. Commr. of Income-tax, Central and United Provinces, A I R 1933 Oudh 475=146 I C 651=9 Luck 115=10 O W N 1003=7 I T C 111.

3. Lakshmi Narasayamma Rao v. Commr. of Income-tax, A I R 1929 Mad 598=119 I C 387=52 Mad 827=57 M L J 36 (S B).

4. Sundrabai v. Commr. of Income-tax, Bombay, (1931) 5 I T C 493.

her husband's estate consisting inter alia of agricultural lands was assessable to tax. In 14 Pat 552,⁵ the assessee had transferred his estate to another person in consideration of, among other things, the payment to him for life of an annuity of Rs. 2,40,000 the annuity having been made a charge on the lands transferred by a separate deed. Their Lordships of the Privy Council remarked that the annuity was not agricultural income but money payable under a contract imposing a personal liability the discharge of which was secured by a charge on land. In 14 Lah 255,⁶ an allowance made to a younger brother was held to be his income and not that of the elder brother. The principle of law enunciated in this case, to my mind, goes against the contention put forward on behalf of the Commissioner. In the same manner as the allowance could not be treated as the income of the elder brother, the assignment in this case cannot be treated as the income of Colonel Ram Singh. This being so, it cannot be assessed, as the younger brother receives that slice out of the assignment itself which to this extent does not go to his elder brother.

The assessee places his reliance on 8 I T C 399,⁷ and though that case proceeds on different facts, certain remarks made therein may be of some help to him. It was observed there that the agricultural income did not lose its original character merely because those who were entitled to receive it did not receive it in its crude form. I would hold therefore that the allowance is a part of the agricultural income and as such immune from tax.

On the second question, whether the assessee receives the allowance as a member of a Hindu undivided family, my opinion is against him. The assessee relies in support of his contention on 59 Cal 1399,⁸ 56 All 468,⁹ 14 Pat 785,¹⁰ 56 All

1009¹¹ and 57 Mad 1023¹²; while 3 I T R 123¹³ and 14 Pat 313¹⁴ have been cited on behalf of the Commissioner. In 59 Cal 1399⁸ their Lordships of the Privy Council held that the right of survivorship is not inconsistent with a custom of impartibility and it applies to the devolution of an impartible estate in a Mitakshara joint family. In order to establish that the family has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members to renounce their right of succession and it is not sufficient to show a separation in food and worship merely. In 56 All 468⁹ the claim of a Hindu to succeed by survivorship to an ancestral impartible estate was in issue. The family admittedly had been joint. It appeared however that for a long period there had been a complete separation in worship, food and social intercourse between the claimant's branch of the family and that of the deceased holder. It was held by their Lordships of the Privy Council that there was not to be implied from the circumstances stated above a renunciation of the right to succeed so as to terminate the joint status for the purposes of that right. This authority was based on 59 Cal 1399.⁸ In 14 Pat 785,¹⁰ the assessment was cancelled as it was held that in the case of an impartible Raj the fact that the holder for the time being is exclusively entitled to the estate was not inconsistent with other members of the family being joint with him. The case reported in 56 All 468⁹ was followed. In 56 All 1009,¹¹ it was observed that the assessee as a member of the Vizianagaram family having acquired a right in the ancestral property by birth could not but be considered to be a member of a Hindu undivided family. He would cease to be a member of such an undivided family only if he expressly or impliedly renounced his right of succession to the estate. This decision was again based on 59 Cal 1399.⁸ In 57 Mad 1023¹² a sum received as maintenance by an assessee as the brother

5. Gopal Saran Narain Singh v. Commr. of Income tax, B. & O., A I R 1935 P C 143 = 156 I C 856 = 62 I A 207 = 14 Pat 552 (P O).

6. Kishen Kishore v. Commr. of Income-tax, A I R 1933 Lah 284 = 14 Lah 255.

7. L. H. G. Conville v. Commr. of Income-tax Punjab, N. W. F. and Delhi Provinces, A I R 1935 Lah 978 = 8 I T C 399.

8. Shiba Prasad Singh v. Prayag Kumari, A I R 1932 P C 216 = 138 I C 861 = 59 I A 331 = 59 Cal 1399 (P O).

9. Collector of Gorakhpur v. Ram Sundar, A I R 1934 P C 157 = 61 I A 286 = 56 All 468 (P C).

10. Commr. of Income-tax, B. & O. v. Visheswar Singh, A I R 1935 Pat 342 = 156 I C 116 = 14 Pat 785 = 16 P L T 351 (S B).

11. In the matter of Income-tax Reference of Vijaya Ananda Gajapathi, A I R 1934 All 818 = 149 I C 306 = 56 All 1009 = 1934 A L J 1237.

12. Commr. of Income-tax Madras v. Narayana Gajapathi Raju, A I R 1934 Mad 608 = 151 I C 926 = 57 Mad 1023 = 67 M L J 306 (S B).

13. In re Moolji Sicka, (1934) 3 I T R 123 = 40 C W N 517.

14. Commr. of Income-tax, B. & O. v. Lakshmibai Saheba, A I R 1935 Pat 8 = 154 I C 866 = 14 Pat 313 = 16 P L T 171.

of the last holder of an ancestral impartible estate entitled under the law to receive maintenance out of such estate was considered to be a sum received by him as a member of a Hindu undivided family. It was remarked that the right to maintenance which the son of a zamindar still possessed was not the creature of custom but it was an incident to the ordinary joint family property which had been left untouched by custom despite its encroachment on the other incidents. The Commissioner had in that case urged that as there was no coparcenary, there was no Hindu undivided family. This contention was repelled. It may be observed here that a contrary proposition was laid down in 3 I T R 123,¹³ which is otherwise referred to in the statement of the Commissioner as *Mulji's case*.¹³ A Division Bench of the Calcutta High Court had held that where in the sections of the Income-tax Act a Hindu undivided family is mentioned, a Hindu co-parcenary is meant. The expression is not used in its wider sense including every Hindu joint family. It is not necessary however for the purposes of this case to enter into the discussion of this abstruse problem of Hindu law, as the question now before us can be disposed of on other grounds. In 14 Pat 313¹⁴ it was held that sub.s. (1) of S. 14, Income-tax Act has no application to a sum in which the assessee has no interest until it is actually received, which is so in the case of a person who receives a maintenance allowance out of income in which he has no vested right.

In this case I cannot persuade myself to believe that the assignment is a part of the ancestral estate, nor is there any material on the record to indicate that there is any co-parcenary or even joint family or joint family property, except the bare presumption that every Hindu family is joint. On the other hand, the fact that both brothers are in receipt of separate incomes on which they are separately assessed and that there is no joint family income which is being assessed as such, leads me to think that there is no foundation for the contention that there is a joint family property. In fact there could be no blending of separate acquisitions with the assignment in question so as to make the entire property owned by the family as ancestral property. As observed by their Lordships of the Privy Council in 59 Cal 1399,⁸ at page 1421, there is a distinction

in this respect between a customary impartible estate and an estate granted by the Crown subject to descent by primogeniture, and while blending may be possible in the case of the former, it is not so in the case of the latter. Further, the one unfailing test that can be applied in this case is to determine whether the allowance would cease, if the assessee ceased to be a member of the undivided family, if any. The answer is clearly in the negative as the allowance is the gift of the Government and not the gift of the holder of the assignment or in other words, the karta of the family and this being so, it cannot be held in any circumstances that the assessee is receiving this income as a member of a Hindu undivided family.

Moreover, what S. 14 (1) contemplates is that the receipt should be from the joint income of the family and not otherwise. I am aware that in 57 Mad 1023¹² it was observed that the question is not whether the income belongs to the zamindar or whether it belongs to the joint family of which the assessee is a member, but whether the assessee received his payment as a member of a Hindu undivided family. But with all respect I am disposed to think that in making this exemption the Legislature did contemplate that the allowance receivable by a member must come out of the income of the Hindu undivided family and not otherwise. Besides, in this case there is a clear renunciation of the assessee's claim to all moveable and immoveable property of the family in lieu of the allowance as has been stated by him unequivocally in the application of 12th May 1927, referred to above.

On all these grounds I am definitely of opinion that the assessee does not receive this allowance as a member of a Hindu undivided family but merely as a member of the last holder's family under the terms of S. 8-A (b) and this allowance he would have received even if there were no joint family and the allowance would not cease even if he separates, were there a joint family. I would, accordingly, answer the question arising in the case and formulated by me above as follows: The allowance is exempt from tax under S. 4 (3) (viii) but not under S. 14 (1), Income-tax Act. I would allow the assessee his costs.

Coldstream, J.—I agree.

V.B.B./R.K.

Reference answered.

A. I. R. 1937 Lahore 911

ABDUL RASHID, J.

Baunku and others — Defendants —
Appellants.

v.

Jamba — Plaintiff — Respondent.

Second Appeal No. 1240 of 1936, Decided on 27th January 1937, from decree of Senior Sub.Judge, Kangra at Dharamsala, D/. 26th June 1936.

(a) Punjab Tenancy Act (16 of 1887), Ss. 50 and 77 (3) (g)—Sons of occupancy tenant coming in possession of occupancy lands after their father — Subsequent dispossession by landlord — Suit by sons for possession is one under Sec. 50 and exclusively triable by Revenue Court.

Where the sons of an occupancy tenant are in possession of the occupancy land after the death of their father and mutations are effected in their names but the landlord dispossesses them from the land, a suit by the sons to recover possession of the occupancy land is one under S. 50, Punjab Tenancy Act, for recovery of possession of occupancy rights and is triable exclusively by a Revenue Court : *A I R 1919 Lah 475 (F B)* and *A I R 1926 Lah 6, Rel. on; A I R 1927 Lah 452 (F B), Disting.* [P 911 C 2]

(b) Punjab Tenancy Act (16 of 1887), S. 100—Suit exclusively triable by Revenue Court tried by Civil Court—Suit involving question of res judicata—Decree passed therein cannot be registered as decree of Revenue Court under S. 100.

Where a suit under S. 50, Punjab Tenancy Act, which is exclusively triable by Revenue Court has been tried by a Civil Court, the decree passed therein cannot be registered as the decree of a Revenue Court under S. 100 of the Act when there is a question of res judicata raised in such suit owing to some decree of the Revenue Court. The parties will be seriously prejudiced if such question is not determined by the Revenue Court. [P 912 C 1]

Mehr Chand Sud — for Appellants.*Arjan Das* — for Respondent.

Judgment.—The facts bearing on the question of law involved in this appeal may be shortly stated. Two brothers, namely Kalu and Achhru, were occupancy tenants of a certain area of land. Narain Das and others, defendants, were the landlords. On 11th April 1913 a report was made to the revenue authorities that Achhru had died about a year ago and that mutation of the land occupied by Achhru as an occupancy tenant might be made in favour of his four sons, namely Jamba, plaintiff, Basanto, Madho and Hira. The land of Achhru was consequently mutated in the name of Jamba, plaintiff, and the other three sons of Achhru. It appears that in the year 1921

Kalu also died. After the death of Kalu, the landlords took possession of the land which was originally cultivated by Kalu and Achhru.

On 30th July 1934 the sons of Achhru and the sons of Kalu brought a suit against the present defendants for possession of 45 kanals 8 marlas of land on the ground that their fathers were the occupancy tenants of this land and the landlords had no right to dispossess them from this holding. This area of 45 kanals 8 marlas included the land now in dispute amounting to 5 kanals 9 marlas. The khasra numbers of this area of 5 kanals 9 marlas are 710, 713, 719, 720, 721 and 722. This suit was compromised and the Revenue Court passed a decree on 18th August 1934 in favour of the sons of Achhru and the sons of Kalu for the entire area with the exception of these six khasra numbers comprising an area of 5 kanals 9 marlas.

The suit which has given rise to this second appeal was instituted by Jamba, one of the sons of Achhru, for possession of 1/8th share of 5 kanals 9 marlas consisting of khasra Nos. 710, 713, 719, 720, 721 and 722. The defendants pleaded, inter alia that this suit was cognizable by a Revenue Court only, in view of the provisions of Ss. 50 and 77 (3) (g), Punjab Tenancy Act. The trial Court did not give effect to this objection and passed a decree in favour of the plaintiff. The defendants' appeal having been dismissed by the Senior Subordinate Judge, they have preferred a second appeal to this Court.

After going through the plaint, I am of the opinion that this case is triable by a Revenue Court only. It is clearly stated in the plaint that the sons of Achhru took possession of the land in dispute after the death of their father and that they were subsequently dispossessed by the landlords after the death of Kalu. The present suit therefore is a suit by a tenant under S. 50 for recovery of possession of occupancy rights. Reference may be made in this connexion to 90 P R 1918¹ and *A I R 1926 Lah 6*.² The lower Courts have relied on a Full Bench ruling of this Court reported in 9 Lah 38.³ That ruling

1. *Akbar Hussain v. Karm Dad*, *A I R 1919 Lah 475=48 I O 8=90 P R 1918 (F B)*.

2. *Buta Singh v. Jagu*, *A I R 1926 Lah 6=89 I O 884*.

3. *Cheta v. Baija*, *A I R 1927 Lah 452=105 I O 507=9 Lah 38=29 P L R 489 (F B)*.

has, however, no applicability to the facts of the present case.

The learned counsel for the respondent contended that even if this suit is cognizable by a Revenue Court, only the decree of the trial Court should be registered as a decree of an Assistant Collector under S. 100, Punjab Tenancy Act. In my opinion however if the decree of the learned Subordinate Judge be registered as a decree of the Assistant Collector, serious prejudice will be caused to the defendants. One of the contentions raised on behalf of the defendants has throughout been that the present suit is barred by *res judicata* in view of the decree passed by the Revenue Court on 18th August 1934. The question as to whether the previous litigation bars the present suit must be determined by a Revenue Court. It has not so far been determined. In these circumstances this is not a fit case for this Court to take action under S. 100, Punjab Tenancy Act.

For the reasons given above I accept this appeal, set aside the judgments and the decrees of the Courts below and order that the plaint be returned to the plaintiff for presentation to the proper Court. In view of all the circumstances I leave the parties to bear their own costs throughout.

K.B./A.L.

Appeal allowed.

A. I. R. 1937 Lahore 912

SKEMP, J.

Hassan Mohammad — Judgment.

debtor — Appellant.

v.

Co-operative Credit Society of Jurian
— Respondent.

Second Appeal No. 1223 of 1936, Decided on 26th January 1937, from order of Dist. Judge, Gujranwala, D/- 19th June 1936.

(a) Co-operative Societies Act (1912), S. 42 (2) (b) and (6)—'Past member' in S. 42 (2) (b) means past member liable for debts under S. 23—Person claiming not to be past member—Civil Court has jurisdiction to investigate matter.

Section 42 (2) (b), Co-operative Societies Act, is governed by S. 23 of the same Act and the words 'past member' in S. 42 (2) (b) mean a past member liable for debts under S. 23 of the Act. [P 912 C 2]

A person who does not claim to be a past member liable under S. 23 of the Act has a right to have his claim investigated by a Civil Court: *A I R 1933 Lah 442* and *A I R 1936 Mad 574*, *Rel. on*; *A I R 1935 Lah 330*, *Disting.*

[P 913 C 1]

(b) Interpretation of Statutes—Harmonious construction—Construction of statute must be made of all parts together.

The construction of a statute must be made of all the parts together, and not of one part only by itself. The true meaning of any passage is that which (being permissible) best harmonizes with the subject, and with every other passage of the statute. [P 912 C 2]

Shuja-Ud-Din — for Appellant.

Abdul Aziz — for Respondent.

Judgment. — A Co-operative Credit Society went into liquidation. A liquidator was appointed and made awards determining the liabilities of past and present members of the Society. On 2nd May 1935 he made an award directing Hassan Mohammad to pay Rs. 2,000. Subsequently he filed the award in Court praying that it be enforced as a decree. Hassan Mohammad objected to execution on the allegation that he had ceased to be a member of the Society long before the date of the award. The Subordinate Judge dismissed the objection on the ground that under S. 42 (2) (b), Co-operative Societies Act, the liquidator had power to determine the contributions to be made by the past members of the Society and that under sub-s. (6) no Civil Court had jurisdiction with regard to any such matter. The learned District Judge maintained this on appeal. The appellant has come here in second appeal through Dr. Shuja-ud Din. He points out that the lower Courts overlooked the effect of S. 23, Co-operative Societies Act. This section runs :

The liability of a past member for the debts of a registered society as they existed at the time when he ceased to be a member shall continue for a period of two years from the date of his ceasing to be a member.

It is, in my opinion, clear that a 'past member' in S. 42 (2) (b) means a past member liable for the debts under S. 23. Mr. Abdul Aziz for the respondent wishes to construe 'past member' under S. 42 (2) (b) in its dictionary meaning. But the construction of the statute must be made of all the parts together, and not of one part only by itself :

The true meaning of any passage is that which (being permissible) best harmonizes with the subject, and with every other passage of the statute: Maxwell on the Interpretation of Statutes, Edn. 7, pp. 25 and 26.

Dr. Shuja-ud-Din invited my attention to 14 Lah 703,¹ in which a Division Bench

1. Mukand Lal v. Malhotra Bank, Hafizabad, *A I R 1933 Lah 442*=144 I O 264=14 Lah 703=34 P L R 717.

laid down that a person claiming not to be a member of a Society had a right to have his claim investigated by a Civil Court. The same principle would, in my opinion, apply to a person claiming not to be a past member liable under S. 23. Mr. Abdul Aziz relied on a ruling of Bhide, J. reported in A I R 1935 Lah 330,² but that ruling may be distinguished as the plaintiff in that case ceased to be a member less than a year before the dissolution. A I R 1936 Mad 574³ is also directly in point. The appellants there pleaded that they had ceased to be members five years before the Society was dissolved, and a Bench of the Madras High Court held that a Civil Court had jurisdiction to investigate the matter. The suggestion that the time should run backward from the date of the award is untenable. The award merely sets forth what sums the members and past members were liable to pay on the date of dissolution, i. e. the date when the registration of the Society was cancelled.

There is no material on the record to show when the registration of the Society was cancelled and the case must be remanded to determine this and also the date on which Hassan Mohammad ceased to be a member. I set aside the orders of the lower Courts and remand this case through the District Judge to the Court of the Subordinate Judge, Hafizabad, to determine (a) the date when Hassan Mohammad ceased to be a member of the Society, and (b) the date on which the registration of the Society was cancelled. He is then to give a decision in accordance with law. Stamp on appeal to be refunded and other costs to be costs in the cause. The parties have been told to appear in the Court of the Subordinate Judge at Hafizabad on 23rd February 1937 in order to obtain a date.

K.B./A.L.

Case remanded.

2. Muhammad Barkat Ali Khan v. Anjuman Imdad, Aarza Delhi, A I R 1935 Lah 930.

3. Vaikunta Bhat v. K. Sarvothama Rao, A I R 1936 Mad 574=59 Mad 895=70 M L J 604.

A. I. R. 1937 Lahore 913

TEK CHAND, J.

Ganda Ram — Creditor — Appellant.

v.

Taj Din and others — Respondents.

Second Appeal No. 28 of 1936, Decided on 9th December 1936, from order of Addl. Dist. Judge, Lyallpur, D/. 10th March 1936.

1937 L/115 & 116

(a) Provincial Insolvency Act (1920), Ss. 4 and 54 — Transfer of debts due to insolvent during pendency of application for adjudication as insolvent — Application by Receiver for refund of amounts realized by transferees and for making them personally liable for entire debts is covered not by S. 54 but by S. 4—Second appeal is competent from such order passed under S. 4.

Section 4, Provincial Insolvency Act, is very wide in its terms. Where an insolvent during the pendency of an application for adjudication as insolvent transfers certain debts due to him and the Official Receiver makes an application praying that the transferees be directed to refund the amounts realized by them and that the transferees are personally liable for the entire amounts of the debts transferred to them, the adjudication of these matters is covered not by S. 54 but by S. 4, and hence against orders passed under S. 4 a second appeal is competent: A I R 1933 Lah 477, *Rel. on.* [P 914 C 2]

(b) Insolvency — Assignment of debts due to insolvent in favour of some creditors — Assignment subsequently annulled — Assignees are not personally liable to pay entire debts to Receiver.

The effect of an order setting aside a transfer by the insolvent is to restore the *status quo ante* between all the parties concerned. The mere fact that some of the creditors managed to get certain debts of the insolvent assigned in their favour, which assignments have been annulled subsequently, cannot make the assignees liable to pay the entire amount of the debts to the Receiver from their own pocket. [P 914 C 2; P 915 C 1]

S. L. Puri — for Appellant.

J. L. Kapur and Faqir Chand Mital — for Respondents.

Judgment.—Ramditta Mal and his son Jowala Das carried on a joint business under the name and style of "Maya Das Ramditta Mal". In execution of a money decree, Ramditta Mal was arrested and brought before the executing Court. He asked for time to apply for insolvency and this was granted. On 10th December 1932 Ramditta Mal applied for adjudication as an insolvent. This application was opposed by the creditors. An enquiry into the allegations made in the application was started and an interim receiver appointed on 19th December 1932. Before the decision of the application for insolvency, Jowala Das, son of Ramditta Mal, on 4th January 1933, transferred four debts due by certain debtors to Firm Maya Das Ramditta Mal to three of his creditors, Vishen Das-Ladha Ram, Jiwan Das and Firm Mukand Lal-Ram Rakha, as follows:

1. A decree for Rs. 600 and costs, obtained by Firm Maya Das-Ramditta Mal against Hakam Khan was assigned by Jowala Das to Firm Vishen Das-Ladha Ram to whom Ramditta Mal-Jowala Dass owned a certain debt.

2. A debt of Rs. 200 due by Taj-ud-din to Ramditta Mal-Jowala Das was transferred by Jowala Das to Jiwan Das.

3. A debt of Rs. 200 due by Alam Khan and Ahmad Khan to Ramditta Mal-Jowala Das was transferred by Jowala Das to Jiwan Das.

4. A debt of Rs. 27 due by Allah Ditta to Ramditta Mal-Jowala Das was transferred by Jowala Das to Firm Mukund Lal-Ram Rakha.

On 12th August 1933 Ramditta Mal was adjudicated an insolvent, and his property vested in the Official Receiver. On 21st May 1934 the Official Receiver made four applications under Ss. 4 and 54, Provincial Insolvency Act, for avoiding the aforesaid transfers of debts by Jowala Das urging that the debts in question were due to the insolvent and that the transfers by his son, made during the pendency of his application for adjudication as insolvent, gave fraudulent preference to the transferee-creditors over the other creditors. It was also prayed that if any of the transferees had received the whole or a part of the amount due from the original debtors, they be directed to pay them to the Receiver. The applications were contested by the transferees who contended that no fraudulent preference had been given to them and that the transfers were valid and binding. They also contested the Receiver's right to claim from them any amount which they might have realized from the original debtors after the transfers. The Insolvency Judge held that the transfers were void as they unduly preferred the transferee-creditors and accordingly he set them aside. He however rejected the additional prayer of the Receiver directing the transferees to pay to him any amount which they might have realized from the original debtors, or making the transferees personally liable for the amount due on those debts, and directed that the debts shall be sold and the sale proceeds credited to the insolvent's estate. Ganda Ram, one of the creditors of the insolvent, preferred four appeals to the District Judge praying that in the circumstances the Insolvency Judge should have ordered that the transferees were personally responsible for the entire amounts of the debts which had been transferred to them. Two of the transferees, Jiwan Das and Firm Vishen Das-Ladha Ram, also appealed against the order of the Insolvency Judge setting aside the transfers in their favour. The learned District Judge agreed with the Insolvency Judge on all points and dismissed the

appeals. Ganda Ram has preferred second appeals to this Court, and cross-objections have been filed by Jiwan Das and Firm Vishen Das-Ladha Ram, transferees.

A preliminary objection has been raised by counsel for the respondents that no appeal lies as the order of the Insolvency Judge was really passed under S. 54, Provincial Insolvency Act and against such an order only one appeal is allowed. In this case however, the original applications by the Official Receiver were made under Ss. 4 and 54. The prayer that the transferees be directed to refund the amounts realized by them, and also the further point subsequently raised that they were personally liable for the entire amounts of the debts transferred to them were not covered by S. 54, and it was evidently for this reason that the applications were made under S. 4 also. This section is very wide in its terms, and as held in 14 Lah 724,¹ it covers adjudication of questions of this kind. Admittedly against orders passed under S. 4, a second appeal is competent. I overrule the preliminary objection, and hold that the orders of the learned District Judge are appealable to this Court.

On the merits, it will be convenient first to dispose of the cross-objection filed by two of the transferees against the concurrent finding of the Courts below that the transfers in question by Jowala Das gave undue preference to the transferee-creditors and were therefore void under S. 54. After hearing Mr. Kapur, I see no force in the cross-objections and uphold the finding of the learned District Judge, which is based on a consideration of the direct and circumstantial evidence in the case, and on which, if I may say so, no other conclusion was, in my opinion, possible.

In support of the appeals, Mr. Shambu Lal Puri has contended that in the circumstances of this case the transferees should have been made personally liable for the amounts of the debts transferred to them. I do not however see on what principle this prayer could be granted. As observed by the learned District Judge, the effect of the order setting aside the transfers is to restore the *status quo ante* between all the parties concerned. The mere fact that some of the creditors

1. Sardar Mohamed v. Labhu Ram, A I R 1933 Lah 477=144 I O 580=14 Lah 724=34 P L R 1076.

managed to get certain debts of the insolvent assigned in their favour, which assignments have been annulled subsequently, cannot make the assignees liable to pay the entire amount of the debts to the receiver from their own pocket. In applying the rule that the *status quo ante* should be restored, the Courts below however have not considered the events which appear to have occurred after the transfers. It is stated by the appellants that the transferee Firm Vishen Das-Ladha Ram took out proceedings for execution of the decree (which had been obtained by the insolvent against Hakam Khan and which had been assigned by Jowala Das to them) and in these proceedings they got Hakam Khan arrested, and he was subsequently released on one Budhe Khan executing a bond for Rs. 690 in favour of Vishen Das Ladha Ram. Now, if the facts are as stated above, all that the receiver is entitled to is to have the bond by Budhe Khan assigned by Vishen Das-Ladha Ram to him, subject to his paying him the taxed costs of the execution against Hakam Khan and the expenses, if any, incurred in getting the bond executed by Budhe Khan.

With regard to the debt due by Taj-ud-Din which has been transferred to Jiwan Das, it is admitted that Rs. 80 has been realized by Jiwan Das. This amount Jiwan Das is liable to refund to the Receiver, subject to the deduction of any legitimate expenses incurred by him. It is stated that the payment of Rs. 80 was received in full and complete discharge of the entire debt by compromise, and the balance remitted, as the debtor was an agriculturist from whom no other realization could possibly be made. This matter obviously required investigation by the Courts below. The order passed by them for the sale of the original debt by Taj-ud-Din is meaningless if the debt has been discharged wholly or in part. Jiwan Das is also stated to have obtained a decree against Alam Khan and Ahmad Khan, subsequent to the transfer of the debt by him. An enquiry was necessary as to whether any portion of this decree has been realized and Jiwan Das should have been ordered to pay it to the Receiver after deducting the taxed costs of the suit, and for the remainder to transfer the decree to the receiver. I accept the appeals and remand the cases to the District Judge with the direction that they

be remitted to the trial Judge for disposal in accordance with law, in reference to foregoing remarks. The cross-objections fail and are dismissed. Having regard to all the circumstances, I leave the parties to bear their own costs throughout.

D.S./R.K.

Cases remanded.

A. I. R. 1937 Lahore 915

ADDISON AND ABDUL RASHID, JJ.

B. J. Heera c/o The Delhi Electric Supply and Traction Co., Ltd., Delhi
— Assessee — Petitioner.
v.

*Commissioner of Income-tax —**Respondent.*

Civil Ref. No. 12 of 1936, Decided on 13th May 1936, made by Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, Lahore, D/- 18th March 1936.

Provident Funds Act (1925), S. 2 (f)—
License granted to company on certain conditions does not create contractual relationship—Company administering tramway under license granted under Tramways Act is not 'Railway administration'.

A license granted to a company on certain conditions does not create contractual relationship.

[P 916 C 2]

An electric supply and traction company administering a tramway in British India under a license granted under the Tramways Act is not a 'Railway administration' within the purview of S. 2 (f), Provident Funds Act, as the Tramways Act is not a special Act but an Act dealing with the construction of tramways in general and as the license granted to the company under the Tramways Act is a unilateral act which cannot be regarded as a contract between the company and the Local Government.

[P 916 C 1, 2]

*M. C. Mahajan — for Petitioner.**S. M. Sikri — for Respondent.*

Abdul Rashid, J.—Under S. 66 (2), Income-tax Act, the Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, has referred the following question of law to this Court :

Is the Delhi Electric Supply and Traction Co., by virtue of its license under the Indian Electricity Act of 1903 and order under the Indian Tramways Act of 1886, a 'Railway Administration' within the terms of Cl. 2 (f), Provident Funds Act 19 of 1925; and its Provident Fund thereby a "Railway Provident Fund" within Cl. 2 (g) thereof?

The assessee, Mr. B. J. Heera, was an employee of the Delhi Electric Supply and Traction Co. during the accounting period. Out of his salary, the assessee contributed a sum of Rs. 428 to the Employers Provident Fund. The claim of the assessee is

that this fund falls within the purview of S. 15 (1), Income-tax Act and the sum of Rs. 428 is not liable to income-tax. The Employers Provident Fund of the Delhi Electric Supply and Traction Co. admittedly is not one registered under Ch. 9-A, Income-tax Act. The Provident Funds Act of 1897 was replaced by the Provident Funds Act 19 of 1925. It was contended by the learned counsel for the assessee that the Delhi Electric Supply and Traction Co. fell within the purview of the definition of the words "Railway administration" as given in S. 2 (f), Provident Funds Act (1925). It is laid down by this Act that :

'Railway administration' means any company administering a railway or tramway in British India either under a Special Act of Parliament or of the Indian or a local Legislature, or under contract with the Secretary of State for India in Council, the Governor General in Council or a Local Government.

It was contended that by being granted an "order" under the Tramways Act (1886), the company became one which was administering a tramway in British India under a Special Act of the Indian Legislature. We are of the opinion that this contention is devoid of all force. The Tramways Act deals with the construction of tramways in general. It is applicable to the whole of British India and was not enacted for the purposes of the construction of any particular tramway. An act of this nature cannot be called a "Special Act". The only other point agitated by the learned counsel for the assessee was that at any rate the Delhi Electric Supply and Traction Co. was administering a tramway under contract with a Local Government and that the company must therefore be regarded as a "Railway administration" within the meaning of S. 2 (f), Provident Funds Act. Reference was made in this connexion to Ss. 7, 23, 35 and 39, Tramways Act. After considering all the relevant sections we are of the opinion that the Delhi Electric Supply and Traction Co. was administering a tramway under a license granted to the promoters on 2nd July 1906, and that the company was not administering the tramway under contract with the Local Government. No contract was ever entered into between the company and the Local Government, and the license granted to the company under the Tramways Act was a unilateral act which could not be regarded as a contract between the com-

pany and the Local Government. A license granted to a company on certain conditions does not create contractual relationship. Such a relationship can only be created by an agreement between two parties and no such agreement is referred to in the "order" whereby the promoters of the Delhi Tramways were granted a license on 2nd July 1906.

For the reasons given above, we hold that the Delhi Electric Supply and Traction Co. is not a "Railway administration" within the purview of S. 2 (f), Provident Funds Act (1925) and its provident fund is not a "Railway Provident Fund" within the meaning of S. 2 (g) thereof. We answer the question referred to us accordingly. The assessee shall pay the costs of the Commissioner of Income-tax.

K.B./R.K. *Answer in the negative.*

A. I. R. 1937 Lahore 916

TEK CHAND AND SKEMP, JJ.

Banarsi Dass & Sons — Petitioners.

v.

Delhi Iron Syndicate and another — Respondents.

Civil Misc. No. 391 of 1936, Decided on 28th October 1936, for leave to appeal to His Majesty in Council against decree of Tek Chand and Dalip Singh, JJ., D/- 9th April 1936.

Civil P. C. (1908), S. 110—Suit for recovery of Rs. 34,000 — Decree by trial Court for Rs. 11,950—Both parties appealing to High Court—Plaintiff's appeal dismissed and defendants' accepted in part, Rs. 11,950 being reduced to Rs. 6,080—Held no appeal lay as of right under S. 110, as appeal and cross-appeal could not be considered together in spite of decree being composite.

In a suit for recovery of Rs. 34,000 the trial Judge passed a decree in favour of the plaintiff for Rs. 11,950. Both the parties appealed to the High Court. Both appeals were heard together and the plaintiff's appeal was dismissed while that of the defendant was accepted in part, the amount of Rs. 11,950 being reduced to Rs. 6,080. The plaintiff applied for leave to appeal and the questions raised in the memorandum of appeal were all questions of fact :

Held : that leave could not be granted as no appeal lay as of right under S. 110. The appeal and the cross-appeal could not be considered together for purposes of S. 110 nor did the fact that a composite decree was prepared in both the appeals make any difference : *A I R 1935 All 374 (F B)*; *A I R 1918 All 945* and *A I R 1930 Lah 554, Rel. on*; *A I R 1929 Pat 561, Disting.*

[P 917 C 1, 2]

Shamsher Bahadur — for Petitioners.

Bishan Narain — for Respondents.

Tek Chand, J.—This is an application under Ss. 109 and 110 and O. 45, R. 3, Civil P. C., for leave to appeal to His Majesty in Council from the decrees of this Court in Civil Appeal No. 898 of 1935 and Civil Appeal No. 985 of 1935. Both these appeals arose from a suit which was instituted by the plaintiff against the defendants for recovery of Rs. 34,000 as damages for non-performance of three contracts. The trial Judge passed a decree in favour of the plaintiff for Rs. 11,950. From this decree both parties appealed to this Court. Civil Appeal No. 985 of 1935 was by the plaintiff in which he prayed that the decretal amount be raised from Rs. 11,950 to Rs. 34,000. Civil Appeal No. 898 of 1935 was by defendant 1, the Delhi Iron Syndicate which prayed for the dismissal of the suit. The two appeals were heard together by a Division Bench of this Court. The plaintiff's appeal was dismissed, while that of the defendant was accepted in part, the amount decreed by the trial Court, i. e. Rs. 11,950 being reduced to Rs. 6,068.12.0. The questions raised in the memorandum of the proposed appeal are all questions of fact. Admittedly no question of law arises on the findings recorded by this Court. On behalf of the respondent it is urged that no appeal lies as of right under S. 110, Civil P. C., and in support of this contention reliance is placed on 57 All 873,¹ 48 I C 124² and 11 Lah 465.³ In our opinion this contention is well-founded and must prevail.

As already pointed out, both parties had filed cross-appeals in this Court. The amount of the subject matter of the plaintiff's appeal was Rs. 22,050; that appeal was dismissed. The decree in that appeal therefore was one affirming the decision of the trial Court and it is clear that from the decree of this Court in that appeal, no appeal lies on facts to His Majesty in Council. In the defendant's cross-appeal the amount involved was Rs. 11,950 and the appeal was successful in part, viz. to the extent of (Rs. 11,950—6,068=) Rupees 5,882 only. The plaintiff, in the proposed appeal to His Majesty in Council, seeks to

have this decision reversed; the subject matter of the appeal in so far as it attacks the decree in Civil Appeal No. 898 of 1935, is therefore far below Rs. 10,000. Counsel for the petitioner contends that the appeal and the cross-appeal must be considered together for the purposes of S. 110, Civil P. C. But in view of the clear wording of S. 110, and for the reasons given by the Full Bench of the Allahabad High Court in 57 All 873,¹ we are unable to accept this argument. Nor does the fact that a composite decree was prepared in both appeals make any difference, as pointed out in 11 Lah 465.³ The petitioner's counsel relied upon 9 Pat 558,⁴ but the facts of that case are distinguishable, as there the amount by which the decree of the trial Court was varied in one of the appeals was over Rs. 10,000. Further, the view taken in 11 Lah 465³ has long been held in this Court and we do not see any reason to dissent from it. In our opinion the petitioner is not entitled to a certificate under Ss. 109 and 110, Civil P. C., and we dismiss the application with costs.

R.M./D.S. *Application dismissed.*

4. Jamuna Prasad Singh v. Jagarnath Prasad, A I R 1929 Pat 561=117 I O 193=9 Pat 558=11 P L T 727.

A. I. R. 1937 Lahore 917

SKEMP, J.

Jati and another — Defendants —
Appellants.

v.

Girja Singh — Plaintiff — Respondent.

Second Appeal No. 753 of 1936, Decided on 2nd December 1936, from decree of Dist. Judge, Ludhiana, D/. 26th March 1936.

Custom (Punjab)—Ancestral land — Land owned jointly by cousins at first settlement according to their shares in ancestral land—Presumption is that land is ancestral.

Where a certain proprietary land is owned jointly at the time of the first settlement by first cousins from the common ancestor in precisely the same shares as ancestral land would be held, the land must be presumed to have descended from the common ancestor in the absence of any indication that the land is self-acquired : A I R 1931 Lah 266; A I R 1930 Lah 793 and A I R 1931 Lah 599, Rel. on; A I R 1933 Lah 333 and A I R 1927 Lah 477, Ref. [P 918 O 2]

Jhanda Singh — for Appellants.

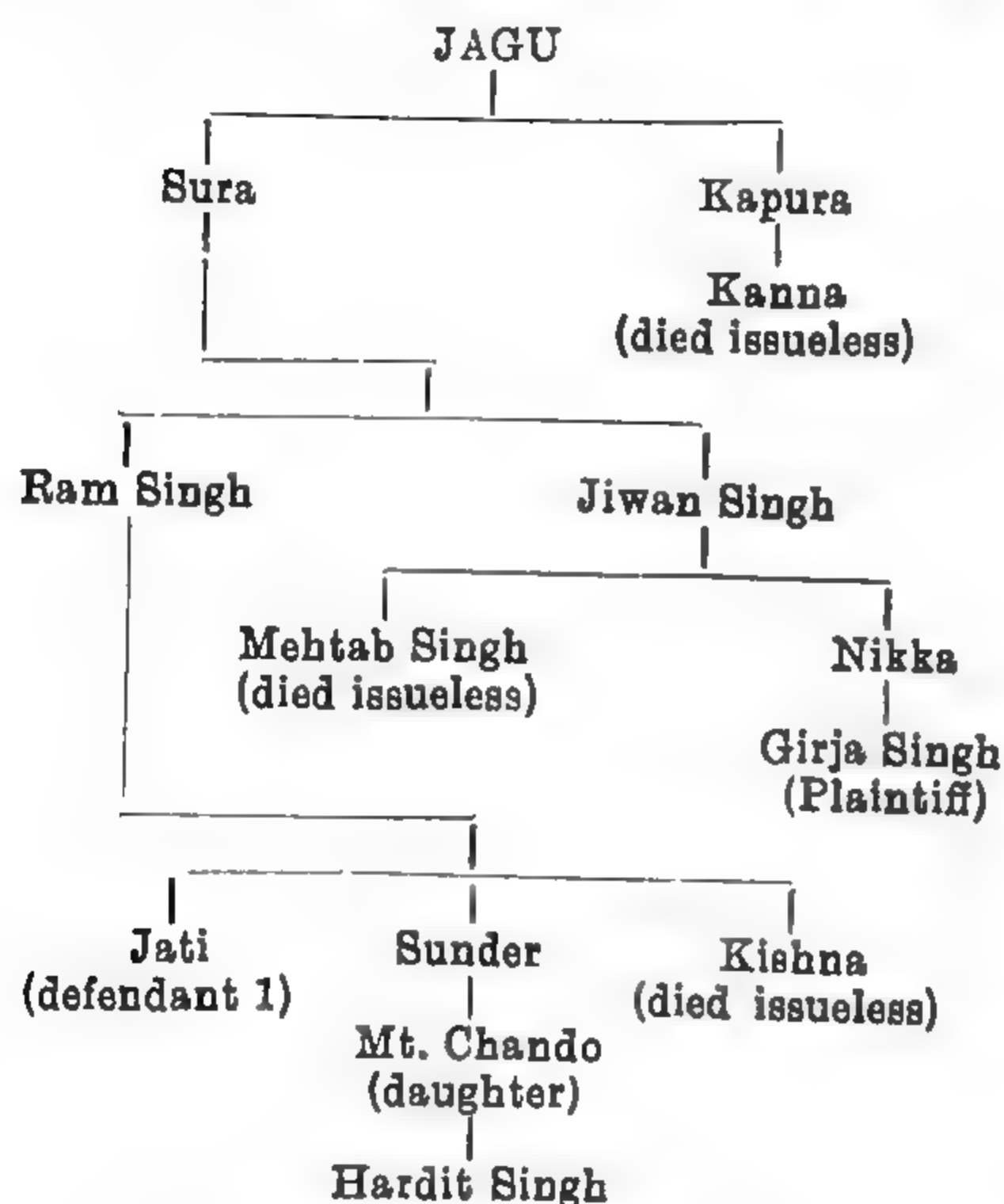
Krishen Swarup — for Respondent.

1. Benares Bank Ltd., Agra v. Rajnath Kunzru, A I R 1935 All 374=155 I C 487=57 All 873=1935 A L J 352 (F B).

2. Chiranji Lal v. Behari Lal, A I R 1918 All 245=48 I C 124=16 A L J 864.

3. Asa Ram v. Kishen Chand, A I R 1930 Lah 554=123 I C 523=11 Lah 465=31 P L R 236.

Judgment.—The only question in this second appeal is whether the land gifted by Jati to his daughter is ancestral property or not. The pedigree table below will prove helpful :



It is proved that at the first settlement in 1852 the land in suit was partly shami-lat and partly a khata jointly owned by Kahna son of Kapura one-half, and Ram Singh and Jiwan Singh sons of Sura one-half, in equal shares. It is conceded that the one-half held by the sons of Sura in equal shares must be presumed to have been held by their father and the appellants do not urge that this half is not ancestral. They urge that the other half has not been proved to be ancestral. They further point out that the finding of the learned District Judge loses its force in part owing to an error, namely he said that the land was held by Kapura and not Kahna.

The appellants' learned counsel relies on A I R 1933 Lah 333,¹ a judgment by a Single Judge, that where the only evidence was that at the first settlement land was held by two sets of brothers or first cousins in equal shares, this was insufficient to prove that it had been held by their grandfather. On the other hand Mr. Krishen Sarup for the respondent urges that there is no evidence of any kind that any member of this family acquired any land except by inheritance. He relies on three recent rulings, all delivered since 8

Lah 584² which held that the mere mention of the common ancestor in the pedigree-table is not sufficient to prove the ancestral character of the land. The three rulings relied on by the respondent's counsel are 12 Lah 525,³ A I R 1930 Lah 793⁴ and A I R 1931 Lah 599.⁵ The first of these rulings was delivered by a Division Bench presided over by Sir Shadi Lal. At the first settlement, the land was held by uncle and nephew, a third son of the common ancestor having died childless. It was adjudged to be ancestral. A I R 1930 Lah 793⁴ is another Division Bench ruling in which part of the land being held at the first settlement by the descendants of the common ancestor, Sir Shadi Lal said :

There is ample authority for the proposition that when a plot of land was owned, at the time of the first settlement, jointly by persons who were brothers or cousins, the presumption, in the absence of any indication that the land was self-acquired property of the owners, is that it was originally held by their common ancestor.

This ruling was followed by Bhide, J. in A I R 1931 Lah 599.⁵ In the present case the proprietary land was held by Kahna and his cousins in precisely the same shares as ancestral land would be held. In circumstances like the present, the balance of authority definitely is that the land is presumed to have descended from the common ancestor, i. e. there being no indication that the land is self-acquired. The lower Courts concurrently came to this conclusion, and I see no reason for dissenting from it. The appeal is rejected with costs.

K.B./R.K.

Appeal dismissed.

2. Chanda Singh v. Banto, A I R 1927 Lah 477 = 102 I O 313 = 8 Lah 584 = 28 P L R 643.

3. Bakhsh v. Mohamad Khan, A I R 1931 Lah 266 = 134 I O 831 = 12 Lah 525 = 32 P L R 770.

4. Hayat v. Rahman, A I R 1930 Lah 793 = 122 I O 479 = 31 P L R 189.

5. Bhan Singh v. Ram Singh, A I R 1931 Lah 599 = 131 I O 634 = 32 P L R 510.

A. I. R. 1937 Lahore 918

JAI LAL, J.

Sm. Hiran Devi — Appellant.

v.

Chanan Shah and others —

Respondents.

First Appeal No. 156 of 1936, Decided on 26th November 1936, from order of Sub-Judge, First Class, Jhelum, D/- 8th May 1936.

1. Karnailu v. Bhagwan Singh, A I R 1933 Lah 333 = 144 I O 308 = 34 P L R 185.

Hindu Law—Minority and Guardianship—Joint family—Whether guardian of property or of person of minor member can be appointed, stated — No appointment of guardian under Guardians and Wards Act is necessary to enable minor to sue for partition.

No guardian of the property of the minor can be appointed in the case of co-parcenary property so as to deprive the managing member of the family of his right to manage the property. [P 919 C 1]

There may be no prohibition in the Hindu law to the appointment of a guardian of the person of a minor member of a joint Hindu family, but where it is not shown that any circumstances exist which take the case out of the rule that ordinarily no such action should be taken in the case of a minor member of a joint Hindu family, no guardian of the person should be appointed.

[P 919 C 1, 2]

The appointment of a guardian under the Guardians and Wards Act is not necessary for the purpose of enabling the minor to sue for partition of the co-parcenary property. [P 919 C 2]

Ram Lal Anand I — for Appellant.

Arjan Das — for Respondents.

Judgment.—This appeal arises out of an application made by the appellant Shrimati Hiran Devi for being appointed guardian of the person and property of her minor sons and a minor daughter. The application was opposed by the step-brothers of the minors, the eldest of whom, the respondent before me, Chanan Shah, claimed that the minors were members of a joint Hindu family with him and that the entire property was co-parcenary property. The learned trial Judge dismissed the application holding that the entire property was co-parcenary property and that the allegation of the appellant that the entire property left by the father of the minors, R. S. Dhera Shah, came by survivorship to the minors was not proved. The ground on which it was sought to deprive the respondents of an interest in the property was that they had been separated from their father during his lifetime. This has rightly been held by the trial Judge not to have been proved.

There is no doubt that no guardian of property can be appointed in the case of co-parcenary property so as to deprive the managing member of the family of his right to manage the property. But it is contended by the learned counsel for the appellant that in any case she should have been appointed a guardian of the persons of the minors, as there is no prohibition in the Hindu law to this course. It may be that there is no prohibition in the Hindu law to the appointment of a guardian of a minor member of a joint Hindu family,

but in the present case it has not been shown that any circumstances exist which take this case out of the rule that ordinarily such action should not be taken in the case of a member of a joint Hindu family. The appellant's counsel suggests that such a course is necessary in order to enable the mother to sue for the partition of the co-parcenary property, but I am unable to see that the appointment of a guardian under the Guardians and Wards Act is necessary for the purpose. If circumstances arise hereafter, it may be necessary to appoint somebody, probably the mother, as the guardian of the persons of the minors, but at the present stage I see no necessity for such an appointment being made. It may incidentally be remarked that the trial Judge has expressed the opinion that the interests of the mother clash with the minors and that she is not a fit person to be appointed their guardian. On the materials placed on the record, this view of the learned Judge cannot be sustained. The question however does not arise under the circumstances of the case. The opinion expressed by the trial Judge on this matter shall not therefore affect any future proceedings that the parties may take. Formally I dismiss this appeal with costs.

S.C./R.K.

Appeal dismissed.

A. I. R. 1937 Lahore 919

YOUNG, C. J. AND MONROE, J.

Pandit Nathu Ram — Petitioner.

v.

Commissioner of Income-tax Lahore — Respondents.

Civil Ref. No. 14 of 1935, Decided on 11th December 1935, made by Commissioner of Income-tax, Punjab, North West Frontier and Delhi Provinces, Lahore, D/- 13th March 1935.

Income-tax Act (1922), S. 13—Accounts—Money brought into cash account—Satisfactory explanation must be given as to why it came in — In absence of such explanation, account can be regarded as unsatisfactory.

The procedure of the assessing authority is a judicial one and he ought to act on evidence. But where money is brought into cash account, he has the right to require a satisfactory explanation of how and why it came in; and in the absence of a satisfactory explanation or if he receives an explanation which he cannot believe, the assessing officer is entitled to regard the account as unsatisfactory. If he finds that a money lender is in the habit of showing in his books that loans

carrying interest have been repaid without interest or that a loan secured by a note has been renewed by a new note without any provision for interest, he is at liberty to consider the accounts unsatisfactory. [P 920 C 2]

Kirpa Ram Bajaj — for Petitioner.

J. N. Aggarwal and *S. M. Sikri* —
for Respondents.

Monroe, J.—The following question has been referred to this Court by the Commissioner of Income-tax under S. 66 (2), Income-tax Act:

Was there any material for the finding of fact that the accounts tendered by the assessee were not a true and complete record of his business transactions?

The assessee *Nathu Ram* is a money lender and, if we were to accept the arguments of his counsel, a philanthropist. The figures supplied by him show a capital of Rs. 1,09,874 in cash which produced in the year of the assessment a net sum of Rs. 597. He had been able to persuade the Commissioner of Income-tax that as regards Rs. 40,000 of this sum, which was outstanding on loan, that loan was carrying no interest. So even allowing for this, the large capital of roughly Rs. 70,000 produced a net revenue of about Rs. 600. It is not surprising that the Income-tax Officer was dissatisfied and his examination of the assessee's books revealed further that in 1931-1932 the capital account was increased by Rs. 12,280 made up of small items, and in 1932-1933 by Rupees 12,498 similarly made up of small items, and in 1933-1934 by Rs. 3,143 also made up of small items. The explanation given of all this was that he had all this money lying at home in cash and brought it into his cash balances as required. The Income-tax Officer also found that the assessee usually accepted on his notes the principal advanced only, giving up interest altogether. He cites two instances, a note or notes for the sum of Rs. 3,366 on which no interest was received when the capital was paid off, and the renewal of notes for Rs. 4,883 without any payment of interest being shown in the books and without any interest being added to the capital sum secured by the notes. As a result of the examination of the books, the Income-tax Officer came to the conclusion that they did not disclose the true state of the assessee's income and this decision has been upheld on appeal by the Assistant Commissioner and the Commissioner of Income-tax.

The argument placed before us for the assessee is that the books, which were arithmetically correct, were produced to the Income-tax authorities and unless they could show that items in those books were incorrect, they were bound to accept the books; in other words it was necessary for the Income-tax authorities to produce evidence or cause to be produced evidence before themselves showing that the statements in the books or some of them were false. We cannot agree with the proposition advanced by the learned counsel, though we do certainly agree with his contention that the procedure of the assessing authority is a judicial one and that he ought to act on evidence. But in our opinion in a case such as this, where money is brought into cash account, he has the right to require a satisfactory explanation of how and why it came in; and in the absence of a satisfactory explanation or if he receives an explanation which he cannot believe, the assessing officer is entitled to regard the account as unsatisfactory. If he finds that a money lender is in the habit of showing in his books that loans carrying interest have been repaid without interest, or that a loan secured by a note has been renewed by a new note without any provision for interest, he is in our opinion at liberty to consider the accounts unsatisfactory. That is all that has been done in the present case by the Income-tax Officer and it is clear that he had ample material, as shown in his assessment order in Annexure B in the printed book, for the finding of fact that the accounts were not a true and complete record.

Accordingly we answer the question in the affirmative. There will be no order as to costs, the assessment being on a rosy estimate of the assessee's income.

K.B./R.K. *Answer in affirmative.*

A. I. R. 1937 Lahore 920

TEK CHAND, J.

Hans Raj—Plaintiff—Appellant.

v.

Banarsi Lal and *others*—Defendants—
Respondents.

Second Appeal No. 746 of 1936, Decided on 20th January 1937, from order of Senior Sub-Judge, Jhelum, D/- 7th April 1936.

(a) Grant—Construction—Two conflicting descriptions of subject matter of grant—That which is more certain, stable and least likely to have been inserted inadvertently, must prevail.

Where there are two conflicting descriptions of the subject matter of a grant, or two conflicting parts of the same description, that which is the more certain and stable, and the least likely to have been inserted inadvertently, must prevail if it sufficiently identifies the subject matter. Applying this rule to documents in which there is a conflict between the description of the boundaries of the land conveyed and the description of the quantity, it has been held that the description of the boundaries, if it is precise and accurate, dominates the description of the quantity. But if the description of the boundaries is vague and uncertain, it yields to the description of the quantity: 37 Cal 293; 14 I C 286; A I R 1924 Mad 493 and 14 W R 5 (P C), Rel. on. [P 922 C 1]

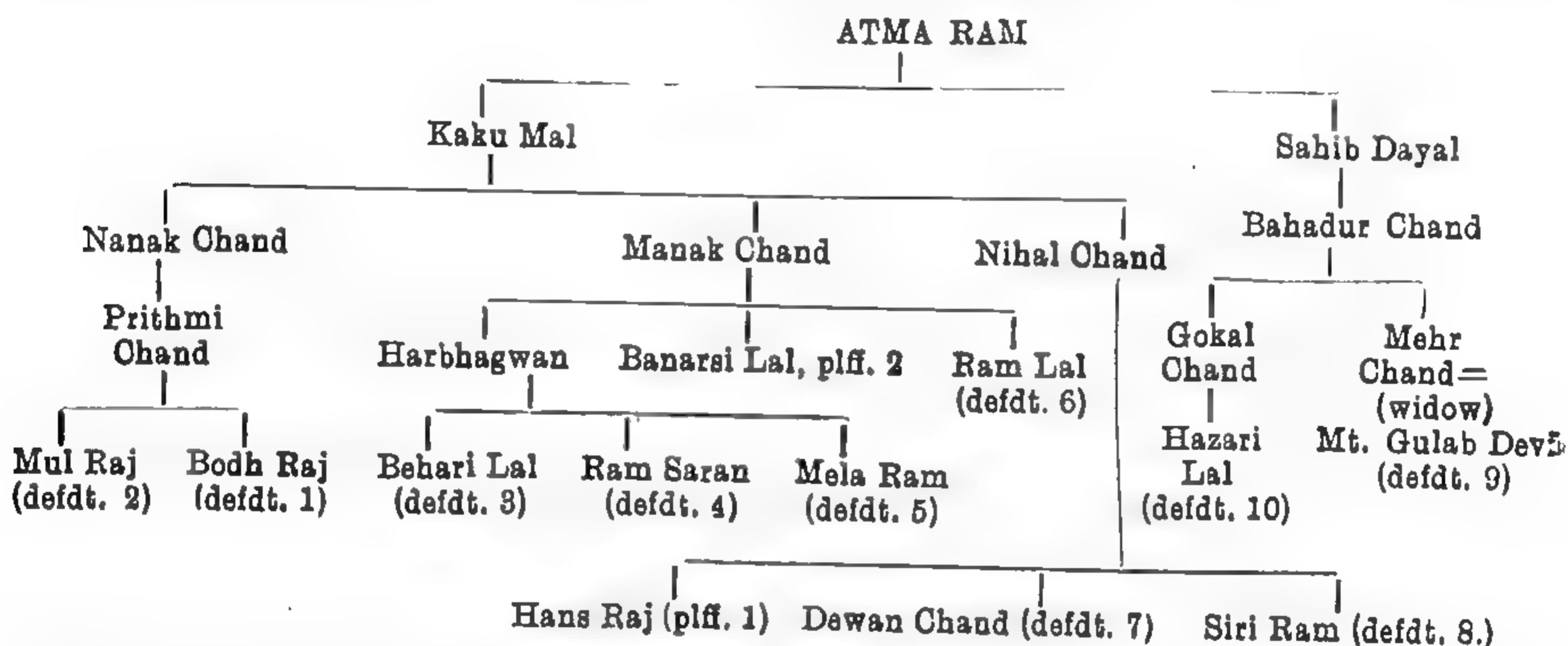
(b) Evidence Act (1872), S. 90 — Execution and contents of lost ancient document are not proved merely by production of 30 years' old copy — With other evidence it may raise presumption of genuineness of original.

The execution and contents of a lost ancient document cannot be proved merely by the production of a copy, which itself is over 30 years old; but this copy, considered with the other evidence, may give rise to a presumption as to the genuineness of the original: A I R 1936 Oudh 87, Rel. on; A I R 1935 P C 132, Expl.; Case law referred. [P 924 C 1]

Arjan Das—for Appellant.

Amar Nath Chona—for Respondents.

Judgment. — The following pedigree table will be helpful in understanding the facts of this case :



On 2nd October 1932 Mt. Gulab Devi, widow of Mehr Chand, and Hazari Lal, son of Gokal Chand (defendants 9 and 10), mortgaged a plot of vacant site, 2 kanals in area, marked A B E G H I F D C on the plan, Ex. P. A., to Baisakhi Ram (defendant 11), for Rs. 99. In the mortgage deed it was stated that the mortgaged site belonged to the mortgagors. On 14th November 1934 Hans Raj, son of Nihal Chand, and Banarsi Lal, son of Manak Chand (plaintiffs), brought a suit for declaration that the site belonged to them and defendants 1 to 8, that they all were in joint possession, and that defendants 9 and 10 had no right to mortgage it to defendant 11. The suit was contested by defendants 9, 10 and 11 who denied the plaintiffs' allegation that they were co-sharers in the site in dispute and pleaded that it belonged exclusively to defendants 9 and 10, who had validly mortgaged it to defendant 11. The trial Judge granted the plaintiffs a declaration that they were joint owners to the extent of 2/9th in the northern portion of the site in dispute,

(18 marlas in area) marked E B A C D F on the plan and of 2/9th share in one-half of the remaining site, marked E G H F, (22 marlas in area), that defendants 1 to 8 were the owners of the remainder, and that defendants 9 and 10 had no concern with any part of the suit property. The plaintiffs and defendants 9 and 10 filed cross-appeals before the senior Subordinate Judge, who found that the plaintiffs were joint owners to the extent of 2/9th share in the plot E B A C D F (18 marlas in area), the remaining 7/9th share in this plot being the property of defendants 1 to 8, and to this extent he maintained the decree of the trial Court. With regard to the southern portion, E G H F, he held that the plaintiffs had failed to prove that they had any share in it and accordingly he dismissed their suit so far as this plot was concerned. The plaintiff, Hans Raj, has preferred a second appeal and prays that the suit be decreed in full. Defendants 9 and 10 have filed cross-objections urging that the suit be dismissed in its entirety.

Both the Courts below have found as a fact that in S. 1902 (1845 A. D.) the Sikh ruler of the day made a grant of a plot of land to Kaku Mal, ancestor of the plaintiffs and defendants 1 to 8, from whom plaintiffs 1 and 2 had inherited 1/9th share each, and the remaining 7/9th had devolved on defendants 1 to 8. The original grant is stated to have been lost, but a certified copy of it, which is on the record of a case decided judicially in 1874, has been produced. The boundaries of the plot which was the subject of the grant, as given in the copy, have been found to tally with those of the entire site in dispute (which is 2 kanals or 40 marlas in extent), but the area is stated in the copy to be 18 *mandlas* only. The learned senior Subordinate Judge has held that a *mandla* is another name for a *marla* and that the area as given in the gift deed should prevail against the boundaries. He has accordingly held that the plaintiffs are owners of 2/9th of 18 marlas only, which he has marked as E B A C D F. In this connexion it is necessary to bear in mind the general rule of construction that where there are two conflicting descriptions of the subject matter of a grant, or two conflicting parts of the same description, that which is the more certain and stable and the least likely to have been inserted inadvertently must prevail, if it sufficiently identifies the subject matter. Applying this rule to documents in which there is a conflict between the description of the boundaries of the land conveyed and the description of the quantity, it has been held that the description of the boundaries, if it is precise and accurate, dominates the description of the quantity. But if the description of the boundaries is vague and uncertain, it yields to the description of the quantity: *See* 37 Cal 293¹ (at p. 308) where the English authorities on the subject are collected; *see also* 14 I C 286,² 78 I C 414³ and 14 W R 5.⁴ In the last-mentioned case a decree had directed that the plaintiff should obtain

possession of land according to the boundaries given in the plaint and also specified the quantities of land of which he has to obtain possession, and it turned out that those quantities were not strictly accurate. It was held by their Lordships of the Privy Council that the decree should be interpreted as if it were a conveyance of land stating the boundaries and then saying that it contains so many acres; and that the plaintiff was entitled to all the land contained within the boundaries stated in the plaint, the mistake in the quantities stated in the decree being merely a false description.

Applying these rules to the grant in question, I have no doubt that the decision of the learned Senior Subordinate Judge on this point is erroneous. The boundaries of the land comprised in the grant, as set out in the deed, are precise and clear; they are the more certain and stable and the least likely to have been inserted inadvertently, and there is nothing in the surrounding circumstances to indicate that a smaller area was granted. Therefore, if the terms of the grant can be taken to have been proved by the production of the certified copy, the description of the boundaries must prevail over the description of the area, and it must be held that the true interpretation of the deed is that the Sikh ruler granted to Kaku Mal the entire site in dispute, and consequently the plaintiffs have in it the share claimed by them.

Mr. Chona for the contesting respondents (defendants 9 and 10) urges however, that the alleged grant to Kaku Mal cannot be held to have been proved by the production of the certified copy from the record of the suit decided in 1874. The original grant has not been produced and the lower Courts have held, after a consideration of all the circumstances, that it may be presumed to have been lost, and this finding has not been challenged before me. The copy produced is admittedly over 30 years old and appears to have been prepared, under orders of the presiding officer, from the original which was produced from proper custody at the time.

The lower Courts have held that the execution and terms of the original grant may be presumed to have been proved under S. 90, Evidence Act by production of the certified copy. This was no doubt the prevailing view for many years. It had

1. Durga Prasad Singh v. Rajendra Narain Bagchi, (1910) 37 Cal 293 = 4 I C 713 = 10 Cr L J 570.

2. Poosapati Rudra v. Maharaja of Jeypore, (1912) 14 I C 286 = 23 M L J 97.

3. Subbayya Chakiliyan v. Muttiah Goundan, A I R 1924 Mad 493 = 78 I C 414 = 46 M L J 182.

4. Mahomed Amunodeen Khan v. Moozeffer Hossein Khan, (1870) 14 W R 5 = 5 Beng L R 570 (P O).

been held in numerous cases, following the leading case reported in 5 Cal 886,⁵ that if a document was shown to have been lost in proper custody, and to be more than 30 years old, secondary evidence of its contents may be given under S. 65 (c) and S. 90, without proof of execution. See 22 All 294,⁶ 41 All 592,⁷ 93 P R 1910,⁸ 46 I C 344,⁹ 52 I C 825¹⁰ and 46 Mad 92.¹¹ This view received support from the decision of their Lordships of the Privy Council in 16 Cal 753¹² where a document which had been produced in a former suit, decided more than 30 years ago and which had been proved to have been lost subsequently, was held proved by the production of a copy, which was on the record of that suit and bore an endorsement, "a copy in accordance with the original", signed by the Judge who presided in that Court. In that case Lord Hobhouse, after concurring with the opinion of the Courts in India as to the genuineness of the copy, observed that "when the copy is looked at, it establishes the deed of gift on which the respondents rely". Again, in 34 Cal 1059¹³ their Lordships accepted a certified copy of an alleged ancient evaznama or exchange deed, the original of which had been lost, as admissible for proving its contents. In this case however, the question does not appear to have been raised directly in the Courts below, nor was it discussed at any length.

The next Privy Council case bearing on the point is 52 Mad 453.¹⁴ There the respondents relied upon an ancient grant. The original grant had been lost, and a copy, proved to have been made more than 30 years ago, had been produced from the

custody of the successors of the alleged grantee. On objection being taken to its admissibility, their Lordships held that the document was properly admitted as secondary evidence of the terms of the grant. Lord Atkin, in delivering the judgment of the Judicial Committee, observed (page 459):

Their Lordships agree with the learned Chief Justice and his colleagues in the High Court that the document was admissible as evidence of the terms of the lost original. The document is over 30 years old and is produced from proper custody. By S. 90, Evidence Act of 1872 the Court may, therefore, presume the signatures authenticating the copy to be genuine. The statement to which the signatures are appended, viz. that the document is a copy of the original, appears to be evidence both for the reason given by the Chief Justice, i. e. as a statement made by a deceased person in a document relating to a relevant fact, and also as an admission made by a party and a predecessor-in-title of the parties. The document, being admissible, is secondary evidence of the terms of the original grant. The Court therefore must proceed upon the footing that the express terms of the original written grant are before it, and must proceed to construe them.

The question once again came before their Lordships in 57 All 494¹⁵ and in this case it has been held that the view taken in 5 Cal 886⁵ and the other cases in India which followed it, is opposed to the plain wording of S. 90, which requires the production to the Court of the particular document, in regard to which the Court may make the statutory presumption. It was accordingly ruled that if the document produced was a copy, admitted under S. 65 as secondary evidence, and it was produced from proper custody and was over 30 years old, then the signatures authenticating the copy may be presumed to be genuine, but the production of the copy was not sufficient to justify the presumption of due execution of the original under S. 90. In this case their Lordships expressly overruled 5 Cal 886,⁵ 22 All 294,⁶ 41 All 592⁷ and 30 N L R 155,¹⁶ and approved of the contrary view expressed by the Judicial Commissioner of the Central Provinces in 15 N L R 192=53 I C 947.¹⁷ It does not appear from the report that the previous decisions of the Judicial Committee in 16 Cal 753¹² and 34 Cal 1059¹³ were brought to their Lordships' notice.

5. Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno, (1880) 5 Cal 886=6 O L R 199.
6. Ishri Prasad Singh v. Lalli Jas Kunwar, (1900) 22 All 294=1900 A W N 82.
7. Dwarka Singh v. Rama Nand, A I R 1919 All 232=51 I O 275=41 All 592=17 A L J 711.
8. Sawan Singh v. Karimbaksh, (1910) 93 P R 1910=8 I C 353=128 P W R 1910=186 P L R 1910.
9. Raj Bahadur Lal v. Bindeshri, A I R 1918 Oudh 145=46 I C 344.
10. Banwari Lal Singh v. Dwarkanath Missir, (1919) 52 I C 825.
11. Subrahmanya Somayajulu v. Seethayya, A I R 1923 Mad 1=70 I C 729=46 Mad 92 (F B).
12. Luchman Singh v. Puna, (1889) 16 Cal 753=16 I A 125=5 Sar 370 (P O).
13. Shahzadi Begam v. Secy. of State, (1907) 34 Cal 1059=34 I A 194 (P O).
14. Seethayya v. Subrahmanya Somayajulu, A I R 1929 P C 115=117 I C 507=56 I A 146=52 Mad 453 (P O).

15. Basant Singh v. Brij Raj Saran Singh, A I R 1935 P C 132=156 I O 864=62 I A 180=57 All 494 (P O).
16. Gopinath v. Moti Ohiwa, A I R 1934 Nag 67=148 I C 561=30 N L R 155.
17. Shripuja v. Kanhaya Lal, A I R 1918 Nag 114=53 I C 947=15 N L R 192.

At p. 503 of the report their Lordships referred to 52 Mad 453¹⁴ in the following context :

If the document produced is a copy, admitted under S. 65 as secondary evidence, and it is produced from proper custody and is over 30 years old, then the signatures authenticating the copy may be presumed to be genuine, as was done in 52 Mad 453¹⁴; in that case the dispute was as to the terms of a grant which had admittedly been made.

Their Lordships then proceeded to consider the 'positive evidence' in the case, and in this category they included the certified copy of the alleged will. Relying upon the "principles laid down in 14 M I A 67¹⁸," and having regard to the surrounding circumstances and the probabilities, and particularly the fact that the copy showed that the original will had been produced in the former litigation many years before and had been accepted by the then presiding officer as a true document, their Lordships held that a very strong presumption arose in favour of the genuineness of the will, which their Lordships did not find themselves at liberty to disregard even though there was no direct evidence of the execution of the will.

In this state of the authorities, I confess the legal position is by no means very clear. But it seems to me that in view of the latest pronouncements of their Lordships of the Privy Council, the Courts in India are bound to hold that the execution and contents of a lost ancient document cannot be proved merely by the production of a copy, which itself is over 30 years old; but that this copy, considered with the other evidence, may give rise to a presumption as to the genuineness of the original. This view appears to have been taken by a Division Bench of the Oudh Chief Court in a case decided recently and reported in 159 I C 780¹⁹ at pp. 784-5. In the case before us there is no doubt that the copy relied upon is genuine. It was prepared under the authority of the presiding officer of the Court in 1874, and is signed by him. It shows that the original was produced in that litigation, to which the ancestors of the plaintiffs and defendants 1 to 10 were parties, and was then regarded as the decisive piece of evidence.

18. *Rajendra Nath v. Jagendra Nath*, (1870-72) 14 M I A 67=7 Beng L R 216=15 W R 41=2 Suther 422=2 Sar 666 (P C).

19. *Shamsunnissa Bibi v. Ali Asghar*, A I R 1936 Oudh 87=159 I C 780=1935 O W N 1376.

Again there is the important fact that in 1932, shortly before the mortgage in question, Mt. Gulab Devi, defendant 9, in execution of a money decree obtained by her against Benarsi Lal, plaintiff 2, attached 1/9th share of the entire site in dispute, alleging that it was the property of Benarsi Lal. The attachment was subsequently raised on Benarsi Lal paying her the decretal amount, but these proceedings clearly show that she regarded the descendants of Kaku Mal as co-owners of the entire plot. Again, in these execution proceedings, a plan of the plot was filed signed by Hazari Lal, defendant 9, which described Benarsi Lal as owner of 1/9th and there is also on that record an affidavit by the Mukhtar of Mt. Gulab Devi admitting Benarsi Lal as a co-sharer to the extent of 1/9th. In my opinion, these admissions and conduct on the part of the contesting defendants, the certified copy produced from the record of the 1874 suit, and the fact that the original was produced in that litigation, to which the predecessors of the contestants in this case were parties and that it was considered genuine and decisive at the time, make the principles in 14 M I A 67,¹⁸ as explained by their Lordships in 57 All 494,¹⁵ fully applicable, and therefore it must be held that the whole of the site in dispute had been granted to Kaku Mal by the Sikh ruler, and that the plaintiffs have a 2/9th share in it, along with defendants 1 to 8. I accordingly accept the appeal and grant the plaintiffs the declaration prayed for in the plaint. The cross-objections fail and are dismissed. Having regard to all the circumstances, I leave the parties to bear their own costs throughout.

R.W./R.K.

Appeal accepted.

A. I. R. 1937 Lahore 924

TEK CHAND, J.

Ram Saran Das and others — Decree-holders — Appellants.

v.

Kesho Nath, Judgment-debtor and another, Auction-purchaser—Respondents.

Execution First Appeal No. 344 of 1936, Decided on 8th January 1937, from order of Senior Sub-Judge, Delhi, D/. 21st May 1936.

Civil P. C. (1908), O. 21, Rr. 71 and 84—Deficiency—Re-sale held not forthwith but after long time—Defaulting purchaser is not liable for deficiency on re-sale.

The defaulting purchaser is answerable for the loss on the re-sale, only if the re-sale takes place forthwith. [P 925 C 2]

The first sale had taken place on certain date when the auction-purchaser defaulted. The decree-holder instead of having the re-sale conducted properly and openly the same day, or on the following day, or as soon thereafter as was reasonably possible, caused a farcical re-sale to be held in collusion with the auctioneer and purchased the property himself for a ridiculously small sum. The inquiry into the propriety of this sale continued for 17 months, and eventually the sale in favour of the decree-holder was set aside:

Held: that the subsequent sale conducted after long delay could not be said to be a sale held 'forthwith' within the meaning of R. 84 of O. 21, Civil P. C., and therefore the defaulting purchaser was not liable to make good the deficiency: *A I R 1916 Lah 445* and *A I R 1929 Lah 744, Rel. on; A I R 1919 Pat 102* and *A I R 1930 Mad 761 (F B), Ref.* [P 925 C 1]

Bishan Narain — for Appellants.

Vishnu Datta — for Respondents.

Judgment.—In execution of a mortgage decree obtained by Ram Saran Das, appellant, against one Kesho Nath, the mortgaged property consisting of certain houses at Delhi was sold. The sale-proceeds were however found insufficient to discharge the decretal amount. Accordingly the decree-holder obtained an order under O. 34, R. 6 for a personal decree against the judgment-debtor and proceeded to recover the deficiency by attachment and sale of other property belonging to the judgment-debtor, including house No. 927. It appears that this house No. 927 had previously been mortgaged by the judgment-debtor to Mt. Hidayat-ul-Nisa, who had brought a suit to enforce the mortgage charge. The sale proclamation was issued on 8th November 1932 and the sale held on 28th November 1932. On that day, the only bid offered was that of Mutsaddi Lal, respondent, for Rs. 5,000. This bid was accepted, but Mutsaddi Lal failed to deposit 25 per cent. of the sale price. Accordingly the auctioneer held a re-sale of the property on the following day (29th November 1932) when the house was purchased by the decree-holder himself for Rs. 800. The judgment-debtor objected that the re-sale had not been properly conducted and was vitiated by material irregularities. After a lengthy inquiry, the Court set aside this re-sale on 6th April 1934. It held that the re-sale was a "farce", having been held in collusion between the auctioneer and the

decree-holder. It was therefore ordered that the property be re-sold. A fresh proclamation was issued on 30th August 1934, and another sale held on 29th October 1934, when the house was sold to a third party for Rs. 3,100. On 10th April 1935 the decree-holder applied under O. 21, R. 71 that Mutsaddi Lal, the purchaser at the first sale of 28th November 1932, be required to pay Rs. 1,900, which was the difference between the price at which the property had been sold to him and the price realized at the re-sale of 29th October 1934. The learned Subordinate Judge has dismissed the application holding that Mutsaddi Lal is not liable, because (1) full information with regard to the mortgage charge of Mt. Hidayat-ul-Nisa on the house in question had not been given to him at the time, and (2) the re-sale of 29th October 1934 could not be said to have been effected "forthwith" as required by O. 21, R. 84. The decree-holder appeals.

In my opinion, this appeal is without force and must be dismissed. As already stated, the sale in favour of Mutsaddi Lal was held on 28th November 1932 and the re-sale for Rs. 3,100 was held on 29th October 1934, nearly two years later. R. 84 lays down that if the purchaser at an auction sale commits default in paying 25 per cent. of the amount of his purchase money to the officer conducting the sale, "the property shall forthwith be re-sold". R. 71 provides that any deficiency of price which may happen on a re-sale by reason of the purchaser's default and all expenses attending such re-sale shall be certified to the Court by the officer holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money. It is obvious that the defaulting purchaser is answerable for the loss on the re-sale, only if the re-sale takes place forthwith. In 32 I C 907¹ it was laid down that in case of default on the part of a purchaser at an auction-sale to deposit the purchase money, the property must be re-sold forthwith. Fresh bids should be invited soon afterwards and no fresh proclamation need issue. But where a period of nearly six months intervened between the default of

1. *Beli Ram v. Sohan Singh*, *A I R 1916 Lah 445=32 I C 907*.

the auction-purchaser and the final sale, the requirements of R. 84 cannot be said to have been complied with and the auction-purchaser could not be called upon to pay the deficiency in price. In A I R 1929 Lah 744,² the auction-sale could not take place for nearly two years owing to the record of the case having been sent for by the High Court in connexion with another case and it was held that the provisions of R. 84 were not complied with and the defaulting purchaser was not liable. Indeed, some Courts have interpreted the word "forthwith" rigidly and have held that the re-sale should be conducted the same day or, if owing to the lateness of hour it cannot be done, it should be conducted on the day following, failing which the defaulting purchaser is not liable: see 50 I C 59.³ The Madras High Court however in 53 Mad 900⁴ has held that the word "forthwith" should be interpreted in a reasonable manner as being equivalent to "as expeditiously as the circumstances permit". In the present case, there can be no doubt that the responsibility for the delay in conducting the re-sale lay principally with the decree-holder. The first sale had taken place on 28th November 1932 when the auction-purchaser defaulted. The decree-holder instead of having the re-sale conducted properly and openly the same day, or on the following day, or as soon thereafter as was reasonably possible, caused a farcical re-sale to be held in collusion with the auctioneer and purchased the property himself for the ridiculously small sum of Rs. 800. The inquiry into the propriety of this sale continued for 17 months, and eventually the sale in favour of the decree-holder was set aside. The subsequent sale conducted on 29th October 1934 cannot therefore be said to be a sale held "forthwith" within the meaning of R. 84, and therefore for this reason Mutsaddi Lal is not liable to make good the deficiency.

There is also force in the second point mentioned by the lower Court. As already stated, the house in dispute had been mortgaged by the judgment-debtor to Mt. Hidayat-ul-Nisa. In the proclamation

which was issued on 8th November 1932, for the sale of the property on 28th November 1932, a note was added in the margin that Mt. Hidayat-ul-Nisa claimed to be the mortgagee of the property but the judgment-debtor and the decree-holder did not admit her claim. The amount of the mortgage was not mentioned nor was it disclosed that the suit had actually been brought by Mt. Hidayat-ul-Nisa for enforcement of the mortgage. The auctioneer issued printed hand bills advertising the sale for 28th November 1932. In these hand bills, no mention whatever was made of the mortgage or the fact that a suit was pending nor were the contents of the note on the sale proclamation repeated. Mutsaddi Lal says that he was misled by these hand bills and made a bid for Rs. 5,000 in the belief that the property was unencumbered. By the time the re-sale came to be held in October 1934, Mt. Hidayat-ul-Nisa had obtained a decree on foot of her mortgage and had assigned her rights to one Tikaya Ram. In the sale proclamation issued on 30th August 1934 for the re-sale on 29th October 1934, this fact was clearly mentioned and therefore the equity of redemption fetched Rs. 3,100 only. For this reason also, Mutsaddi Lal is not liable. The appeal fails and is dismissed with costs.

P.R./D.S.

Appeal dismissed.

A. I. R. 1937 Lahore 926

ADDISON AND DIN MOHAMMAD, JJ.

Jiwan Dass — Defendant — Appellant.
v.

Peoples Bank of Northern India,
Plaintiff and others, Defendants —
Respondents.

First Appeal Nos. 174 and 412 of 1936,
Decided on 29th January 1937, from preliminary decree of Senior Sub.Judge, Multan, D/- 24th February 1936.

(a) Mortgage—Equitable—Deposit of copy of jamabandi does not constitute equitable mortgage.

A copy of a jamabandi and a copy of a plan submitted to the Municipality for sanction to build on the site are not documents of title and hence their deposit does not constitute a valid equitable mortgage: *Case law relied on.*

[P 928 C 1, 2]

(b) Companies Act (1913), S. 171—Company in liquidation successful in action instituted by itself — Defendants wanting to take defensive proceeding—Leave is not necessary.

2. Hari Singh v. Sanwan Mal-Gopi Chand, A I R 1929 Lah 744=121 I C 189.

3. Kameshwar Narain Singh v. Harbans Babui, A I R 1919 Pat 102=50 I C 59.

4. Venkatasubbiah v. Akkamma, A I R 1930 Mad 761 = 127 I C 303 = 53 Mad 900 = 59 M L J 267 (F B).

When once an action by the company in liquidation itself has been proceeded with, and is successful, there is no necessity for the defendants in the action to obtain leave for any defensive proceeding on their behalf, as the defendants cannot be said to proceed with or commence any legal proceedings against the company : *A I R 1918 Lah 181 (F B)* and *Humber v. Griffiths*, 85 *L T* 141, *Foll.* ; *A I R 1936 Lah 401, Disting.*

[P 929 C 2]

(c) **Hindu Law—Debts—Promissory note—Member of joint family not participating in its execution is not personally liable.**

If a member of a Hindu joint family does not participate in executing a promissory note, he cannot be held to be personally liable for the loan ; his liability only extends to his interest in the joint family property as a member of the Hindu joint family : *A I R 1935 Lah 735* and *A I R 1937 Lah 247, Rel. on.* [P 930 C 1]

J. L. Kapur, S. M. Sikri for *J. N. Agarwal* — for Appellant.

D. C. Ralli and Bhagwat Dayal — for Respondents.

Din Mohammad, J. — This judgment will dispose of Civil Appeals Nos. 174 and 412 of 1936. They have arisen in the following circumstances :

The Peoples Bank of Northern India, now in liquidation (hereinafter called the Bank), instituted a suit for recovery of Rs. 15,101.1.6 against Amir Chand, Jowala Das, Kanshi Ram, Ram Lal, Attar Chand and Jiwan Das by sale of the three different properties described in the plaint. The Bank alleged that Amir Chand, Jowala Das and Kanshi Ram raised a loan of Rs. 25,000 from it on a promissory note dated 23rd October 1926 and on the same day they mortgaged to it the properties in suit by deposit of title-deeds. On 28th May 1928, the same debtors executed a fresh promissory note in its favour on the same security as before. On 1st January 1932 a new promissory note for Rupees 14,341.6.6 was again executed by the same persons keeping the original security intact. The Bank further averred that subsequent to their mortgage one of the properties was fraudulently and fictitiously leased out to Ram Lal and Attar Chand for a period of 10 years and that another property, with which we are at present concerned, was in the same manner transferred to Jiwan Das on 15th May 1934.

The defendants put forward various pleas on which necessary issues were framed. The Subordinate Judge found in favour of the Bank on almost all the important issues and made a decree in the following terms :

I accordingly grant plaintiffs a preliminary decree for Rs. 15,101-6-0 with costs against the defendants on the property mortgaged. Defendants to pay the decretal amount within three months from the date of this order, otherwise the plaintiffs can realize the money by the sale of the property mortgaged. Defendants to pay future interest at the rate as mentioned in the pro-notes.

From this decree, Jiwan Das has preferred an appeal, mainly alleging that the Bank was not a mortgagee of the property sold to him and that the sale to him was neither fictitious nor fraudulent. This is Appeal No. 174 of 1936. Attar Chand has appealed against the decree on his own behalf as well as on behalf of his brother Ram Lal on the ground that no personal liability could be imposed upon them inasmuch as they were not the executants of the promissory notes. This appeal is No. 412 of 1936.

Counsel for the appellant Jiwan Das has contended that so far as the property sold to him is concerned, the only documents that are said to have been deposited with the Bank were : (1) a copy of a jamabandi for the year 1922-23, and (2) a copy of the plan submitted to the Municipal Committee by Jowala Das for sanction to build on the site in suit ; and that these documents not being documents of title, their deposit does not constitute a valid equitable mortgage. In support of his contention, he has referred to 16 *Lah 1113*,¹ *A I R 1935 Lah 10*,² *A I R 1936 Lah 251*,³ 11 *Lah 564*,⁴ *A I R 1935 Lah 957*,⁵ 11 *Rang 239*⁶ and 10 *Rang 403*.⁷ All these authorities, in our view, support his contention.

In 16 *Lah 1113*¹ it was held that the documents to be deposited should be original documents by which the title to the

1. *Punjab and Sind Bank Ltd., Lyallpur v. Ganesh Das-Nathu Ram*, *A I R 1935 Lah 721=161 I C 429=16 Lah 1113=38 P L R 145.*

2. *Hem Raj v. Simla Banking & Industrial Co., Ltd.*, *A I R 1935 Lah 10=159 I C 1085.*

3. *Jowala Das Gobind Ram v. Thakur Das*, *A I R 1936 Lah 251=158 I C 562.*

4. *Ralli Brothers v. Punjab National Bank, Ltd.* *A I R 1930 Lah 920=129 I C 21=31 P L R 934=11 Lah 564.*

5. *Punjab and Sind Bank Ltd., Lyallpur v. Gurdit Singh*, *A I R 1935 Lah 957=161 I C 209=38 P L R 354.*

6. *Chettyar Firm v. Ma Joo Teen*, *A I R 1933 Rang 299=147 I C 1105=11 Rang 299.*

7. *Ma Joo Teen v. Ma Thein Nyun*, *A I R 1932 Rang 185=140 I C 487=10 Rang 403.*

property in question was conferred on the mortgagor or his predecessors-in-interest, as the deposit of such documents alone could justify an inference that the parties intended to create a lien on the property. It was on this basis that the deposit of the copy of a jamabandi was considered not sufficient to constitute an equitable mortgage. In A I R 1935 Lah 10³ Coldstream, J. remarked :

The doctrine of equitable mortgage surely requires the mortgagor to deprive himself of the possession of the documents which create his title so as to render him unable to deal with the property upon the assertion that the title is still with him.

In that case a copy of the original deed, which was in existence, and the production of which was within the power of the mortgagor, was considered insufficient to create an equitable mortgage.

In A I R 1936 Lah 251³ a distinction was drawn between documents creating title and documents evidencing title, and it was observed that it was only the documents of the former class that created an equitable mortgage. In that case also, a certified copy of a jamabandi entry had been deposited and it was held to be insufficient for the purposes for which it was used. In 11 Lah 564⁴ a so-called mortgage by deposit of title deeds was held invalid inasmuch as the principal documents of title had not been deposited. In A I R 1935 Lah 957⁵ it was laid down that neither a copy of the jamabandi nor a copy of the mutation entry was a document of title.

In 11 Rang 239⁶ it was remarked that merely because a document related to the title to the property, it was not a 'document of title' or a 'title deed'. In that case a tax receipt and a certified copy of a survey map relating to the land in suit had been deposited and it was considered that these documents were not sufficient to create a mortgage.

In 10 Rang 403⁷ Cunliffe, J. remarked that even if a tax receipt and a copy of a map relating to immoveable property were the sole documents in respect of rights in the property, they were not 'documents of title' or 'title deeds' and the deposit of such documents, even with the intention of the parties to create a security thereby, could not constitute a valid mortgage.

As against this array of reported decisions, the only authority cited by the

counsel for the respondent is 48 Mad 454.⁸ In that case a ryotwari patta in respect of lands in the mufassal of the Madras Presidency was considered to be a document of title by the deposit of which an equitable mortgage could be validly created. In the first place it is not clear what sort of a document a ryotwari patta is. Secondly Srinivasa Ayyangar, J. remarked in the course of his judgment that :

So far as South India is concerned, there is no doubt that a patta has generally been regarded as a document of title.

It is obvious therefore that this authority is of no use to the respondent. Further, it is abundantly clear that even the Bank itself was not satisfied with the sufficiency of the documents deposited with it and more than once wrote to the mortgagors to deposit proper conveyance deeds in relation to the property in suit. On 25th January 1930 the Manager of the Bank wrote to the mortgagors to deposit as early as possible the deeds of conveyance of ibatas Nos. 24 and 25. On 13th February 1930 the mortgagors informed the Bank that the amount was sufficiently secured by the title deeds of property worth Rs. 60,000. On 16th June 1930 the mortgagors were however again reminded that they should at once send conveyance deeds of the two ibatas that they had promised to send. On all these grounds we have no hesitation in holding that there was no valid mortgage in favour of the Bank so far as the property sold to Jiwan Das is concerned.

Counsel for the respondent however has urged that inasmuch as the Subordinate Judge has found that the sale in favour of Jiwan Das was fictitious, collusive and fraudulent, he has no locus standi to find fault with the mortgage in favour of the Bank. So far as the collusive or the fraudulent nature of the transaction is concerned, we are clear that this point cannot be raised in this suit. A suit under S. 53, T. P. Act, can be instituted only on behalf of or for the benefit of all the creditors, and it cannot be denied that this suit is not of that nature. Moreover, it is not yet established that the Bank is unable to realize its dues from the other property mortgaged to it. We accordingly overrule this contention to this extent. In fact, counsel for the respondent in the end

8. Official Assignee, Madras v. Basudevadas Badrinarayana Doss, A I R 1925 Mad 723= 88 I C 401=48 Mad 454=48 M L J 423.

admitted that this plea could not be taken in the present case.

There only remains the question whether the sale in favour of Jiwan Das was fictitious. On that point too, we are prepared to hold in favour of the appellant. The Senior Subordinate Judge does not appear to have realised the distinction that exists between a fictitious transaction and a fraudulent transaction, and although he framed an issue covering both the aspects of the case, his judgment on issue 7 is mainly confined to the collusive or fraudulent nature of the transaction and does not touch the fictitious nature of the matter at all. There is abundant evidence on the record that this transaction did take place on the day on which it is said to have taken place, and that full consideration passed on that account.

On 9th April 1934 Messrs Jowala Das Sohan Lal entered into a compromise with Messrs Eduljee Dinshaw of Karachi and agreed to pay Rs. 12,000 to the latter in three instalments of Rs. 7,500, Rs. 2,500 and Rs. 2,000 respectively. Rs. 7,500 were to be paid at once, Rs. 2,500 were to be paid by 31st May 1934 and Rs. 2,000 were to be paid by 31st March 1935. On 18th April 1934, Jiwan Das paid Rupees 7,800 to Jowala Das and got the receipt registered. It was expressly stated therein that this was out of the sale price of ihatas Nos. 24 and 25. On the same day the amount was duly posted up in the cash book of the firm to which Jiwan Das belonged. On 19th April 1934 Messrs Wadhu Mal and Company, Advocates for Eduljee Dinshaw, executed a receipt in favour of Jowala Das acknowledging the payment of Rs. 7,500 towards the compromise decree mentioned above. This amount was duly entered in the bahis of Jowala Das too, which further showed an expense of Rs. 18-13-9 incurred by Jowala Das at Karachi. Similarly, on 15th May 1934, Jiwan Das appears to have paid a further sum of Rs. 4,700 to Jowala Das on account of the balance of the sale price of the two ihatas. A receipt to this effect was registered on the same day. This amount also has been duly posted up both in the bahis of Jiwan Das and those of Jowala Das. On 21st May 1934, Messrs Wadhu Mal and Company acknowledged the receipt of Rs. 2,500 from Jowala Das on account of the compromise decree. It is further proved that the parties appeared

before the Patwari on 12th May 1934 and had a report made to the effect that Jowala Das had sold the land in suit to Jiwan Das for Rs. 12,500 of which he had received Rs. 7,800 in cash and would take Rs. 4,700 on the day when the mutation would be attested. In our opinion this evidence is enough to establish the genuine nature of the transaction and the passing of the consideration in relation thereto. We accordingly hold that the Bank was not a mortgagee of the property in suit and that the transfer in favour of Jiwan Das is not in any manner affected by the alleged mortgage in favour of the Bank.

Before concluding, we may remark that counsel for the respondent has raised an objection that the appeal could not be instituted by Jiwan Das without obtaining leave of the Court under S. 171, Companies Act, inasmuch as the Bank had gone into liquidation at the time when the appeal was instituted. In this connection he relied on A I R 1936 Lah 401.⁹ That judgment however is not relevant to the case inasmuch as it proceeds on different facts. The authority applicable to the present case is 62 P R 1918¹⁰ in which, on similar facts, it was held by a Full Bench of the Punjab Chief Court that no leave was necessary. The decision in that case was based on a judgment of the House of Lords reported in 85 L T 141,¹¹ where Lord Davey had observed :

When once an action by the Company itself has been proceeded with, there is no necessity for the defendants in the action to obtain leave for any defensive proceeding on their behalf, and further remarked that the respondents having been successful in the lower Court cannot now object to the appellants defending themselves against the consequences of the judgment by the ordinary means of an appeal to this House.

In this case also, it was the Bank which had instituted the suit in the first instance and had come out successful in the litigation. The appellant cannot, in these circumstances, be said to have proceeded with or commenced any legal proceedings against the Company. We therefore overrule this objection.

On the grounds stated above, we accept the appeal of Jiwan Dass, set aside the de-

9. Peoples Bank of Northern India Ltd. v. Fateh Chand & Co., A I R 1936 Lah 401=164 I C 136=38 P L R 1104.

10. Kishen Singh v. Industrial Bank of India, A I R 1918 Lah 181=47 I C 392=62 P R 1918=32 P L R 1918 (F B).

11. Humber v. Griffiths, (1901) 85 L T 141.

decree of the Court below and dismiss the suit of the plaintiff so far as he is concerned. The property in his possession will not be affected by the alleged mortgage in favour of the Bank, nor by the decree obtained by the Bank against Jowala Das and others. Jiwan Das will get his costs of both the Courts from the Bank.

We now take up Civil Appeal No. 412 of 1936. Counsel for the respondent has frankly conceded that both Ram Lal and Attar Chand could not be held to be personally liable under the decree. Even otherwise there is ample authority in support of the proposition that if a member of a Hindu joint family does not participate in executing a promissory note, he cannot be held to be personally liable for the loan, his liability only extending to his interest in the joint family property as a member of the Hindu joint family: see 17 Lah 311¹² and 17 Lah 395.¹³ We accordingly accept the appeal and set aside the judgment of the Senior Subordinate Judge fixing personal liability upon them for the decree in suit. We make no order as to costs before us.

P.R./D.S.

Appeal accepted.

12. Mutsadi Lal v. Sakhr Chand, A I R 1936 Lah 735=161 I C 91=17 Lah 311=38 P L R 654.

13. Shiv Charan Das v. Hari Ram, A I R 1937 Lah 247=17 Lah 395=38 P L R 842.

A. I. R. 1937 Lahore 930

TEK CHAND, J.

Keshav Chander — Defendant —
Petitioner.

v.

Sher Singh — Plaintiff — Respondent.

Civil Revn. Petn. No. 699 of 1936, Decided on 14th January 1937, from decree of Addl. Judge, Small Cause Court, Amritsar, D/- 31st August 1936.

(a) Transfer of Property Act (1882), S. 108 — Applicability — Though not S. 108, its principle applies to Punjab.

Though S. 108, T. P. Act, is not in force in the Punjab, yet the principle underlying that section, relating to covenant for quiet enjoyment, is of universal application and applies as much to the territories in which the Transfer of Property Act is in force as to those to which that Act has not been extended. [P 931 C 1]

(b) Transfer of Property Act (1882), S. 108 — Lessor covenants to indemnify against only lawful title.

Where a lessor covenants to indemnify the lessee against all persons, this is but a covenant

to indemnify against lawful title: A I R 1929 Cal 272 and A I R 1933 Mad 465, Rel. on. [P 931 C 1]

Charanjiva Lal Aggarwal —

for Petitioner.

Mehr Chand Sud — for Respondent.

Order. — A garden at Amritsar belongs to Nazir Hussain, Abid Ali and Asghar Ali, sons of Muzaffur Ali. On 19th October 1934, they leased it for a term of 99 years to Keshav Chander. On 17th October 1935, Keshav Chander sub-let the garden for one year to Sher Singh for Rs. 525. One-half of the lease money, i.e. Rs. 262.8.0, was paid in advance and Sher Singh was let in possession. It appears that in April 1935, the owners, Nazir Hussain, etc., forcibly ejected Sher Singh before he could gather the fruit crop. Accordingly Sher Singh brought a suit against Keshav Chander for recovery of Rs. 500, claiming a refund of the amount paid in advance, the amount paid as dalali, the costs of keeping watch over the garden and taking out weeds, and Rs. 48.8.0 as damages. The main plea raised by the defendant was that the plaintiff was not entitled to a decree as he allowed Nazir Hussain to enter into possession without any lawful title and, indeed in collusion with him. It was also urged that the plaintiff was not entitled to a refund of the advance, as he had made default in paying the balance of the lease money in the month of March. It was further contended that no damages had really occurred or could be claimed. The trial Judge has passed a decree in favour of the plaintiff for Rs. 475 with proportionate costs.

It seems to me that the real point on which the decision of the case turns has not been considered by the Courts below. The lease by the defendant to the plaintiff no doubt contains a covenant for quiet enjoyment, but it is quite clear that his liability depends upon the question whether the act of his lessors (proprietors) in entering into possession of the garden was lawful or not. If the defendant had broken the terms of the original lease and on his default Nazir Hussain, etc., were entitled under the terms of that lease or under the general law to resume possession, the defendant is certainly liable to refund to the plaintiff the amount received by him in advance and also to indemnify him for any loss caused thereby. If however the act of Nazir Hussain and others was unjustified and they entered into possession unlaw-

fully as trespassers, the covenant for quiet enjoyment would not help the plaintiff. This argument appears to have been put forward before the learned Judge of the Court below, but he dismissed it with the cryptic remark that S. 108, T. P. Act, is not in force in the Punjab. This is no doubt true, but the principle underlying that section relating to the covenant for quiet enjoyment is of universal application and applies as much to the territories in which the Transfer of Property Act is in force as to those to which that Act has not been extended. It is settled law that where a lessor covenants to indemnify the lessee against all persons, this is but a covenant to indemnify against lawful title and, as observed by Woodfall in his standard work on the law of Landlord and Tenant, this is so

because, as it regards such acts as may arise from rightful claims, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant, if it were good against all the acts which the folly or malice of strangers might suggest; and therefore the law has properly restrained it within its reasonable import; that is to rightful title.

See also to the same effect A I R 1929 Cal 272¹ and A I R 1933 Mad 465.² No copy of the lease granted by Nazir Hussain and others in favour of Keshav Chander is on the record, nor is there any finding by the learned Judge as to whether the defendant had broken any of the conditions of the lease, and therefore Nazir Hussain and others were justified in taking possession of the garden from the plaintiff. In these circumstances I am constrained to hold that there has not been a proper trial of the case and it must be remitted for fresh inquiry on the point mentioned above. I accept the petition for revision, set aside the judgment and decree of the Court below and remit the case to it for disposal in accordance with the foregoing remarks. The costs shall abide this event.

D.S./R.K.

Case remanded.

*** A. I. R. 1937 Lahore 931**

ADDISON AND DIN MOHAMMAD, JJ.

*Anjuman-i-Imdad Qarza Bahami Ba-
findagan Katra Hakiman, Amritsar*
—Defendant—Appellant.

v.

Mehr Din, Plaintiff and others,
Defendants — Respondents.

First Appeal No. 111 of 1936, Decided on 2nd February 1937, from order of Senior Sub-Judge, Amritsar, D/- 30th January 1936.

(a) Co-operative Societies Act (1912), S. 23 — Interpretation—Words 'debts of a registered society' mean debts owed by society and not to society.

The words 'debts of a registered society' as used in S. 23, Co-operative Societies Act, refer only to those debts which the society owes and not to those which are owed to the society: *A I R 1935 Lah 947, Foll.* [P 932 C 2]

* (b) Co-operative Societies Act (1912), S. 42 (2) (b) — Scope — Word 'contribution' means payment by each member of share of liability of society and not debt owed by him to society—Liquidator has no jurisdiction under S. 42 (2) (b) to determine liability of person owing debt to society.

The word 'contribution' in S. 42 (2) (b), Co-operative Societies Act, means a payment by each of the member of his share in any common loss or liability of society and does not include a debt owed by an individual member to the society. Under S. 42 (2) (b) of the Act, the liquidator has therefore no jurisdiction to determine the liability of a person in relation to a debt alleged to have been owed by him to the society. [P 932 C 2; P 933 C 1]

* (c) Co-operative Societies Act (1912), S. 42 — Liquidator exceeding his power as given by S. 42—Civil Court has jurisdiction to determine legality of his order.

Where the Act of the liquidator is within S. 42, Co-operative Societies Act, the jurisdiction of Civil Courts is ousted. But where the liquidator exceeds his power and conducts himself in a manner not permissible under the law, the Civil Courts can go into the matter in order to determine the legality of the order. [P 934 C 1]

Where therefore the liquidator proceeds in a summary manner under S. 42 (2) (b) of the Act against a person as a debtor to the society and not as a member contributing to the assets of the society, the act of the liquidator is ultra vires and a civil suit is maintainable by such person that he is not so liable: *Case law discussed; A I R 1926 Nag 379, Dissent.* [P 934 C 2]

Roop Chand — for Appellant.

Hem Raj Mahajan — for Respondents.

Din Mohammad, J.—This appeal has been referred to us by Jai Lal, J. as in his opinion the question of law involved in the case is not free from difficulty and the authorities relating thereto are conflicting. The facts are these. One Mehr Din was a member of a society registered under the

1. *Indu Bhusan v. Moazam Ali*, A I R 1929 Cal 272=117 I C 838=49 C L J 252=33 C W N 106.

2. *V. Ayyanna v. V. Gangayya*, A I R 1933 Mad 465=144 I C 16.

Co-operative Societies Act, 1912, and named "Anjuman-i-Imdad Qarza Bahami Bafindagan Katra Hakimian, Amritsar" (hereinafter called the society). Similarly Mehraj Din and Lal Din were members of that society. Mehraj Din raised some loans from the society and Mehr Din stood surety for him. In 1923, Mehr Din left for Iran and returned in 1925. He then applied to the society that his name be struck off the register and that he may be discharged from his security bond. In pursuance of this application his name was struck off and Lal Din was accepted as surety in his place. Mehr Din again left for Iran and returned in 1931. In 1932, the registration of the society was cancelled and one Thakar Mahan Chand was appointed liquidator to wind up the society. On 15th June 1933 the liquidator made an order holding Mehr Din as well as Mehraj Din and Lal Din liable for a sum of Rs. 1,500, which was owing to the society from Mehraj Din. The liquidator then took out execution of the decree and got Mehr Din's house attached. Mehr Din submitted objections to the executing Court but they were dismissed. On 22nd May 1935, Mehr Din instituted a suit for a declaration that no liability could legally be fixed upon him on account of his security bond as it had been cancelled long before and that consequently the order of the liquidator was illegal and unenforceable at law. The trial Judge dismissed the suit holding that the jurisdiction of the Civil Courts was barred in this matter. He mainly relied on a judgment of Bhide, J. reported in A I R 1935 Lah 330.¹ The Senior Subordinate Judge on appeal referred to S. 23, Co-operative Societies Act and reversed the judgment of the trial Judge on the ground that the liquidator could not ignore the clear provisions of law contained in that section. The society preferred a further appeal to this Court which has been, as stated above, referred to us for decision.

We may say at once that neither the trial Judge nor the Senior Subordinate Judge had a clear conception of the law applicable to the facts of the case. The trial Judge based his decision on a judgment of Bhide, J., but he obviously misunderstood the true import of that decision and did not appreciate the distinction that

clearly existed between the facts of that case and those of the case before him. That case related to S. 23 which deals with the liability of past members for the debts of a registered society and not with debts due to the registered society, and the plaintiff in that case was contesting the liability imposed upon him by the liquidator in relation to the contributions to the assets of the society falling within the definition of S. 42 (2) (b). The Senior Subordinate Judge also ignored this distinction while discussing the maintainability or otherwise of the suit in the light of S. 23 of the Act.

It should be clearly borne in mind that the words 'debts of a registered society', as used in S. 23, Co-operative Societies Act, 1912, refer only to those debts which the society owes and not to those which are owed to the society. This distinction was brought into prominence by Sale, J. in A I R 1935 Lah 947,² and in view of the clear wording of the section, we have no hesitation in holding that the construction put upon these words in that judgment was the only legal construction that could be put. Further, in S. 19 of the Act, debts due from members or past members are described as "outstanding demand due to the society from a member or past member". Similarly, in S. 20, while referring to the liabilities of members or past members, the words used are 'any debt due from such member or past member to the society'. S. 36 contemplates debts due by a society and these are the debts which are referred to in Ss. 23 and 24, Co-operative Societies Act. Adverting now to S. 42 (2) (b), the word 'contribution' in Murray's Oxford Dictionary is said to mean:

Payment by each of the parties interested of his share in any common loss or liability.

Evidently, therefore, a debt owed by an individual member to the society will not be such a payment in any circumstances. Calvert in his Law and Principles of Co-operation has defined 'contribution' as used in S. 42 (2) (b) in the same manner. At page 174 of his book he says:

Contribution usually means the amount payable by a member as such and does not include debts payable to the society. It is the unpaid portion of the liability. In a limited liability society with fully paid up capital it is nil unless it be held "that dividends have been paid without being earned, in which case perhaps these might be recovered".

1. Mahomed Barkat Ali Khan v. Anjuman Imdad Qarza, Dehi, A I R 1935 Lah 330.

2. Dhanpat v. Anjuman Dahi Alo Mahar, A I R 1935 Lah 947.

At p. 176 of the same book he observes :

Outside Bombay and Madras, it is not competent for the liquidator to make a decree under Cl. (2) (b) for loans owed by a member. There is nothing corresponding to S. 186, Companies Act, empowering a Court after making a winding up order, to order any contributory to pay any money due from him to the Company exclusive of any money payable by virtue of any call.

Moreover, R. 26 of the rules made by the Local Government under S. 43, sub.s. (1), Co-operative Societies Act 2 of 1912, which deals with winding up, leaves no doubt in the matter. In sub.r. (c) it is provided that "if necessary, the liquidator may institute suits for the recovery of sums due to the society". In sub.r. (l) it is laid down that :

After recovery of the dues of the society and the realization of the contribution and the costs of liquidation from the members and past members the liquidator shall . . . wind up its affairs

Comparing this rule with S. 23 and S. 42 (2) (b) and (d), it would be obvious that 'dues of the society' are a thing apart from 'debts of the society' as well as from 'contribution' as contemplated by Cl. (b) and 'costs' as contemplated in (d). Sub-r. (i) of R. 26 further makes the matter sufficiently clear. It says that :

If the Civil Court is unable to recover the sum assessed against any member or members, the liquidator may frame a subsidiary order or orders against any other member or members to the extent of the liability of each for the debts of the society, until the whole amount due from the members is recovered.

It cannot be conceived that it was intended that any member of the Society should be compelled to pay any debt due by any member other than himself. It is clear therefore that under S. 42 (2) (b) the liquidator had no jurisdiction to determine the liability of the plaintiff in relation to a debt alleged to have been owed by him to the society, and consequently his act was ultra vires. The only question that now remains to be considered is whether in face of this finding a Civil Court has jurisdiction to entertain the suit as lodged by the plaintiff. Various authorities have been cited at the Bar and before we arrive at our own conclusion, it would be necessary to refer to them at some length. In the case reported in 14 Lah 703,³ the question that arose for decision was whether the liquidator had power to determine the question of membership and whether

his decision on that point was open to challenge in a Civil Court or not. A Division Bench of this Court came to the conclusion that S. 42, Co-operative Societies Act, did not confer any power upon the liquidator to determine the question of membership and as he had assumed jurisdiction over persons who were not and had never been members of this society, the matter could be raised in Civil Courts. In AIR 1935 Lah 330¹ the question related to the amount of contribution payable by a past member, and as it fell directly under S. 42 (2) (b) a learned Judge of this Court held that Civil Courts had no jurisdiction to go into the matter. In AIR 1935 Lah 631⁴ the question at issue was whether Civil Courts had jurisdiction in a case in which the relief claimed was that no award could be obtained against the plaintiffs after an award had once been given and regarded as satisfied by the executing Court. A learned Judge of this Court held that as the dispute had ended by the order of the executing Court, it was not open to the society to take further action in the matter by having recourse to the Registrar and the subsequent arbitration proceedings. On this ground, he came to the conclusion that the jurisdiction of the Civil Court was not ousted. In AIR 1931 Nag 48,⁵ the learned Judicial Commissioner of Nagpur held that a liquidator of a society had no power to proceed against anybody and everybody irrespective of the fact that he had ever been a member of the society, and S. 42 (2) (b) could not be so construed as to oust the jurisdiction of the Civil Courts in cases where the liquidator passed an order against a person who was not a member of the society. In AIR 1927 Nag 217,⁶ the same learned Judicial Commissioner had remarked as follows:

If we can assume for a moment that the revenue authorities had acted ultra vires and had attached and sold the property which was not liable to be sold, I do not think that the present suit would have been barred.

In 44 I C 353⁷ the liquidator had made an order under the provisions of S. 42 (2)

4. Hira Nand v. Anjuman Imdad-i-Qarza Mausuma Sunar Bank, AIR 1935 Lah 631=161 I C 248=38 P L R 355.

5. M. A. Koyal v. Bhond Lal, AIR 1931 Nag 48=180 I C 820.

6. Balajisao v. Anand Prasad, AIR 1927 Nag 217=103 I C 131=23 N L R 66.

7. Beni Madho Singh v. Tahsildar of Unao, AIR 1918 Oudh 112=44 I C 353.

3. Mukand Lal v. Malhotra Bank, Hafizabad, AIR 1933 Lah 442=144 I C 264=14 Lah 703=34 P L R 717.

(b) and (d) directing certain members of the society to contribute a certain sum towards its assets. A declaratory suit was thereupon instituted questioning the authority of the liquidator to determine the liability of officials as distinguished from members. The learned Additional Judicial Commissioner of Oudh held that the order being legal could not be attached in the Civil Courts. In A I R 1926 Nag 379⁸ the order made by the liquidator related to the debts due to the Society from its members. The Additional Judicial Commissioner, before whom the appeal was heard, in agreement with the Courts below, held that as the order of the liquidator related to the dissolution of a registered society, it could not be impugned in a Civil Court. It is significant that this judgment was neither referred to in A I R 1927 Nag 217⁶ nor in A I R 1931 Nag 48.⁵

From the above analysis of these judgments it would be abundantly clear that the jurisdiction of the Civil Courts was ousted in those cases alone where it was held that the act of the liquidator was within S. 42 (cf. A I R 1935 Lah 330¹ and 44 I C 353⁷), and in all those cases where it was found that the liquidator had exceeded his power and conducted himself in a manner not permissible under the law, it was unhesitatingly found that the Civil Courts could go into the matter in order to determine the legality of the order. It would also be evident that none of those cases except A I R 1926 Nag 379⁸ related to the question at issue before us. The decision in the Nagpur case no doubt supports the contention raised on behalf of the society, but with all respect to the Additional Judicial Commissioner responsible for that judgment, we are constrained to remark that the question was not properly considered by him and his decision does not appear to us to be correct. It is merely based on the general consideration of the fact that every order of the liquidator in relation to the dissolution of a society is covered by S. 42 and hence sacrosanct. A conclusion expressed in such general terms we are not prepared to endorse and we are inclined to hold the same view as was taken in a large majority of cases referred to above, viz. that where the act of the liquidator is ultra vires, Civil Courts can interfere.

In the case before us the plaintiff was proceeded against as a debtor to the society and not as a member contributing to the assets of the society. As such, the liquidator could not proceed against him in the summary manner in which he is permitted to do under S. 42 (2) (b); his act, therefore, was clearly beyond his powers. In these circumstances we hold that the plaintiff was entitled to a decree, and we dismiss this appeal. The case will now go back to the trial Court to give effect to our order and to decree the claim. The plaintiff will get his costs throughout.

K.B./A.L.

Appeal dismissed.

A. I. R. 1937 Lahore 934

ADDISON AND DIN MOHAMMAD, JJ.

*Baba Hakam Singh — Plaintiff —
Appellant.*

v.

*Naranjin Singh and another —
Defendants — Respondents.*

Second Appeal No. 1229 of 1936, Decided on 2nd February 1937, from the decree of Dist. Judge, Rawalpindi, D/- 7th July 1936.

Transfer of Property Act (1882), S. 6 (e) —
— Partner of firm, after dissolution of partnership, cannot transfer firm's right to recover damages for negligence from sub-agent—Transferee has no right to sue as mere right to sue is transferred to him.

A right to take accounts and to recover such sums as may be found due is not assignable, being a mere right to sue within the meaning of S. 6, Cl. (e), T. P. Act, and the assignee is therefore not entitled to maintain a suit for such a purpose. [P 935 C 2]

A certain firm was a clearing and forwarding agency at S for shopkeepers and what the firm did was to clear the goods at R, transport them to S and deliver them to the owners. They had their sub-agents at R. There was some negligence on the part of the sub-agents. One of the partners of the firm as a sole proprietor transferred the firm's right to recover damages from their sub-agent after the dissolution of the firm. In a suit by the transferee :

Held : that one of the partners had no power to transfer any asset of the firm. [P 935 C 1]

Held also : that if the sub-agent was negligent, the firm might call him to account and sue for compensation, but it had no property in the goods. Hence the transferee could not maintain the suit, as what was transferred to him was a mere right to sue : A I R 1924 Cal 1047, Rel. on. [P 935 C 1, 2]

Lala Achhru Ram — for Appellant.

*Mehr Chand Mahajan —
for Respondents.*

8. Sadasheo v. Fadnavis, A I R 1926 Nag 379 = 94 I O 40 = 24 N L R 5.

Addison, J. — The Khalsa Clearing Agency operated in Srinagar in Kashmir. It consisted of four partners: Ude Singh, Mehtab Singh, Ikbāl Singh and Naranjin Singh. The business of the firm was to obtain railway receipts from business concerns in Srinagar, get from them the railway freight and other transfer freight along with commission and then clear the goods mentioned in the railway receipts at Rawalpindi station and forward them to the owners of the goods in Srinagar. This Srinagar firm appointed the firm Kartar Singh-Mul Singh of Rawalpindi as their sub-agents in Rawalpindi for the purpose of clearing the goods at the railway station and putting them on lorries to be carried to Srinagar. A dispute arose between the Khalsa Clearing Agency and the firm Kartar Singh-Mul Singh about certain goods cleared at Rawalpindi station, which were alleged not to have been delivered at Srinagar. Naranjin Singh, one of the proprietors of the Khalsa Clearing Agency, describing himself as the proprietor, executed a document, Ex. P-1, in favour of the plaintiff Hakam Singh, wherein, for a consideration of Rs. 1,000, he transferred his firm's right to recover the goods or their value by way of damages from the Rawalpindi firm Kartar Singh-Mul Singh, and Hakam Singh then brought this suit against Naranjin Singh as proprietor of the Khalsa Clearing Agency and against Kartar Singh-Mul Singh, in which he claimed from the latter firm either the goods in question or their equivalent value of Rs. 3,399-15-9. The trial Court dismissed the suit. On appeal the learned District Judge held that there was no proper transfer at the time of the execution of the document Ex. P-1, because the Khalsa Clearing Agency had dissolved and one partner could not act for the others. He further held that what was transferred was a mere right to sue. On both these grounds he dismissed the appeal and Hakam Singh has preferred this second appeal. As a witness, Naranjin Singh admitted that there were four partners in the Srinagar firm, the Khalsa Clearing Agency, and that it closed down before Ex. P-1 was executed. It follows that Naranjin Singh had no power to transfer any asset of the firm to Hakam Singh and that on this ground alone the appeal must be dismissed.

We are also of opinion that what was transferred was a mere right to sue. In

the plaint Hakam Singh admitted that the Khalsa Clearing Agency was only a clearing and forwarding agency for shopkeepers who gave the firm the railway receipts and other transport charges plus commission and all that the Khalsa Clearing Agency did was to clear the goods at Rawalpindi, transport them to Srinagar and deliver them to the owners. The Khalsa Clearing Agency did not own the goods. As a witness however, Hakam Singh stated that the goods belonged to Naranjin Singh, the proprietor of the Khalsa Clearing Agency and that what he had purchased from Naranjin Singh was the railway receipts. This is of course false and the goods did not belong to the Khalsa Clearing Agency, and this was admitted, as already stated, in the plaint. If therefore the sub-agent firm at Rawalpindi was negligent, the Khalsa Clearing Agency might call them to account and sue for compensation, but it had no property in the goods. It has been held in 51 Cal 972¹ that a right to take accounts and to recover such sums as may be found due is not assignable, being a mere right to sue within the meaning of S. 6, Cl. (e), of the T. P. Act, and the assignee is therefore not entitled to maintain a suit for such a purpose. The decision of the learned District Judge was therefore correct on both points.

There is also no force in the fourth ground of appeal to the effect that the District Judge overlooked the fact that the other alleged partner in the Khalsa Clearing Agency had successfully repudiated the partnership and Naranjin Singh alone had been judicially held to be the sole owner of the business. There was a suit between Naranjin Singh and Ude Singh and his father Damodar Singh, relating to the activities of the firm in Sialkot. In that suit the only allegation was that Naranjin Singh and Ude Singh, minor, as well as Ude Singh's father, Damodar Singh, were partners; but it has been admitted and proved that the partners in the Srinagar firm consisted of three majors and one minor, Ude Singh, so that the decision in the other case cannot affect the present case. For the reasons given, we dismiss this appeal with costs.

V.B.B./A.L.

Appeal dismissed.

1. Khetra Mohan Das v. Biswanath, A I R 1924 Cal 1047=82 I C 411=51 Cal 972=28 C W N 894=40 C L J 79.

A. I. R. 1937 Lahore 936

TEK CHAND, J.

Ali Bakhsh and others — Defendants —
Appellants.

v.

Pir Bakhsh, Plaintiff and others,
Defendants — Respondents.

Second Appeal No. 1430 of 1936, Decided on 10th February 1937, from decree of Senior Sub-Judge, Jullundur, D/- 25th June 1936.

Punjab Relief of Indebtedness Act (7 of 1934), Ss. 5 and 6—Suit pending on commencement of the Act—S. 5 is applicable to such suit—Payment of interest during first three years after execution of mortgage does not amount to past transactions.

By S. 6, Punjab Relief of Indebtedness Act, the provisions of Part 3 of the Act have been made applicable to all suits "pending on or instituted after the commencement of the Act". Accordingly S. 5 which amends S. 3, Usurious Loans Act, is clearly applicable to such suit. Under that section, as amended, the Court is bound to re-open the transaction, if the rate of interest is 'excessive'. It cannot be said that payment of interest made during the first three years after the execution of the mortgage amounts to "past transactions already settled between the parties". [P 936 C 2]

Bakhshi Hazur Ali — for Appellants.

Parkash Chand for Shamair Chand and Shamair Chand — for Respondents.

Judgment.—On 9th November 1928, Ali Bakhsh and others, defendants, mortgaged certain house property to Pir Bakhsh, plaintiff, for Rs. 400. The amount advanced was to bear interest at Rs. 2-4-0 per cent. per mensem, payable at the end of each year, failing which compound interest was to be charged at the same rate. Admittedly, the mortgagors paid interest at Rs. 2-4-0 per cent. per mensem for the first three years, regularly at the end of each year. On 6th March 1934, the plaintiff brought a suit for recovery of Rs. 500, being the amount of principal and interest and compound interest at the stipulated rate for the period of two years and four months preceding the suit, after remitting Rs. 200. During the pendency of the suit, the Punjab Relief of Indebtedness Act (7 of 1934) came into force. The Subordinate Judge accordingly re-opened the entire transaction. He held that the stipulated rate of interest was in excess of the rate allowed by that Act and therefore the provisions of the Usurious Loans Act, as modified by Act 7 of 1934, were applicable. He accordingly calculated interest and

compound interest at 9 per cent. per annum from the date of the mortgage, and after giving credit for payment already made, found that the amount due to the plaintiff was Rs. 199-13-0 and passed a preliminary decree in terms of O. 34, R. 4. On appeal the learned Senior Sub-Judge held that under Act 7 of 1934 it was not competent to the Court to re-open "past transactions already settled between the parties" and, therefore, the plaintiff was held entitled to claim compound interest at Rs. 2-4-0 per cent. per mensem up to 9th November 1934, after which interest was to be calculated at 9 per cent. per annum only. On these findings he held that the plaintiff was entitled to Rs. 488. He accordingly accepted the appeal and enhanced the decretal amount to Rs. 488.

The defendant has come in second appeal and it has been contended on his behalf that the view of the law taken by the learned Senior Sub-Judge is erroneous. In my opinion this contention is well founded and must succeed. By S. 6 of Act 7 of 1934, the provisions of Part 3 of the Act have been made applicable to all suits "pending on or instituted after the commencement of the Act". Accordingly S. 5, which amends S. 3, Usurious Loans Act, is clearly applicable to the suit. Under that section, as amended, the Court was bound to re-open the transaction, if the rate of interest was 'excessive'. It is not denied that this was so, having regard to Cl. (4) of S. 5. It cannot be said that payment of interest made during the first three years after the execution of the mortgage amounted to "past transactions already settled between the parties", as held by the Senior Sub-Judge.

It is admitted by the respondents' counsel that if the account is to be re-opened from the beginning, and interest is to be allowed at the maximum rate fixed by Act 7 of 1934, the amount due to the plaintiff is Rs. 199-13-0, as found by the trial Judge. I accept the appeal, set aside the judgment and decree of the learned Senior Sub-Judge and restore that of the Court of first instance. Costs in the trial Court shall be paid as ordered by that Court. The parties shall bear their own costs in this Court and the lower Appellate Court.

D.S./R.K.

Appeal accepted.

A. I. R. 1937 Lahore 937

COLDSTREAM AND JAI LAL, JJ.

Sadhu Ram — Plaintiff — Appellant.

v.

Firm Dhanpat Rai-Telu Ram —
Defendant — Respondent.

Letters Patent Appeal No. 143 of 1936,
Decided on 2nd February 1937, from judgment of Din Mohammad, J., D/- 2nd October 1936.

Civil P. C. (1908), S. 73 — Two decrees against a person—One against person individually and other against him as partner of firm—Decrees are not against same judgment-debtor within meaning of S. 73.

Where two decrees are obtained against a person, one against him in his individual capacity and other against him as a partner of a firm, such person cannot be treated as the same 'judgment-debtor' within the meaning of S. 73, Civil P. C., for rateable distribution: *A I R 1915 Cal 658, Rel.on.*; *A I R 1936 Mad 40, Expl.* [P 938 C 1, 2]

Charanjiva Lal Aggarwal —
for Appellant.

D. N. Aggarwal — for Respondent.

Coldstream, J. — Kishna, the father of Sadhu Ram, appellant, held a money decree against one Moti Ram. The firm Dhanpat Rai-Telu Ram had obtained a decree against the firm Moti Ram-Harka Ram. In execution of his decree Kishna attached a decree in favour of Moti Ram against one Jawahra for possession of land. That decree was sold in execution for Rs. 600. Dhanpat Rai-Telu Ram, who had also proceeded to execute against Moti Ram their decree in which the judgment-debtor was the firm Moti Ram-Harka Ram, applied under the provisions of S. 73, Civil P. C., for rateable distribution of the assets held by the Court. His application was successful and the executing Court ordered payment of Rs. 358.4.0 to Dhanpat Rai-Telu Ram by Sadhu Ram who had been impleaded in the proceedings as Kishna's legal representative. Thereupon Sadhu Ram instituted a suit for refund of the money on the ground that S. 73, Civil P. C., had been wrongly applied as it did not empower the executing Court to order rateable distribution except when the decree being executed had been passed against the same judgment-debtor and Dhanpat Rai-Telu Ram's decree was not against Moti Ram in his individual capacity but against another judgment-debtor, namely the firm Moti Ram-Harka Ram. The trial Court decreed the claim relying

on 42 Cal 1.¹ This decision was upheld by the learned Additional District Judge of Ambala on appeal, and Dhanpat Rai-Telu Ram came to this Court with a further appeal which was heard by a Single Judge, who accepted the appeal and dismissed the suit. Against this judgment Sadhu Ram has appealed under the provisions of Cl. 10, Letters Patent, of our Court.

The learned Judge based his decision on the authority of a number of rulings which have laid down that the principle that rateable distribution can be allowed of the assets realised from a judgment-debtor common in all the decrees being executed, although in some of the decrees there are judgment-debtors other than the common judgment-debtor, that is to say all the judgment-debtors need not be identical in the decrees being executed, but if one or more of the judgment-debtors be the same, rateable distribution can be had as regards his or their shares of the property, he or they being the same judgment-debtor or debtors: 29 Bom 528,² 30 Cal 583,³ *A I R 1923 Pat 521*⁴ and *A I R 1935 Mad 399*.⁵ The learned Judge held that 42 Cal 1¹ was not applicable. In that case rateable distribution was sought by two decree-holders, the decree held by one of them being against Dasarathi Mukherjee and that held by the other against a firm D. Mukherjee & Co., a firm of which Dasarathi Mukherjee was a partner. In deciding that in the circumstances the decrees could not be regarded as having been passed against the same judgment-debtor, Mukherjee and Beachcroft, JJ. remarked that :

The decree held by the opposite party in execution of which the properties have been brought into Court was passed against Dasarathi Mukherjee, while the decree held by the petitioner was obtained against the firm of which Dasarathi was a partner and is not shown to be capable against him individually.

The learned Single Judge in his judgment distinguished the present case from that dealt with by the Calcutta Court,

1. *Balmer Lawrie & Co. v. Jadu Nath Banerjee*, *A I R 1915 Cal 658* = 27 I C 644 = 42 Cal 1 = 19 C W N 1202.
2. *Chhota Lal v. Nabibhai*, (1905) 29 Bom 528 = 7 Bom L R 567.
3. *Gonesh Das v. Shiv Lakshman* (1903) 30 Cal 583 = 7 C W N 414 (F B).
4. *Inderbasi Kuer v. Satnarain Singh*, *A I R 1923 Pat 521* = 74 I C 626 = 4 P L T 973.
5. *Seetaramayya v. M. Rathamma*, *A I R 1935 Mad 399* = 156 I C 631.

because here the decree against the firm Moti Ram-Harka Ram could be executed against Moti Ram inasmuch as he had appeared in his own name in the suit in which the decree was passed and had admitted that he was a partner. It is contended for the appellant that in the present case not only are the decrees not against the same judgment-debtor but rateable distribution is impossible in view of the provisions of S. 49, Partnership Act (which provision reproduces S. 262, Contract Act, before it was amended) and that the judgment in 42 Cal 1¹ is fully applicable, because although the decree against the firm could be executed against Moti Ram, it could not be executed against his separate property until the debts of the firm had been paid, while Kishna's decree would have to be satisfied out of Moti Ram's separate property first. The firm's property is not Moti Ram's property, nor is Moti Ram's property the firm's and it is obvious that Moti Ram's property cannot be made a hotchpot out of which rateable distribution could be made to satisfy both the decrees. Counsel for respondent has referred us in support of the decision under appeal to 59 Mad 93⁶ where it was held that a legal representative against whom a decree has been passed in respect of a deceased's estate, and the deceased person against whom a decree was passed in his lifetime but is sought to be executed against his property in the hands of his legal representatives, can be described as the same judgment-debtor within the meaning of the expression in S. 73. There however it was admitted that the decrees sought to be executed were "executable in the same way and against the same properties", which is not the case here.

In the end, counsel for the respondent asks us to affirm the decision appealed against because Moti Ram and Harka Ram are father and son, and the firm is a joint family business. In this connexion he relies upon A I R 1936 Mad 123.⁷ But it is not admitted that the firm is a joint family business and there is no evidence that it is. Nor was this case ever set up either in the Courts below or before our learned brother in this Court, whose judgment makes it clear that the only point

argued before him was the question of law whether a decree against a firm and a decree against a partner in his individual capacity are necessarily decrees against the same judgment-debtor within the meaning of S. 73. The plea now taken sets up a new case upon which we are not now prepared to adjudicate. For the reasons I have given, I would accept the appeal with costs and restore the judgment and decree of the Additional District Judge.

Jal Lal, J.—I agree.

P.R./D.S.

Appeal allowed.

A. I. R. 1937 Lahore 938

TEK CHAND, J.

Surat Singh and others—Defendants—Appellants.

v.

Mt. Santi, Plaintiff and others, Defendants — Respondents.

Second Appeal No. 1131 of 1936, Decided on 4th February 1937, from decree of Dist. Judge, Sialkot, D/- 29th April 1936.

Punjab Courts Act (6 of 1918), S. 41—Suit about custom—Trial Court on consideration of judicial instances cited by parties in support of their respective claims holding instances cited by plaintiff sufficient to rebut custom in *Riwajiam*—Second Appeal held could not lie without certificate under S. 41 (3).

The parties to a suit relied upon several judicial precedents as instances in support of the custom alleged by them respectively and the only question before the Court was whether the instances cited by the plaintiff were sufficient to rebut the presumption arising from the entry in the *Riwajiam*. The lower Court after considering the judicial decisions which were mere instances and not binding on the lower Court as final pronouncements of the High Court, gave a finding that the instances cited by the plaintiff were sufficient to rebut the presumption. The defendant appealed:

Held: that the second appeal really raised a question as to the existence of a custom and it could not lie without a certificate under S. 41 (3), Punjab Courts Act. [P 939 O 2]

Barkat Ali — for Appellants.

S. L. Puri — for Respondent (Plaintiff).

Judgment.—The property in dispute belonged to one Jhanda Jat of mauza Dhamthal, tehsil Narowal, district Sialkot. On his dying sonless it was taken possession of by the defendants-appellants, who claimed to be his collaterals in the 11th degree. The plaintiff, Mt. Santi, who is the daughter of Jhanda, instituted a suit

6. Ramakrishna Chettiar v. Visvanathan Chettiar, A I R 1936 Mad 40 = 159 I O 501 = 59 Mad 93 = 69 M L J 711 (F B).

7. Swaminatha Ayyar v. Salvu Rowthan, A I R 1936 Mad 123 = 160 I O 559.

for possession alleging that she was the heir of the deceased, the property being non-ancestral qua the defendants. The trial Judge decreed the suit. The defendants appealed to the District Judge but the appeal was unsuccessful. They have preferred a second appeal to this Court, in which the sole question raised is that under the custom prevailing in the tribe, collaterals, howsoever distantly related, succeed to the property of sonless proprietor, whether ancestral or not, in preference to his daughter. A preliminary objection is raised on behalf of the respondents that this second appeal is incompetent as no certificate has been obtained from the District Judge under S. 41, Cl. (3), Punjab Courts Act.

In my opinion this preliminary objection has force and must succeed. Mr. Barakat Ali has contended that in this case no oral or documentary evidence was led by the other party who relied upon certain judicial instances, one of which was in his favour and that the learned District Judge should have followed it in preference to the other instances which had consistently taken the opposite view. He has also cited before me a number of rulings in support of his contention. None of these rulings however has any bearing on the point before me, as there the question involved was either one of interpretation of a particular entry in the Riwajiam or the Wajibularz or of the interpretation of a particular ruling of this Court. In the present case, the parties had relied upon several judicial precedents as instances in support of the custom alleged by them respectively and the only question before the Court was whether the instances cited by the daughter were sufficient to rebut the presumption arising from the entry in the Riwajiam. None of these judicial instances was binding on the lower Court as the final pronouncement of the High Court, but they were mere instances in the case. The learned District Judge, after considering these instances, found that those cited by the plaintiff-respondent were sufficient to rebut the presumption arising from the Riwajiam.

His finding was therefore based upon a consideration of the evidence on the record and was to the effect that the custom actually prevailing in the tribe was that the daughters of a sonless Jat in the Sialkot district succeed to his property in pre-

ference to collaterals of the 11th degree. The second appeal therefore really raises a question relating to the existence of a custom, which cannot be gone in, in second appeal without a certificate under S. 41, Cl. (3). The preliminary objection therefore must be upheld and the appeal dismissed with costs.

K.B./A.L.

Appeal dismissed.

A. I. R. 1937 Lahore 939

BHIDE, J.

Sita Ram — Decree-holder —

Appellant.

v.

Phusal Singh and others — Judgment-debtors — Respondents.

Exn. Second Appeal No. 960 of 1936, Decided on 14th January 1937, from decree of Dist. Judge, Hissar, D/- 8th May 1936.

(a) Civil P. C. (1908), S. 60—Scope.

Section 60, Civil P. C., does not prohibit a voluntary transfer by an agriculturist judgment-debtor of his house for satisfaction of the decree : *A I R 1935 Lah 164, Rel. on.* [P 939 O 2; P 940 O 1]

(b) Registration Act (1908), S. 49 — Collateral purpose — Agriculturist judgment-debtor mortgaging his house under compromise and obtaining instalments of decretal amount—Compromise deed not registered—Deed held admissible for collateral purpose of proving waiver.

Where an agriculturist judgment-debtor under a compromise in execution proceedings mortgages his house and obtains instalments to pay the decretal amount, but the compromise deed is not registered, the compromise deed though ineffectual to prove the subsistence of the mortgage for want of registration, can be admitted in evidence for the collateral purpose of proving waiver on the part of the judgment-debtor of his right to object to the attachment and sale of his house : *A I R 1927 Pat 233, Rel. on.* [P 940 O 1]

Parkash Chand — for Appellant.*Vishnu Datt* — for Respondents.

Judgment.—The sole point for decision in this second appeal is whether the house of the judgment-debtor Phusal Singh is exempt from attachment under S. 60, Civil P. C., as claimed by him. The learned Additional District Judge has held that the judgment-debtor is an agriculturist and the house was used for agricultural purposes and this finding is no longer open to challenge in this appeal. On this finding the house would ordinarily be exempt from attachment and sale. But it is urged on behalf of the appellant that S. 60 does not create an absolute bar to

the sale of such a house for satisfaction of a decree and that it is open to an agriculturist to make a voluntary transfer thereof for that purpose, if he chooses to do so: A I R 1935 Lah 164.¹ Secondly, it is contended that the judgment-debtor in this case had entered into a compromise with the appellant in the course of the execution proceedings, by which he mortgaged the house in favour of the appellant and obtained from him the concession of paying the decretal amount in certain instalments. The compromise deed was not registered, as it ought to have been, as the house was not the subject matter of the original suit and its value exceeded Rs. 100, but it is urged that although the mortgage was ineffectual for want of registration of the deed, the document was admissible for the collateral purpose of showing that the judgment-debtor had waived his right of objecting to the attachment and sale of the house for satisfaction of the decree.

The learned counsel for the respondent conceded that S. 60, Civil P. C., did not prohibit a voluntary transfer of the house for satisfaction of the decree. He, however, contended that the document relating to the previous compromise being unregistered, it could not be used for proving waiver, for, what the appellant was trying to prove was in effect the mortgage itself. I do not consider this contention to be sound. What the appellant wants to prove is not that the mortgage subsists, but that the judgment-debtor had offered the house as a security and thereby obtained time for payment of the decretal amount. In my opinion the document would be admissible for this collateral purpose and it supports the appellant's plea of waiver. The facts of the case are similar to those in A I R 1927 Pat 233,² cited by the learned counsel for the appellant, in which waiver was inferred from a prior agreement to mortgage; and the judgment-debtor was held to be estopped from objecting to the attachment. I accept the appeal and direct the house in question to be attached and sold in execution of the decree. The appellant will get his costs throughout.

K.B./R.K.

Appeal allowed.

1. Chittar Mal v. Mt. Ram Devi, A I R 1935 Lah 164.

2. Ganga Bishun Ram v. Jagmohan Ram, A I R 1927 Pat 233=102 I O 616=6 Pat 254=8 P L T 563.

A. I. R. 1937 Lahore 940

BHIDE, J.

Nand Lal — Defendant — Appellant.
v.

Ghulam Ahmad and another, Plaintiffs
and *others*, Defendants—Respondents.

Second Appeal No. 1437 of 1936, Decided on 9th February 1937, from decree of Dist. Judge, Mianwali, D/- 22nd August 1936.

Deed — Construction — Discrepancy between area and boundaries—Boundaries are to be taken as criterion for determining property actually conveyed.

When there is a discrepancy between the area and the boundaries given in a deed, the boundaries will normally be taken as the criterion for determining the property actually conveyed, according to law: A I R 1936 Pat 257, *Foll.* [P 941 O 1]

M. C. Mahajan and V. N. Sethi —
for Appellant.

Barkat Ali and Mohd. Amin —
for Respondents (Plaintiffs).

Judgment.—This second appeal arises out of a suit instituted by Ghulam Ahmad and Nur Mohammad for a declaration that a decree obtained by Nand Lal, defendant 1, on the basis of a mortgage with respect to certain house property during their minority was not binding on them inasmuch as Mt. Jantan, who conducted that suit as their guardian ad litem, had been guilty of gross negligence in conducting it. The Courts below have found that Mt. Jantan had not put in a defence that a portion of the house property described as plot No. 2 which belonged to the appellants was not really under mortgage and she was therefore guilty of gross negligence. They have accordingly granted a decree in favour of the plaintiffs and from this decision Nand Lal, defendant, has appealed.

The finding of the Courts below that Mt. Jantan was guilty of gross negligence is *prima facie* one of fact, but it appears to me that it is based on a misapprehension of facts as well as law. The only question in the previous case was whether the house property in dispute had been mortgaged in favour of the present appellant Nand Lal. The boundaries as stated in the mortgage deed in his favour showed *prima facie* that the house property included plot No. 2 which is now claimed by the plaintiffs as their own property, and this fact is conceded also by the learned District Judge. He has however held by

considering the boundaries of the properties in several previous mortgage deeds that as a matter of fact it could not be the intention of the parties to include plot No. 2 in the mortgage deed in favour of Nand Lal. The finding of the learned District Judge is merely based on a reference in the mortgage deed to the fact that the property had been previously mortgaged in favour of Wishen Das and Jodha Ram in 1925. The boundaries as stated in the mortgage deed in favour of Nand Lal were the same as those stated in the mortgage deed in favour of Wishen Das and Jodha Ram, but the property had been once before mortgaged in favour of Kalu Ram in the year 1916, and it appears from the evidence that at that time plot No. 2 did not belong to the mortgagor and could not therefore have been included in the mortgage in favour of Kalu Ram. If therefore the property mortgaged in favour of Nand Lal was identical with the property mortgaged in favour of Kalu Ram in 1916, the finding of the learned District Judge would appear to be correct; but it seems to me that the matter would really depend upon the intention of the parties and the reference in the deed in favour of Nand Lal to the effect that the property had been previously mortgaged is not by any means conclusive on the point. Plot No. 2 had been included in the haveli, and the mortgagor may well have intended to mortgage the whole haveli as it stood in 1928. It is true that the area of the mortgaged property was stated to be 4 kanals as in the mortgage deed of the year 1916 in favour of Kalu Ram. But, as pointed out in A I R 1926 Pat 257,¹ when there is a discrepancy between the area and the boundaries given in a deed, the boundaries will normally be taken as the criterion for determining the property actually conveyed, according to law. Further, the learned Judge has himself pointed out that the area in 1916 was really 3 kanals 4 marlas and not four kanals, and the area does not afford any convincing proof of the real intention of the parties in the circumstances of the case. The learned Judge has arrived at his finding by a comparison of the boundaries and other circumstances relating to a number of deeds. But when the boundaries were clearly given in the mortgage deed and when the area afforded

no safe criterion, I do not think the learned Judge was justified in relying upon extraneous evidence in support of his finding.

However, even assuming for the sake of argument that the learned Judge's finding on the above point was correct, it seems to me that it cannot certainly be said that Mt. Jantan was guilty of gross negligence in not raising this plea. In the first place, the question as to what property had been previously mortgaged in favour of Bishen Das and Jodha Ram or in favour of Kalu Ram did not arise in the previous suit and there was no occasion for any one to go into this question. Mt. Jantan had denied the previous mortgage and put Nand Lal to its proof. This was all that she could reasonably have done in the circumstances. It is not shown that Mt. Jantan was aware of the fact that plot No. 2 was not really included in the mortgage in favour of Nand Lal. It must be remembered in this connexion that Hassan Din, the mortgagor, was himself a party to the suit and put forward several defences to defeat the claim of Nand Lal. He raised a plea, for instance, that part of the mortgaged property belonged to two of his sons. Hassan Din must have known what property was actually mortgaged in favour of Nand Lal, and if plot No. 2 was really not included in the property mortgaged, he might have been expected to raise that plea. It is true that he had sold this property before the suit to Allah Yar, father of the present plaintiffs; but Allah Yar was Hassan Din's brother and when Hassan Din was trying to defeat the suit of Nand Lal, he would not have omitted to raise the plea if he had thought that there was any force in it. The evidence on the record raises a suspicion that Hassan Din had transferred the property in favour of Allah Yar merely to defeat his creditors.

The learned counsel for the plaintiffs-respondents has referred to 45 Mad 425² and 35 P R 1898³ in support of his contention that Mt. Jantan was guilty of gross negligence, but the facts in those cases were, in my opinion, clearly distinguishable. In the former case the guardian ad litem had omitted to raise a plea which, in the opinion of the learned Judges, must have

1. Raghunandan Thakur v. Kishundeo Narain Mahta, A I R 1926 Pat 257=98 I C 351=7 P L T 134.

2. Chundurur Punnayyah v. Rajam Viranna, A I R 1922 Mad 273=70 I C 668=45 Mad 425=42 M L J 429.

3. Ahmad Ali Shah v. Amir Shah, (1898) 35 P R 1898.

been patent to any intelligent man with an elementary knowledge of Hindu law. In 35 P R 1898³ also the guardian had failed to appeal when she had an excellent case both in law and facts. In the present case, as I have pointed out above, the question as regards the identity of the property mortgaged did not arise in the suit. Mt. Jantan herself had no knowledge of the property actually mortgaged and Hassan Din who must have known what the real intention of the parties was did not raise any plea to the effect that plot No. 2 was not included in the mortgage, although he was evidently making every effort to defeat the suit of Nand Lal. The learned District Judge's own finding regarding plot No. 2 is based on a consideration of a number of documents and is by no means free from doubt. In view of all these circumstances, I am of opinion that the view of the learned District Judge that Mt. Jantan had been guilty of gross negligence in conducting the previous suit cannot be upheld. I therefore accept this appeal and setting aside the decree of the District Judge dismiss the plaintiffs' suit, but in view of all the circumstances leave the parties to bear their costs throughout.

S.O./D.S.

Appeal allowed.

A. I. R. 1937 Lahore 942

ADDISON AND DIN MOHAMMAD, JJ.

Taj Mohammad and another —

Defendants — Appellants.

v.

Bhajan Lal—Plaintiff—Respondent.

Second Appeal No. 873 of 1936, Decided on 3rd February 1937, from decree of Dist. Judge, Hissar, D/- 18th April 1936.

Custom (Punjab) — Alienation — Necessity — Debts raised for marriage of son and for muklawa ceremony of daughter are for necessity — Mortgage to pay off decrees against mortgagor — Mortgagee need not see to actual application of money.

Where debts are raised by a person for the purposes of marriage of his son and for the muklawa ceremony of his daughter, the purposes are necessary purposes within the meaning of the customary law. [P 943 C 2]

A mortgagee is sufficiently protected by law if he advances any amount to the mortgagor for the discharge of decrees obtained against the mortgagor and is not bound to see to the actual application of the money received by the mortgagor. [P 944 C 1]

Malik Barkat Ali — for Appellants.*N. C. Pandit* — for Respondent.

Din Mohammad, J. — On 26th June 1928 one Ram Sukh Bishnoi mortgaged his land in favour of Taj Mohammad Khan for Rs. 8,000. The deed was registered on 12th July 1928. Among others, it was attested by Mukh Ram, a son of Ram Sukh. A part of the land so mortgaged was already under mortgage with two other persons. The necessity for this alienation was stated to be the indebtedness of the mortgagor and his harassment by his creditors. The consideration was made up as follows :

	Rs.
1. On account of decree No. 234, dated 5th November 1927, passed by the Junior Subordinate Judge of Hissar against the mortgagor in favour of the mortgagee... ..	4,000
2. On account of bahi debts due to the mortgagee	725
3. For payment to the previous mortgagees, including principal and interest	1,100
4. For registration expenses	150
5. Cash before the Sub-Registrar	2,025

On 29th June 1934 Bhajan Lal, another son of Ram Sukh, instituted the suit out of which the present appeal has arisen for a declaration that the mortgage in question was without consideration and valid necessity and should not affect his reversionary rights. The mortgagee resisted the suit and contended that the mortgage was for consideration and necessity. He further pleaded that the suit was collusive and that the plaintiff was a mere cat's paw in the hands of his father, whose object was to avoid the transaction in an indirect manner. The mortgagee further professed his ignorance of the ancestral nature of the land. On the pleadings of the parties, necessary issues were framed and the Senior Subordinate Judge came to the conclusion that the land was ancestral, that the suit was not collusive, that the mortgagor's powers of transfer were restricted and that the mortgage was binding on the plaintiff to the extent of Rupees 6,600 only. Out of the sums mentioned in the mortgage deed, he disallowed the sum of Rs. 725 which was on account of the bahi debts due to the mortgagee himself and in addition to that he disallowed Rs. 675 more consisting of the items of Rs. 350 which represented the amount owed by a relative of Ram Sukh under a decree dated 10th July 1925; Rs. 300 which were alleged to have been paid to a lawyer for prosecuting a criminal complaint by Ram Sukh's wife; and Rs. 25

the proportionate costs of registration on the items disallowed.

On appeal the mortgagee mainly contested the question of consideration and necessity, and claimed the full amount covered by the mortgage, while the plaintiff challenged the items allowed by the Senior Subordinate Judge. The District Judge re-opened the decree that the mortgagee had obtained against the mortgagor in 1927 and came to the conclusion that the full amount of Rs. 4,000 could not be allowed on account of that decree, inasmuch as a greater part of the decretal amount was not for necessity. He consequently reduced the amount to Rs. 1,245. Similarly, out of Rs. 2,025 he allowed an item of Rs. 316 only which was proved to have been paid to a previous creditor, Pat Ram, in July 1928, on the ground that there was no proof that the remaining amount was paid to any of the previous creditors of the mortgagor and the decrees against him were still outstanding. Out of the sum reserved for the previous mortgagees, he allowed Rs. 908. In addition to these sums, he allowed a sum of Rs. 631 on account of *bahi*-debts. Adding to the sums allowed by him a sum of Rs. 50 only on account of registration expenses, the District Judge modified the decree of the Senior Subordinate Judge to the extent of reducing the sum payable by the plaintiff, Rs. 3,150. The mortgagee along with Sahib Dad Khan who is an assignee from him of a part of the mortgaged property has appealed.

Counsel for the appellants has contended that the District Judge was not justified in disallowing the items that had been allowed to him by the Senior Subordinate Judge and has further claimed the items disallowed by the Senior Subordinate Judge. Counsel for the respondent, on the other hand, has urged that the various loans raised by the mortgagor during the short period of five years or so point to the conclusion that he was extravagant and wasteful and that on this account the mortgagee was not entitled to any sum other than that allowed by the District Judge. He has mainly relied on 65 P R 1900,¹ 26 P R 1913² and A I R 1935 Lah 69.³ 65 P R

1900¹ is no doubt a leading authority on the question before us, but the principles that it has laid down do not help the respondent in this case. The learned Judges have in that case sounded a note of warning in the matter of the application of the principles formulated by them to the cases that may arise and have remarked :

They are, however, general principles to be borne in mind in deciding cases, but the special facts of each case must have a material bearing in the application of these principles.

The principles enunciated in that judgment are :

(1) A male proprietor, unlike a widow, is a full proprietor and the necessities in his case are not to be judged by analogies drawn from the case of a widow ; (2) the payment of his just antecedent debts is a necessity ; (3) 'just debt' is a debt which is actually due, and which is not immoral, illegal, or opposed to public policy. It need not be one incurred for a necessary purpose, but if a non-necessary debt is unreasonably large compared to the means and station in life of the proprietor, it cannot come under the definition of a just debt. Similarly, if a number of comparatively small loans for non-necessary purposes are contracted within an unreasonably short period, they collectively may amount to extravagance judged by the tests previously mentioned, and may be excluded from the category of just debts. What is unreasonable or extravagant must depend upon the circumstances of each particular case, and must be decided by a Court of law on fair and rational grounds ; (4) debts incurred for necessary purposes are always binding irrespective of the income and means of the male proprietors ; (5) the onus of proof of the validity of the transfer lies in the first instance on the alienee ; (6) it is not necessary for the alienee, who is also the antecedent creditor, to prove that all the previous debts were incurred for necessity. An outsider, who pays antecedent debts in consideration of a transfer of the property if he acts honestly and makes proper enquiry whether the debts are actually due, is not responsible if he has been deceived, and is entitled to ask for his alienation to be treated as binding.

In our view, these principles, if properly applied, help the mortgagee more than the mortgagor in this case. It has been reliably established that the debts covered by the decree were raised for the purposes of the marriage of the mortgagor's son and the muklawa ceremony of his daughter, and these purposes are necessary purposes within the meaning of the customary law. Taking into consideration the fact that both the marriage and the muklawa actually took place, we fail to understand how the District Judge could re-open the decree based on those items and disallow a major portion of them on the ground that these ceremonies could be arranged at a less cost. Judged by the amount of land the mortgagor owned, his position in society and

1. *Devi Ditta v. Saudagar Singh*, (1900) 65 P R 1900=322 P L R 1900.

2. *Kirpal Singh v. Balwant Singh*, (1913) 26 P R 1913=17 I C 666=40 Cal 288 (P O).

3. *Gurdit Singh v. Narain Singh*, A I R 1935 Lah 69.

the amount of loans that he raised on account of these two ceremonies, to which people living in the Punjab villages attach a good deal of importance, it cannot be concluded that the mortgagor was in any manner extravagant or wasteful, not to speak of his extravagance being reckless or of his waste being wanton. The other judgments relied on by counsel for the respondent are mainly based on the Full Bench judgment quoted above and do not carry his case any further. We accordingly hold that the District Judge was not justified in disallowing any amounts out of Rs. 4,000 on the payment of which the mortgagor had secured a discharge of a decree for Rs. 4,950.

Coming now to the sum of Rs. 2,025, it is admitted that several decrees were outstanding against the mortgagor at the time the mortgage in suit was effected and, in these circumstances, we consider that the alienee was sufficiently protected by law if he advanced any amount to the mortgagor for the discharge of those decrees. The mortgagee was in no wise bound to see to the actual application of the money received by the mortgagor. In fact the Senior Subordinate Judge had allowed Rs. 1,375 on this account and the District Judge also found that to a previous creditor, Pat Ram, Rs. 316 had actually been paid. We consider, therefore, that the mortgagee is entitled to receive Rs. 1,375 at least, which had been allowed to him by the Senior Subordinate Judge.

The item of Rs. 725 has been cut down to Rs. 631 by the District Judge, but for no

valid reason. Having once come to the conclusion that the debt was due to the mortgagee and had been raised for necessary purposes, the District Judge could not arbitrarily cut down the amount. We accordingly allow the mortgagee this sum in full. The only item that remains to be considered besides the item of Rs. 908, which has been allowed by the District Judge, is that which relates to the costs of registration. In view of the conclusion arrived at above, no deduction in this amount is called for. In the result we allow the following items to the mortgagee:

	Rs.
1. On account of the mortgagee's previous decree	4,000
2. On account of the antecedent debts of the mortgagor	1,375
3. On account of the mortgagee's bahi debts	725
4. On account of previous mortgages ...	908
5. On account of registration expenses ...	150
Total ...	7,158

We accordingly accept the appeal and alter the decree of the District Judge to this extent that the mortgage in question will be binding on the plaintiff to the extent of Rs. 7,158. The mortgagee and his assignee will get $\frac{2}{3}$ th of their costs (one set) throughout from the plaintiff, and as between themselves, the mortgagee will get $\frac{2}{3}$ th and the assignee $\frac{1}{3}$ th.

P.R./D.S.

Appeal accepted.

KASHMIR UNIVERSITY

Toba: 11/11/37

Acc. No ... 177209 END

Dated ... 18.11.38

